UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENVIRONMENTAL DEFENSE FUND, Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, Defendant.	))))))))))	Civil Action No.: 1:18-cv-7085 **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiff Environmental Defense Fund ("EDF") brings this action to compel the U.S. Environmental Protection Agency ("EPA" or "Agency") to release records withheld in violation of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The records at issue could shed light on EPA's decision to propose a rule that, if finalized, would drastically undermine the Agency's ability to carry out its mission of protecting public health and the environment through sound science. *See* Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18,768 (proposed Apr. 30, 2018) (to be codified at 40 C.F.R. pt. 30) ("Proposed Rule"). EPA's failure to release these records not only violates FOIA, but also deprives the public of important information that could reveal the impetus for the Proposed Rule and, thus, offer significant insight into EPA's decision-making process. EPA's failure to release the records at issue also frustrates the public's ability to submit fully informed comments on the Proposed Rule before the comment period closes on August 16, 2018. Any further delay could prevent EDF and other interested parties from thoroughly evaluating and responding to subsequent actions pertaining to the Proposed Rule.

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2. In March 2018, E&E News reported that then-EPA Administrator Scott Pruitt had announced plans to issue a proposed rule "widely expected to resemble" stalled legislative attempts to restrict the role of science in agency rulemaking. Scott Waldman & Robin Bravender, *Pruitt Is Expected to Restrict Science. Here's What it Means*, E&E News (Mar. 16, 2018), https://www.eenews.net/stories/1060076559.html.

3. Within days of this report—on March 20, 2018—EDF submitted a FOIA request seeking records related to EPA's consideration and implementation of ideas derived from or similar to unsuccessful legislation concerning EPA's use of science. *See* Letter from Surbhi Sarang, EDF, to Nat'l Freedom of Info. Officer, EPA (Mar. 20, 2018) ("March FOIA Request"), attached as Exhibit 1.

4. On April 30, 2018, EPA published the Proposed Rule in the Federal Register. *See* 83 Fed. Reg. at 18,768. According to EPA, this rule would "preclude" the Agency from considering landmark studies assessing the health consequences—including risks to children—associated with exposure to particulate matter and lead. *Id.* at 18,769 n.3.

5. Shortly thereafter—on May 4, 2018—EDF submitted a second, more detailed FOIA request, also seeking records related to EPA's consideration and implementation of unsuccessful legislation involving science. *See* Letter from Surbhi Sarang, EDF, to Nat'l Freedom of Info. Officer, EPA (May 4, 2018) ("May FOIA Request" or, together with the March FOIA Request, "FOIA Requests" or "Requests"), attached as Exhibit 2.

6. The statutory deadlines for EPA to respond to EDF's FOIA Requests have come and gone, but EPA has thus far failed to release *any* responsive records. EDF is entitled to the immediate release of all non-exempt records responsive to its Requests.

PARTIES

7. Plaintiff ENVIRONMENTAL DEFENSE FUND is a 501(c)(3) non-profit organization headquartered in this judicial district at 257 Park Avenue South in Manhattan. Guided by science and economics, EDF has fought for over 50 years to find practical and lasting solutions to the most serious environmental problems. EDF was founded by scientists, and scientific integrity remains central to its strategies and objectives. Among other activities, EDF regularly uses FOIA to obtain information about government operations and activities that pose a threat to public health or the environment. EDF disseminates this information to the public—including EDF's over 2 million members and supporters—through media campaigns, internet advocacy, and other effective communications strategies. As one of the world's largest and most well-known environmental organizations, EDF frequently shares information and provides commentary at conferences, on radio and television, and in major newspapers nationwide.

8. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY is a federal agency as defined in 5 U.S.C. §§ 551(1) and 552(f)(1). Congress has charged EPA with protecting human health and the environment by administering a number of federal laws—including the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*; the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.*; the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001 *et seq.*; the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*; the Safe Drinking Water Act, 42 U.S.C. §§ 300f *et seq.*; and the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq*. On information and belief, EPA has possession or control of the records EDF seeks.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (Federal question).

10. Venue is proper in this judicial district pursuant to 5 U.S.C. § 552(a)(4)(B) because EDF has its principal place of business within this district.

FACTUAL BACKGROUND

11. In March 2017, Representative Lamar Smith introduced the "Honest and Open New EPA Science Treatment Act of 2017" ("HONEST Act") "[t]o prohibit the Environmental Protection Agency from proposing, finalizing, or disseminating regulations or assessments based upon science that is not transparent or reproducible." H.R. 1430, 115th Cong. (1st Sess. 2017). In relevant part, the HONEST Act sought to preclude EPA from taking any of a wide range of actions "unless all scientific and technical information relied upon to support such action is . . . publicly available online in a manner that is sufficient for independent analysis and substantial reproduction of research results," subject to limited exceptions. *Id.* § 2. Like previous legislative attempts to constrain EPA's use of science, *see* H.R. 1030, 114th Cong. (1st Sess. 2015); H.R. 4012, 113th Cong. (2d. Sess. 2014), the HONEST Act failed to become law.

12. Approximately one month later, in April 2017, then-EPA Administrator Scott Pruitt met with Representative Smith to discuss the HONEST Act, as well as other unsuccessful science-related legislation. *See Who Is the E.P.A. Administrator Scott Pruitt Meeting With? A Detailed Schedule*, N.Y. Times 157 (Oct. 3, 2017), https://www.nytimes.com/interactive/2017/10/03/us/politics/document-Pruitt-Sked-and-McCarthy-Sked.html.

13. In January 2018, Pruitt and Smith met again. Juliet Eilperin & Brady Dennis, *Pruitt Unveils Controversial 'Transparency' Rule Limiting What Research EPA Can Use*, Wash.

Post (Apr. 24, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/04/24/pruitt-to-unveil-controversial-transparency-rule-limiting-what-research-epa-can-use/. During this January meeting, "Smith made 'his pitch that EPA internally implement the HONEST Act [so that] no regulation can go into effect unless the scientific data is publicly available for review.'" *Id.* (alteration in original) (quoting an internal agency email).

14. On March 16, 2018, E&E News reported that Pruitt intended to issue a proposed rule "widely expected to resemble" the HONEST Act. *See* Waldman & Bravender, *supra* ¶ 2.

15. On April 30, 2018, EPA published the Proposed Rule in the Federal Register. *See* 83 Fed. Reg. at 18,768. Like the HONEST Act, the Proposed Rule purports to enhance transparency and reproducibility. *See, e.g.*, *id.* ("This document proposes a regulation intended to strengthen the transparency of EPA regulatory science."); *id.* at 18,769 ("EPA . . . must . . . ensure that its decision-making is marked by independence, objectivity, transparency, clarity, and reproducibility."). The Proposed Rule also echoes the HONEST Act by "direct[ing] EPA to ensure that the regulatory science underlying its actions is *publicly available in a manner sufficient for independent validation*." *Id.* at 18,773 (emphasis added).

16. The Proposed Rule directs EPA to "ensure that the data and models underlying scientific studies that are pivotal to . . . regulatory action are available to the public." *Id.* at 18,769. Previously, EPA had rejected this approach to increasing transparency, arguing that it would prohibit the Agency from considering relevant science—in part, because many public health studies rely on participants' private medical information and other data that researchers cannot legally or ethically disclose. *See, e.g.*, National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,689 (July 18, 1997) (to be codified at 40 C.F.R. pt. 50) ("If EPA and other governmental agencies could not rely on published studies without

conducting an independent analysis of the enormous volume of raw data underlying them, then much plainly relevant scientific information would become unavailable to EPA for use in setting standards to protect public health and the environment. . . . [S]uch data are often the property of scientific investigators and are often not readily available because of . . . proprietary interests . . . or because of arrangements made to maintain confidentiality regarding personal health status and lifestyle information of individuals included in such data.").

17. In introducing the Proposed Rule, EPA acknowledged that "courts have at times upheld EPA's use [of] non-public data in support of its regulatory actions." 83 Fed. Reg. at 18,769 n.3 (citing *Coal. of Battery Recyclers Ass'n. v. EPA*, 604 F.3d 613, 623 (D.C. Cir. 2010); *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 372 (D.C. Cir. 2002)). In support of this statement, EPA cited judicial decisions upholding actions taken in reliance on landmark studies assessing the health consequences—including risks to children—associated with exposure to particulate matter and lead. *Id.* EPA explained that the Proposed Rule would "preclude it from using such data in future regulatory actions." *Id.*

18. EPA initially provided only a 30-day period for the public to comment on the Proposed Rule and did not schedule a public hearing. *See id.* at 18,768. EPA later extended the deadline for public comments until August 16, 2018. *Strengthening Transparency in Regulatory Science; Extension of Comment Period and Notice of Public Hearing*, 83 Fed. Reg. 24,255, 24,256 (May 25, 2018). EPA also announced that it would hold a public hearing on the Proposed Rule in Washington, D.C. on July 17, 2018. *Id.*

19. In June 2018, EPA's own Science Advisory Board ("SAB") complained that EPA had departed from its "usual process" in issuing the Proposed Rule. Letter from Dr. Michael Honeycutt, Chair, Sci. Advisory Bd., to Scott Pruitt, Administrator, Envtl. Prot. Agency 2 (June

28, 2018), https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebReportsLastMonthBOARD/4ECB44CA28936083852582BB004ADE54/$File/EPA-SAB-18-003+Unsigned.pdf. EPA typically provides the SAB with information about major actions *before* they are proposed, so that the SAB can assess the scientific and technical bases for those actions—and provide feedback to the Agency, as necessary. *Id.* In this situation, however, the SAB learned of the Proposed Rule only "through an April 25, 2018, press event and an April 30, 2018 *Federal Register* notice, as well as news articles." *Id.*

20. The Proposed Rule and its political underpinnings have attracted significant public interest and media attention. *See, e.g.*, Lisa Friedman, *The E.P.A. Says It Wants to Research Transparency. Scientists See an Attack on Science.*, N.Y. Times (Mar. 26, 2018), https://www.nytimes.com/2018/03/26/climate/epa-scientific-transparency-honest-act.html (reporting that "[EPA] is considering a major change to the way it assesses scientific work, a move that would severely restrict the research available to it when writing environmental regulations" and explaining that "[t]he proposal is based on legislation named the Honest and Open New E.P.A. Science Treatment Act, also known as the Honest Act, a bill sponsored by Representative Lamar Smith"); Scott Waldman & Niina Heikkinen, *EPA: Smith Pitched Pruitt on 'Secret Science.' Now It's Happening*, E&E News (Apr. 20, 2016), https://www.eenews.net/stories/1060079655.html ("EPA coordinated with House Republicans about their plans to restrict the science used in crafting regulations, newly released emails show.").

LEGAL BACKGROUND

21. FOIA requires that "each agency . . . shall make . . . records promptly available to any person" upon receipt of a proper request, unless certain narrow exemptions to disclosure apply. 5 U.S.C. § 552(a)(3)(A).

22. Specifically, under FOIA and EPA's implementing regulations, EPA must determine whether to comply with a properly submitted FOIA request within 20 business days of receipt and must immediately notify the requester of its determination, along with the underlying reasons. *Id.* § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a) ("EPA offices will respond to requests no later than 20 working days from the date the request is received."). If the Agency determines not to comply with a properly submitted request, it must inform the requester of the right to appeal that adverse determination to the head of the Agency. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

23. In "unusual circumstances," EPA may extend the 20-day deadline for responding to a FOIA request for no more than ten additional business days by written notice to the requester. *Id.* § 552(a)(6)(B)(i); *see id.* § 552(a)(6)(B)(iii) (defining "unusual circumstances"). This written notice must set forth the unusual circumstances justifying the extension and specify the date on which the Agency will determine whether to comply with the request. *Id.* § 552(a)(6)(B)(i); *see also* 40 C.F.R. § 2.104(d) ("When the statutory time limits for processing a request cannot be met because of 'unusual circumstances,' . . . and the time limits are extended on that basis, you will be notified in writing, as soon as practicable, of the unusual circumstances and of the date by which processing of the request should be completed.").

24. If EPA fails to notify a FOIA requester before the statutory deadline of its determination about whether it will comply with a properly submitted request, the requester is deemed to have exhausted his or her administrative remedies and may immediately seek review in an appropriate district court. 5 U.S.C. § 552(a)(6)(C)(i), (a)(4)(B); *see* 40 C.F.R. § 2.104(a) ("If EPA fails to respond to your request within the 20 working day period . . . you may seek judicial review to obtain the records without first making an administrative appeal."). If the Agency is exercising due diligence in responding to the request and "exceptional circumstances"

apply, the court may retain jurisdiction and allow the Agency additional time to respond. 5 U.S.C. § 552(a)(6)(C)(i). A delay resulting from a "predictable agency workload of [FOIA] requests" generally does not qualify as an exceptional circumstance. *Id.* § 552(a)(6)(C)(ii).

PLAINTIFF'S FOIA REQUESTS AND EPA'S FAILURE TO RESPOND

EDF's March FOIA Request

25. On March 20, 2018, EDF submitted the March FOIA Request to EPA by e-mail. *See* Ex. 1 at 1. This Request sought records "related to EPA's consideration and implementation of ideas derived from or similar to unsuccessful House Committee on Science, Space, & Technology legislation concerning EPA's use of science." *Id.* Specifically, EDF requested "copies of correspondence that:

(1) contain any of the following terms:
- 'secret science'
- 'reproduc!'[1]
- 'HONEST Act' or 'Honest and Open New EPA Science Treatment Act'
- 'replicat!'
- 'computer codes'

(2) and has included among its sender(s) or recipient(s), or is in the custody of, any one or more of the following EPA employees:
- Jennifer Orme-Zavaleta
- Chris Robbins
- Bruce Rodan
- Richard Yamada
- Mary Ellen Radzikowski
- Thomas Sinks
- Jerry Blancato
- Clint Woods
- Bill Wehrum
- Ryan Jackson
- Byron Brown
- Nancy Beck
- Samantha Davis

[1] EDF explained that the symbol "!" is a "wildcard" intended to include all words that begin with the letters preceding the symbol. *See id.* at 2.

- Brittany Bolen
- Charlotte Bertrand
- E. Scott Pruitt[.]"

Id. at 1–2. EDF sought expedited processing and requested that EPA waive the search and production fees. *Id.* at 2–5.

26. On March 20, 2018, EPA confirmed receipt of the March FOIA Request and assigned the Request tracking number EPA-HQ-2018-005636. *See* E-mail from foia_hq@epa.gov to Surbhi Sarang, EDF (Mar. 20, 2018, 2:45 PM EST), attached as Exhibit 3.

27. On March 29, 2018, EPA informed EDF that "the total fees that would be incurred in processing this request do not meet the cost threshold and therefore [are] not billable." *See* Letter from Larry F. Gottesman, EPA, to Surbhi Sarang, EDF 1 (Mar. 29, 2018), attached as Exhibit 4. In the same communication, EPA denied EDF's request for expedited processing. *Id.* However, EPA explained that the March FOIA Request "will be processed as expeditiously as possible by the Office of Research and Development (ORD)." *Id.*

28. EPA's response to EDF's March FOIA Request was due 20 working days after receipt. Although EDF has engaged in multiple phone and email communications with ORD employees and other EPA representatives, EPA has not yet notified EDF of its determination as to whether it intends to comply with the FOIA Request or of the reasons for that determination, and it has not released any responsive records to date. *See* FOIAonline, EPA-HQ-2018-005636 Request Details, https://www.foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-HQ-2018-005636&type=request (last visited Aug. 7, 2018) (indicating that the March FOIA Request is at the "Assignment" stage and has not yet begun "Processing"), attached as Exhibit 5.

EDF's May FOIA Request

29. On May 4, 2018, EDF submitted the May FOIA Request to EPA through the Agency's "FOIAonline" application. *See* Ex. 2 at 1. Like the March FOIA Request, the May FOIA Request sought records "related to EPA's consideration and implementation of ideas derived from or similar to unsuccessful House Committee on Science, Space, & Technology legislation concerning EPA's use of science." *Id.* As compared to the March FOIA Request, however, the May FOIA Request extended the timeframe during which responsive records might have been created or modified, identified additional custodians, and provided an expanded list of relevant terms, including key phrases used in the Proposed Rule. *Id.* Specifically, EDF requested "copies of correspondence that:

(1) contain any of the following terms:
- 'secret science'
- 'reproduc!,'[2] not including use of the term within the phrase 'no unauthorized reproductions of this document' or other similar standard disclaimers,
- 'HONEST Act' or 'Honest and Open New EPA Science Treatment Act'
- 'replicat!'
- 'computer codes'
- 'causa!'
- 'uncertain!'
- 'dose response'
- 'pivotal'
- 'significant regulatory decisions'
- 'transparen!'
- 'independent! validat!'

(2) and has included among its sender(s) or recipient(s), or is in the custody of, any one or more of the following EPA employees:
- Jennifer Orme-Zavaleta
- Chris Robbins
- Bruce Rodan
- Richard Yamada
- Mary Ellen Radzikowski

[2] As with the March FOIA Request, EDF explained that the symbol "!" is a "wildcard" intended to include all words that begin with the letters preceding the symbol. *See id.* at 2.

- Thomas Sinks
- Jerry Blancato
- Clint Woods
- Bill Wehrum
- Ryan Jackson
- Byron Brown
- Nancy Beck
- Samantha Davis
- Brittany Bolen
- Charlotte Bertrand
- E. Scott Pruitt
- Louis Anthony (Tony) Cox
- Drew Feeley
- Aaron Ringel[.]"

Id. at 1–2. EDF sought expedited processing and requested that EPA waive the search and production fees. *Id.* at 3–6.

30. On May 4, 2018, EPA confirmed receipt of the May FOIA Request and assigned the Request tracking number EPA-HQ-2018-007397. E-mail from foia_hq@epa.gov to Surbhi Sarang, EDF (May 4, 2018, 5:57 PM EST), attached as Exhibit 6.

31. On May 10, 2018, EPA granted EDF's request for a fee waiver. *See* Letter from Larry F. Gottesman, EPA, to Surbhi Sarang, EDF 1 (May 10, 2018), attached as Exhibit 7. In the same communication, EPA denied EDF's request for expedited processing. *Id.* However, EPA explained that the May FOIA Request "will be processed as expeditiously as possible by the Office of Research and Development (ORD)." *Id.*

32. EPA's response to EDF's May FOIA Request was due 20 working days after receipt. Although EDF has engaged in multiple phone and email communications with ORD employees and other EPA representatives, EPA has yet not notified EDF of its determination as to whether it intends to comply with the FOIA Request or of the reasons for that determination, and it has not released any responsive records to date. *See* FOIAonline, EPA-HQ-2018-007397 Request Details, https://www.foiaonline.gov/foiaonline/action/public/submissionDetails?

trackingNumber=EPA-HQ-2018-007397&type=request (last visited Aug. 7, 2018) (indicating that the May FOIA Request is at the "Assignment" stage and has not yet begun "Processing"), attached as Exhibit 8.

* * *

33. EDF reasonably believes that non-exempt records responsive to the FOIA Requests could shed light on EPA's decision to issue the Proposed Rule. The period in which EPA will accept public comments on the rule will close on August 16, 2018—and EPA could finalize the rule at any point thereafter. As a result of EPA's failure to comply with FOIA's statutory deadlines, EDF recognizes that it might not receive responsive records before the comment period expires. Nonetheless, EDF believes that these records will help to inform ongoing review of the Proposed Rule. EDF, its members and supporters, and the public at large may also rely on responsive records in evaluating and responding to EPA's subsequent actions pertaining to the rule. Accordingly, EDF respectfully requests that this Court order EPA to release the requested records within 20 business days of the Court's Order granting EDF's requested relief.

CLAIM FOR RELIEF

1. Under FOIA, Plaintiff has a statutory right to obtain all non-exempt records responsive to its request.

2. EPA failed to respond to Plaintiff's Requests within 20 days. To date, EPA has not notified Plaintiff of its determinations as to whether it intends to comply with Plaintiff's properly submitted FOIA Requests, in violation of FOIA, 5 U.S.C. § 552(a)(6)(A)(i).

3. EPA failed to make all non-exempt responsive records promptly available to Plaintiff, in violation of FOIA, 5 U.S.C. § 552(a)(3)(A).

REQUEST FOR RELIEF

Plaintiff respectfully requests that this Court enter an Order:

1. Declaring, pursuant to 28 U.S.C. § 2201, that EPA violated FOIA by failing to notify Plaintiff of EPA's determinations about whether to comply with Plaintiff's properly submitted FOIA Requests, along with the reasons for those determinations, before the statutory deadline;

2. Declaring, pursuant to 28 U.S.C. § 2201, that EPA violated FOIA by failing to make the requested records promptly available to Plaintiff;

3. Ordering EPA, pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202, to release the requested records to Plaintiff within 20 business days of the Court's Order;

4. Ordering EPA, pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202, to produce an index identifying any responsive records or parts thereof that it decides to withhold from disclosure, along with the specific statutory exemption claimed;

5. Retaining jurisdiction over this case to rule on any assertion by EPA that certain responsive records are exempt from disclosure;

6. Awarding Plaintiff its reasonable attorney fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E)(i); and

7. Granting such other and further relief as the Court deems just and proper.

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Respectfully submitted this 7th day of August 2018.

/s/Alexis Andimam

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