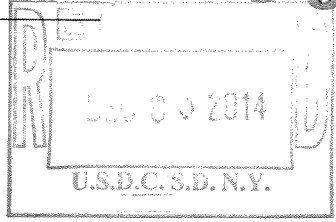


**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

NATURAL RESOURCES DEFENSE)
 COUNCIL, INC.,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Defendant.)

JUDGE WOODS
14 CV 9639
 14 CIV
 ECF Case


COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Defendant United States Environmental Protection Agency (EPA) violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, when it failed to timely disclose responsive records requested by plaintiff Natural Resources Defense Council, Inc. (NRDC) concerning the agency’s implementation of two provisions within the Clean Water Act, 33 U.S.C. § 1321(j)(1)(B) & (C).

2. On January 9, 2014, over 5000 gallons of 4-methylcyclohexanemethanol—a chemical used in coal processing—leaked from a ruptured above-ground storage tank into the Elk River in West Virginia just upstream of the intake pipe used by the regional water company. The Elk River spill contaminated the regional water supply, leaving over 300,000 people without drinking water and leading President Obama to declare a federal emergency. The Elk River chemical spill also exposed a gap in the federal regulatory framework addressing hazardous substance spills.

3. On April 30, 2014, NRDC submitted a FOIA request (the “April FOIA Request”) to EPA seeking documents pertaining to the agency’s implementation of 33 U.S.C. § 1321(j)(1)(C) and requesting that EPA waive the fee it would otherwise charge for search and production. Section 1321(j)(1)(C) requires the promulgation of regulations to prevent and contain discharges of hazardous substances. *Id.* (“[A]s soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws . . . (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges[.]”).

4. By delegation, EPA is responsible for promulgating regulations under § 1321(j)(1)(C) to prevent and contain the discharges of hazardous substances from non-transportation-related onshore facilities, *see* Exec. Order No. 12777, 56 Fed. Reg. 54,757, 54,760 (Oct. 18, 1991), *superseding* Exec. Order No. 11735, 38 Fed. Reg. 21,243 (Aug. 3, 1973), as well as non-transportation-related offshore facilities located landward of the coast line, *see* 40 C.F.R. pt. 112 app. B.

5. EPA acknowledged receipt of the April FOIA Request on April 30, 2014 and granted NRDC’s request for a fee waiver on May 6, 2014.

6. On October 17, 2014, NRDC submitted a FOIA request (the “October FOIA Request”) to EPA seeking documents pertaining to the agency’s implementation of 33 U.S.C. § 1321(j)(1)(B) and requesting that EPA waive the fee it would otherwise charge for search and production. Section 1321(j)(1)(B) requires the promulgation of regulations to guide local and regional oil and hazardous substance removal contingency plans. *Id.* (“[A]s soon as practicable

after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws . . . (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans[.]”).

7. By delegation, EPA is responsible for establishing criteria under § 1321(j)(1)(B) for local and regional oil and hazardous substance contingency plans for “inland zone[s].” *See* Exec. Order No. 12777, 56 Fed. Reg. at 54,760.

8. EPA acknowledged receipt of the October FOIA Request on October 17, 2014 and granted NRDC’s request for a fee waiver on October 24, 2014.

9. EPA was required to respond to NRDC’s April FOIA Request by May 29, 2014, and its October FOIA Request by November 17, 2014. EPA has failed to provide NRDC with a final response or determination as to whether it will produce documents responsive to NRDC’s requests, including a determination about whether EPA will withhold any documents, and the rationale for any withholding.

10. NRDC seeks a declaration that EPA has violated FOIA by failing to provide a final determination as to whether it will comply with NRDC’s requests and by failing to produce responsive documents by the statutory deadlines. NRDC seeks an injunction ordering that EPA disclose without further delay all non-exempt, responsive records to NRDC.

JURISDICTION AND VENUE

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

12. Venue is proper in the Southern District of New York because plaintiff NRDC resides and has its principal place of business in this judicial district. 5 U.S.C. § 552(a)(4)(B).

THE PARTIES

13. Plaintiff NRDC is a national, not-for-profit environmental and public health membership organization with more than 300,000 members. NRDC engages in research, advocacy, media, and litigation related to protecting public health and the environment.

14. Defendant EPA is a federal agency within the meaning of FOIA, 5 U.S.C. § 551(1), and has possession or control of the records that NRDC seeks in this action.

STATUTORY AND REGULATORY FRAMEWORK

15. FOIA requires that federal agencies release, upon request, information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. § 552.

16. Within twenty business days of an agency's receipt of a FOIA request, the agency must "determine . . . whether to comply" with the request. *Id.* § 552(a)(6)(A)(i). The agency must "immediately notify" the requester "of such determination and the reasons therefor." *Id.*

17. If an agency fails to provide the requester a final determination within the statutory time limit, the requestor is deemed to have exhausted administrative remedies and may immediately seek judicial relief. *Id.* § 552(a)(6)(C)(i); 40 C.F.R. § 2.104(a).

FACTS

18. Although EPA has promulgated regulations that address the removal of hazardous substances following a discharge, *see, e.g.*, 40 C.F.R. pts. 109, 300, NRDC seeks to learn more about the extent to which EPA has promulgated regulations under 33 U.S.C. § 1321(j)(1)(C) to prevent and contain such discharges in the first instance. NRDC similarly wishes to understand the extent to which EPA has established criteria under 33 U.S.C. § 1321(j)(1)(B) for the development and implementation of local and regional hazardous substance removal contingency plans.

April FOIA Request

19. On April 30, 2014, NRDC submitted the April FOIA Request to EPA via the agency's "FOIAonline" website.

20. The April FOIA Request sought records reflecting EPA's implementation of that portion of 33 U.S.C. § 1321(j)(1)(C) that requires EPA to promulgate regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of . . . hazardous substances . . . and to contain such discharges."

21. EPA confirmed receipt of the April FOIA Request on April 30, 2014, via e-mail. EPA assigned the April FOIA Request the tracking number EPA-HQ-2014-006101.

22. Pursuant to the deadline established in 5 U.S.C. § 552(a)(6)(A)(i), EPA's final determination to the April FOIA Request was due on May 29, 2014.

23. EPA did not provide a final response to the April FOIA Request by May 29, 2014.

24. To date, EPA has failed to provide a final response or produce any documents in response to the April FOIA Request.

October FOIA Request

25. On October 17, 2014, NRDC submitted the October FOIA Request to EPA via the agency's "FOIAonline" website.

26. The October FOIA Request sought records reflecting EPA's implementation of that portion of 33 U.S.C. § 1321(j)(1)(B) that requires EPA to promulgate regulations "establishing criteria for the development and implementation of local and regional . . . hazardous substance removal contingency plans."

27. EPA confirmed receipt of the October FOIA Request on October 17, 2014 via e-mail. EPA assigned the October FOIA Request the tracking number EPA-HQ-2015-000577.

28. Pursuant to the deadline established in 5 U.S.C. § 552(a)(6)(A)(i), EPA's final determination to the October FOIA Request was due on November 17, 2014.

29. EPA did not provide a final response to the October FOIA Request by November 17, 2014.

30. On November 14, 2014, EPA's Office of Resource Conservation Recovery (ORCR) notified NRDC by email that, while the October FOIA Request initially was assigned to that office, it was being transferred to EPA's Office for Emergency Management (OEM). On December 2, 2014, NRDC received a letter from ORCR stating that the office had searched its files and found no records pertaining to the October FOIA Request, and on December 4, 2014, NRDC received an email stating that the Request had been resolved. An official from ORCR informed NRDC in a telephone conversation that the disposition applied only to ORCR, and did not apply to OEM.

31. To date, EPA has failed to provide a final agency-wide response or produce any documents in response to the October FOIA Request.

32. NRDC seeks a declaration that EPA has violated FOIA by failing to make a final determination about whether to comply with NRDC's April and October FOIA Requests by the statutory deadlines. NRDC also seeks an injunction ordering that EPA promptly disclose all non-exempt, responsive records to NRDC. In the event that EPA determines that certain responsive records are exempt from disclosure, NRDC seeks an injunction ordering EPA to produce a *Vaughn* index identifying any documents or parts thereof that they withhold and the basis for the withholdings.

33. NRDC brings this action on its own behalf and on behalf of its members. NRDC and its members have been and continue to be injured by EPA's failure to timely provide responsive records. The requested relief will redress these injuries.

CLAIMS FOR RELIEF

COUNT ONE

34. NRDC incorporates by reference all preceding paragraphs.

35. NRDC has a statutory right under FOIA to immediately obtain all requested records responsive to the April FOIA Request that are not exempt from disclosure under FOIA.

36. EPA violated its statutory duty under FOIA, 5 U.S.C. § 552(a), to release all non-exempt, responsive records for the April FOIA Request to NRDC.

COUNT TWO

37. NRDC incorporates by reference all preceding paragraphs.

38. NRDC has a statutory right under FOIA to immediately obtain all requested records responsive to the October FOIA Request that are not exempt from disclosure under FOIA.

39. EPA violated its statutory duty under FOIA, 5 U.S.C. § 552(a), to release all non-exempt, responsive records for the October FOIA Request to NRDC.

REQUEST FOR RELIEF

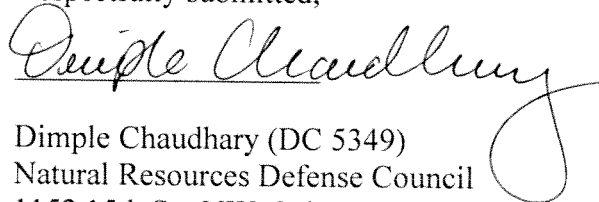
WHEREFORE, NRDC respectfully requests that this Court enter judgment against EPA as follows:

A. Declaring that EPA has violated FOIA by failing to issue a final determination and produce non-exempt records responsive to NRDC's April and October FOIA Requests by the statutory deadlines;

- B. Ordering that EPA disclose the requested records to NRDC without further delay;
- C. In the event that EPA determines that certain responsive records are exempt from disclosure, ordering EPA to produce a *Vaughn* index identifying any documents or parts thereof that they withhold and the basis for the withholdings;
- D. Awarding NRDC its costs and attorneys' fees; and
- E. Granting such other and further relief as the Court deems just and proper.

Dated: Washington, DC
December 5, 2014

Respectfully submitted,

A handwritten signature in cursive script that reads "Dimple Chaudhary". The signature is written in black ink and is positioned above the typed contact information.

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