

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Public Employees for Environmental
Responsibility

Plaintiff,

v.

U.S. Environmental Protection Agency

Defendant.

Civil Case No. 18-2219

**MEMORANDUM IN REPLY TO DEFENDANT’S OPPOSITION TO PLAINTIFF’S
CROSS-MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

Plaintiff Public Employees for Environmental Responsibility (“Plaintiff” or “PEER”) has clearly demonstrated its right to information wrongfully withheld by Defendant Environmental Protection Agency (“Defendant” or “EPA”), whose defense relies on the same pedantics they have spent the last two years baffling Congress with. EPA has suppressed the science it purports to champion by intentionally muddying the record, misleading Congress, obstructing investigators, refusing to answer direct questions, and playing word games with litigants. The agency’s complaints about the specific “Step” language used by Plaintiff and its stubborn insistence that not only is there is no completed formaldehyde assessment, but that Plaintiff should be ridiculed for even “imagining” that one exists, are the absolute height of cynicism. EPA is not trying to protect its deliberative process, it is trying to defend political suppression of its own science.

Other than denial of the final draft’s existence, EPA has two core arguments:

1) that the Formaldehyde Assessment is deliberative in its entirety by virtue of its

status as a draft, and 2) it is impossible to produce any version of the formaldehyde assessment that is not thoroughly riddled with redline changes and individual comments. Both arguments are highly questionable given the facts here. The final political approval for the draft's release for public comment has already been extensively documented in Congress, undercutting EPA's protestations that no finalized draft exists. The only clear potential damage to any deliberative process is the claimed "redline" edits, but the history of assertions by EPA that a completed draft exists and the agency's failure to correct assertions to the contrary suggest that redlining is not present in at least one final document.

FACTUAL BACKGROUND

As outlined in Plaintiff's cross-motion, this is far from the first attempt to compel the disclosure of EPA's Formaldehyde Assessment. Starting with Administrator Pruitt's statement to the Senate January 24, 2018 confirming his "understanding" that "the EPA ha[d] finalized its conclusion that formaldehyde causes leukemia and other cancers, and that that completed new assessment [was] ready to be released for public review," the agency has done nothing to contradict the universal public agreement that its draft has been finalized for a period of years.¹ EPA now tries to "clarify" his statement for the first time, arguing that because Markey asked a compound question, it is impossible to know what Pruitt was agreeing with,

¹ U.S. Senate Comm. on Envt. & Pub. Works, S. Hrg. 115-325; Volume 1, *Oversight Hearing to Receive Testimony from Environmental Protection Agency Administrator Scott Pruitt* 278 (Jan. 30, 2018), available at <https://www.govinfo.gov/content/pkg/CHRG-115shrg30599/pdf/CHRG-115shrg30599.pdf> (statement of Senator Edward Markey, which Administrator Pruitt agreed with by stating "[m]y understanding is similar to yours.").

and that he was actually only promising to provide more information. This weak objection to form is almost three years too late. EPA is trying to build a universe of “alternative facts” where it has treated Congress and Plaintiff in good faith, when in reality it has concealed and equivocated at every opportunity.

EPA’s scorn for candor and accountability concerning its formaldehyde assessment is apparent from even a cursory review of its actions after Administrator Pruitt’s promise to “confirm the status of the assessment and get back to Senator Markey.” Def.’s Mem. in Opp’n to Pl.’s Cross-Mot. for Summ. J. at 4 [*hereinafter* Def’s Opp’n]. On several occasions over the last few years, EPA has either indicated that there is a completed formaldehyde assessment or evaded responding to pointed questions about it. Only now has it adopted the surprise position in an opposition brief that no completed draft exists, a claim that lacks credibility given EPA’s previous statements. An abbreviated list includes:

1. On May 17, 2018, Senators Markey, Whitehouse, and Carper demanded by letter that EPA live up to its promise to “get back to” Senator Markey and also reply to post-hearing questions for the record, asking point blank “I have been informed that the human health assessment for formaldehyde was completed by IRIS staff months ago. Is that accurate?”² This letter was sent after following up “every two to three weeks” for more than 3 months. *Id.* EPA’s reply did not address the question or provide any information about the status of the formaldehyde report, stating, in full:

² Letter from Senator Edward J. Markey, Senator Sheldon Whitehouse, and Senator Thomas R. Carper to The Honorable Scott Pruitt (May 17, 2018), *available at* <https://www.markey.senate.gov/imo/media/doc/Pruitt%20Letter%20formaldehyde%20assessment.pdf>.

The National Academy of Science (NAS) identified numerous significant recommendations for improving the science that underlies the formaldehyde IRIS assessment. As noted by EPA staff during the February 2018 NAS workshop to review advances made to the IRIS process, the Agency is working to fully implement the NAS recommendation in all IRIS assessments released moving forward.

2. The Government Accountability Office's March 2019 report on the IRIS program named formaldehyde as one of "four assessments in the later stages of development" and emphasized this by observing that the formaldehyde assessment was listed on EPA's website as being at "Step 4."³ EPA now claims that the reference on its website was to the 2010 Step 4 formaldehyde report. Second Decl. of Dr. Jennifer Orme-Zavaleta ¶ 5. EPA failed to make this clarification in its six-page comment on the GAO report, to GAO investigators contemporaneously, or when EPA's declarant testified in committee about that report.

3. On March 27, 2019, the House Committee on Science, Space, and Technology held a hearing about the IRIS program and the recent GAO report entitled *EPA'S IRIS Program: Reviewing Its Progress and Roadblocks Ahead*.⁴ EPA's declarant, Dr. Orme-Zavaleta, testified alongside Mr. Alfredo Gomez, GAO's Natural Resources and Environment Director. All three opening statements by committee and subcommittee chairwomen Eddie Bernice Johnson, Lizzie Fletcher, and Mikie Sherrill

³ GAO, GAO-19-270, *CHEMICAL ASSESSMENTS: Status of EPA's Efforts to Produce Assessments and Implement the Toxic Substances Control Act 2*, (2019), <https://www.gao.gov/assets/700/697212.pdf>.

⁴ No official transcript is currently available for this hearing. Its official webpage containing written opening statements can be found at: <https://science.house.gov/hearings/epas-iris-program-reviewing-its-progress-and-roadblocks-ahead>. Quotations from are provided with timestamps to the video of the hearing, at: <https://www.youtube.com/watch?v=RwGG587A67U>.

stated explicitly their shared concern that the formaldehyde assessment had been completed but held up by EPA political leadership. Dr. Orme-Zavaleta's written testimony did not discuss the formaldehyde report. During that hearing, Rep. Ben McAdams asked Dr. Orme-Zavaleta:

Press reports and Senate testimony from then EPA Administrator Scott Pruitt indicate that the IRIS formaldehyde assessment has been ready for public release since 2017, since the end of 2017, and that the assessment establishes a link between formaldehyde exposure and leukemia. Formaldehyde did not appear on the December 2018 list of IRIS priority chemicals, and the GAO report indicated that its future is unknown. So my question is what is the status of the formaldehyde assessment and when can we expect it to be released for public comment?⁵

Dr. Orme-Zavaleta responded:

So we do have a draft formaldehyde assessment, and with TSCA recently announcing that formaldehyde is in their top 20 we're gonna be having conversations with our Office of Chemical Safety and Pollution Prevention to determine next steps in going forward. We feel that the assessment that we have will help with that TSCA determination and we need to determine next steps for supporting the other agency needs.⁶

This response, along with Administrator Pruitt's statement in January 2017, is the clearest answer provided on the record by EPA about the formaldehyde assessment. It does not refer to several email attachments that may or may not be draft formaldehyde assessments, a series of increasingly marked up documents, or a jumble of redline comments. EPA "do[es] have a draft formaldehyde assessment" that is complete enough to be considered the definitive draft. No interpretive gloss about

⁵ Official video at 1:16:42. <https://youtu.be/RwGG587A67U?t=4602>.

⁶ Id., at 1:17:17. <https://youtu.be/RwGG587A67U?t=4637>.

compound questions can dispute this basic fact, and EPA has not contested that fact until this litigation.

4. On April 3, 2019, Chairwomen Eddie Bernice Johnson and Mikie Sherrill of the House Committee on Science, Space & Technology and its Subcommittee on Investigations and Oversight sent a follow-up letter to Administrator Wheeler.⁷ That letter stated that the formaldehyde assessment “has been ready for public comment since at least the end of 2017” and criticized the agency for allowing political considerations to subvert its scientific review.

5. On July 18, 2019, Chairwoman Eddie Bernice Johnson sent another letter to EPA, outlining again the evidence that the formaldehyde draft had been “finalized” and lamenting “the mysterious delay of the long-completed formaldehyde report.”⁸ The letter stated that Dr. Orme-Zavaleta was unprepared to answer many questions asked by the Committee, and included correspondence demonstrating that EPA attempted to change the record of the March 2019 hearing “in order to circumvent Congressional oversight and improve public perception of EPA’s actions.”⁹ That letter demonstrated conclusively that despite repeated promises to

⁷ See Letter from Chairwoman Eddie Bernice Johnson of the House Comm. on Science, Space, & Technology and Chairwoman Mikie Sherrill of the House Subcommittee on Investigations and Oversight to the Hon. Andrew Wheeler (Apr. 3, 2019), <https://science.house.gov/imo/media/doc/4.3.19%20Wheeler%20letter%20EPA%20IRIS.pdf>; see also Pl.’s. Cross-Mot. for Summ. J. at 9-10 (discussing same).

⁸ Letter from Chairwoman Eddie Bernice Johnson of the House Comm. on Science, Space, & Technology to the Hon. Andrew Wheeler (July 18, 2019), <https://science.house.gov/imo/media/doc/7.18.19%20Letter%20to%20Wheeler%20regarding%20IRIS.pdf>.

⁹ Id., at 3.

follow up or provide more information about the state of EPA's programs, EPA was instead making "every effort to obstruct the Committee's oversight."¹⁰

In sum, the facts show that there is a complete draft formaldehyde assessment, and until now, although EPA tried to evade and obfuscate that fact, it never outright denied it.

The agency claims that the July 6, 2018 article cited in Plaintiff's Cross-Motion "actually contradicts Plaintiff's belief that there is now or was at that time a completed formaldehyde assessment" because it acknowledges the agency stalled its internal review.¹¹ The first two sentences of that article are:

The Trump administration is suppressing an Environmental Protection Agency report that warns that most Americans inhale enough formaldehyde vapor in the course of daily life to put them at risk of developing leukemia and other ailments, a current and a former agency official told POLITICO. **The warnings are contained in a draft health assessment EPA scientists completed just before Donald Trump became president, according to the officials.**¹²

¹⁰ One particularly striking attempt at obstruction described by Chairwoman Johnson demonstrates the same kind of fatuous legalism EPA argues here about the parties' correspondence and Plaintiff's alleged failure to ask the right question about which document to focus summary judgment on. According to Chairwoman Bernice Johnson's letter:

On March 4, 2019, I wrote with three of my colleagues in the Senate to EPA to request documents relating to EPA's elimination of the IRIS formaldehyde assessment. My Senate colleagues were informed by EPA Congressional Affairs that EPA intended to treat the request as a Senate Minority request rather than a House Majority request, as my signature was not listed first. We understand this as EPA's attempt to undermine the authority of a Chairwoman.

¹¹ Def's Opp'n at 5.

¹² Annie Snider, *Sources: EPA blocks warnings on cancer-causing chemical*, Politico (July 6, 2018), <https://www.politico.com/story/2018/07/06/epa-formaldehyde-warnings-blocked-696628> (emphasis added); cf. Bobby Azarian Ph.D., *Trump Is Gaslighting America Again — Here's How to Fight It*, PSYCHOLOGY TODAY (Aug. 31, 2018),

Despite EPA's unprofessional ridicule¹³ of Plaintiff's reliance on the GAO report's reference to a "Step 4" report, an ambiguity of its own design, and its spin of the parties' correspondence, amounting to an objection that Plaintiff did not ask nicely enough for information of obvious import,¹⁴ the agency either has in its possession a fully drafted formaldehyde assessment or it has misled Congress by testimony from the EPA Administrator that it exists, and then failing to correct or deny his statement, and instead evading all further questions about it. To argue now that there is no such final draft evidences a breathtaking degree of contempt for Congressional oversight. It also flatly contradicts EPA documentation received and preserved by Congress.¹⁵ Every time the agency has promised to provide information

<https://www.psychologytoday.com/us/blog/mind-in-the-machine/201808/trump-is-gaslighting-america-again-here-s-how-fight-it> (discussing persistent use of "gaslighting" by President Trump, a tactic of getting people to question their direct experience "through persistent lying, misdirection, and contradiction").

¹³ See, e.g., Def's Opp'n at 10 (referring to the document Plaintiff seeks as "the imagined" version and accusing Plaintiff of "inventing a completed version"); 14 ("Plaintiff then makes the counterfactual assertion that the Current Draft Assessment includes a . . . 'ready for public release' document Plaintiff's pivot to seek some hypothetical other document—which again does not exist").

¹⁴ See Def's Opp'n at 6-7 ("a refusal requires a specific request"); see also Cross-Mot. at 12 (describing unsuccessful attempts to have EPA provide a version with the least "redlining" and margin comments).

¹⁵ Senator Thomas Carper has hosted some of these materials on his Senate website. A document entitled "A Message from the IRIS Program" providing information about the state of various IRIS assessments then in development lists June 23, 2017 as the date entered for Formaldehyde in a column titled "Draft Assessment Developed (Management/Executive Review)." Further steps were blank or noted in red with the note "*Projected Pending Positive Memo Results*." It is unclear what exactly this means but it certainly supports the proposition that the IRIS program completed its full draft assessment and delivered that document to "management." Available at: <https://www.carper.senate.gov/public/cache/files/f/3/f30f9b46-4315-44b1-aad1-885ee29e1c2b/49443A81AE043C0BE95E7469D5CD408D.ordmay2018august2018.pdf>.

to Plaintiff or to Congress it has reneged or provided nonresponsive materials, exploiting its presumption of good faith to refuse to answer even the most basic questions about its program.

ARGUMENT

The EPA agrees with Plaintiff on most points of law regarding the standards for application of the deliberative process privilege. Many of the most important cases in this circuit, particularly *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992), *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), *Morley v. CIA*, 508 F.3d 1108, 1126-27 (D.C. Cir. 2007), and *Mapother v. Dep't of Justice*, 3 F.3d 1533 (D.C. Cir. 1993), appear in both sides' briefs for largely the same principles. The key distinction between the parties' analyses is in addressing the role of a document in "the formulation or exercise of agency policy-oriented judgment." *Petroleum Info. Corp.*, 976 F.2d, at 1435 (emphasis in original). EPA has generally ignored this requirement for application of the privilege. Plaintiff has provided the only coherent analysis of why the draft formaldehyde assessment contains no candid thoughts or policy-oriented judgment calls, as explained herein.

I. THE WITHHELD MATERIALS ARE NOT PREDECISIONAL BECAUSE THEY DO NOT CONTRIBUTE TO ANY PARTICULAR DECISION OR INVOLVE THE ONGOING DEVELOPMENT OF AGENCY POLICY

EPA relies heavily on the logic that the draft formaldehyde assessment is at Step 1 of the IRIS process, which is earlier in the "temporal sequence" than Step 4 in

the risk assessment process. Def's Opp'n at 8-9.¹⁶ That temporal sequence is not the end, or even really the substance, of the relevant analysis. The most important threshold consideration, as EPA points out, is whether the court can "pinpoint an agency decision or policy to which these documents contributed."¹⁷ *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007).

Defendant does not meaningfully dispute that the "decision" to which the Draft Formaldehyde Assessment properly relates is publication of a public review draft at Step 4 of the IRIS process. See Def's Opp'n at 9. EPA's alternative theory of what "decision" the draft formaldehyde assessment should analytically relate to is a nonspecific "variety of agency environmental and health recommendations and actions." *Id.* The agency does not provide a specific policy decision that the draft formaldehyde assessment would inform. IRIS Assessments *in general* apply to a variety of agency environmental and health recommendations and actions as sources of reliable scientific information gleaned from a systematic review of available literature, as acknowledged by the GAO and EPA's declarant. *Id.*, at 9-10. Moreover, the fact that EPA consults IRIS "scientific information" to inform EPA decisions that also may have policy components only supports the argument below, that IRIS reports are not deliberative but factual. Facts or scientific analyses feeding into a policy decision are not themselves deliberative.

¹⁶ As discussed here, EPA's current statement that the assessment is at Step 1 contradicts statements it has previously made and failures to correct the record about it being at Step 4. However, here we will show that the draft is not deliberative even assuming it is at Step 1.

¹⁷ See Def's Opp'n at 9.

That EPA cannot point to a specific policy decision that the draft would be “predecisional” to is a consequence of the agency’s decision to mothball the formaldehyde assessment on the grounds that no programmatic offices at EPA actually had a “need” for it to be completed. *See* Cross-Mot., at 7-8 (describing internal EPA survey to address programmatic needs for ongoing IRIS assessments) [*hereinafter* “Cross-Mot.”]. Defendant’s briefing does not dispute or discuss this characterization of the survey process. Finally, EPA claims that some of the formaldehyde research was repurposed to work on the Toxic Substances Control Act (“TSCA”) but does not respond to Plaintiff’s analysis of how the differing regulatory standards prevent the IRIS draft from being predecisional to a TSCA risk evaluation. *Compare* Cross-Mot. at 20-21 *with* Def’s Opp’n at 10, n.8.

All the cases relied on by Defendant are distinguishable or inapplicable. *Abtew v. Dep’t of Homeland Sec.* involved not a draft, but an “Assessment to Refer,” an analytical document prepared by a DHS employee who interviewed an asylum applicant, which contained legal and policy recommendations to a superior. 808 F.3d 895 (D.C. Cir. 2015). The superior then made a final policy decision relying on in part but not incorporating the underlying deliberative document. This case’s reasoning may apply to internal memoranda about how to construct the formaldehyde assessment or individual researchers’ interim notes or recommendations, perhaps, but not to the fully drafted assessment itself.

Exxon Corp v. Dep’t of Energy likewise does not stand for the rule that drafts are always deliberative. 585 F. Supp. 690, 698 (D.D.C. 1983). In the paragraph following EPA’s citation, that court explains that while the deliberative process

privilege applied “to the great majority of draft documents identified in this case,” it did not apply “where DOE has failed to identify a final document corresponding to a putative draft” *Id.* As in that case, here EPA cannot identify a final published document or policy that the draft formaldehyde assessment supports.

Finally, EPA expresses disbelief that Plaintiff could have inferred the existence of a finished draft of the Formaldehyde Assessment from the evidence on the record. This argument has been addressed in the factual discussion *supra*, but restated in brief, members of the House and Senate, including the chairwomen of the relevant oversight committees and the GAO are all in agreement, based on the former Administrator’s statement and other evidence, that there is a finished draft, regardless of whether it is at the end of Step 1 or at Step 4, and have stated as much as a basic premise of their oversight activities. EPA has had every opportunity to correct the record but chose not to do so. This Court should not grant the agency’s strategic silence in obstructing lawful oversight any argumentative weight and should dismiss this argument as pedantic.

II. THE RELEASE OF THE DRAFT FORMALDEHYDE ASSESSMENT WOULD NOT REVEAL THE AGENCY’S DELIBERATIVE PROCESS

EPA has leaned heavily on the categorical implication that drafts are deliberative in character but has presented little evidence that the draft formaldehyde assessment specifically is deliberative. EPA’s two substantive arguments are 1) the selection of which facts to include in a report is deliberative, and 2) the redline edits and personal comments are deliberative. Importantly, Plaintiff recognizes that it is possible for the selection of facts to be deliberative, but only if that process involves the application of policy judgment and the disclosure of those

facts under FOIA would cause injury to the EPA's ability to freely apply its policy judgment in the future. EPA has not established either of those conditions here.

EPA has argued that the selection of which studies and facts to include in the draft assessment is a quintessentially deliberative process. Accepting this argument, however, would swallow the all-important factual/deliberative distinction, as almost all factual or scientific reports involve selecting which studies and facts to include. It is clearly not the law that all such reports are exempt. Most importantly, EPA does not address *Playboy Enters., Inc. v. Dep't of Justice*, 677 F.2d 931 (D.C. Cir. 1982), or *Lahr v. NTSB*, 453 F. Supp. 2d 1153 (C.D. Cal. 2006). Each of these cases directly refutes the agency's argument that the "culling" or "selection" of facts by agency employees by itself is sufficiently deliberative to merit application of the privilege. Def's Opp'n at 11-12. They stand for the proposition that the selection and culling of facts from a greater set, even where some professional judgment is applied in the process, is not deliberative unless that judgment somehow relates to matters of agency policy. See Cross-Mot. at 26-28 (discussing and quoting from *Playboy Enters.* and *Lahr*).

While *Lahr* was decided out of circuit, it contains the most applicable reasoning to the agency's argument in this case. The National Transportation Safety Board argued in *Lahr* that the release of data relied upon in a subsequent agency decision "would reveal the deliberative process, because some staff member selected *this* specific data for a reason." 453 F. Supp. 2d, at 1187. The *Lahr* court rejected this logic because it failed to demonstrate that data "represent[ed] the mental processes of the agency in considering alternative courses of action prior to settling on a final plan." *Id.* (quoting *National Wildlife Federation v. United States Forest Service*, 861 F.2d

1114, 1122 (9th Cir. 1988). The Ninth Circuit opinion which Lahr applied in that case has been favorably cited in this District.¹⁸ *Playboy Enterprises* similarly found that “a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material.” 677 F.2d at 935.

Defendant has failed to demonstrate that the decisions made by IRIS staff in assembling the draft formaldehyde assessment were exercises of policy judgment. The cases EPA does discuss do not contradict the principle that the exercise of policy judgment is necessary for the deliberative process privilege to attach. EPA miscites *Nat'l Sec. Archive v. CIA*, claiming it stands for the extraordinary proposition that where a document is a draft, it is thus pre-decisional and deliberative.¹⁹ 752 F.3d 460, 465 (D.C. Cir. 2014). While a draft that never evolves into a final version *can* certainly be deliberative, it is not so by mechanical application of such a rule. *See Cause of Action Inst. v. United States DOJ*, 330 F. Supp. 3d 336, 353-54 (D.D.C. 2018) (“A record is not protected merely by virtue of being a relevant predecisional communication.”).

EPA also applies *National Security Archive* to defend withholding by arguing that “the Withheld Draft Assessment is ‘intended to facilitate or assist development of the agency’s final position’ on a relevant issue.”²⁰ However, the court in *National*

¹⁸ *National Wildlife Federation v. U.S. Forest Serv.* was followed in this district by *Heartwood, Inc. v. U.S. Forest Serv.*, 431 F. Supp. 2d 28, 37-38 (D.D.C. 2006) (“A document containing ‘opinions or recommendations regarding facts’ that also reveals ‘the decision-making process itself’ would be protected from disclosure under Exemption 5. The drafts here are not deliberative because nothing in the drafts ‘reflects an agency’s preliminary positions or ruminations about a particular policy judgment.’” (internal citation omitted)).

¹⁹ Def’s Opp’n at 8.

²⁰ Def’s Opp’n at 10-11.

Security Archive did not establish such a black-and-white rule. That case made clear that documents assisting development of a final position are not exempt unless they involve “policy oriented judgment.” It was explicit that its decision applied only “[i]n the narrow confines of this case, which involves a draft agency history.” 752 F.3d at 465. In so doing, it emphasized that the selection of facts thought to be relevant for agency histories *specifically* involve the exercise of a great deal of “policy-oriented judgment.” *Id.* (quoting *Mapother*, 3 F.3d, at 1539). *NRLB v. Sears, Roebuck & Co.* similarly emphasized that the judgments protected by the deliberative process privilege must be “part of a process by which governmental decisions and policies are formulated.” 421 U.S. 132, 150 (1975). Official histories of military or intelligence agencies involve the exercise of policy judgment about which events or acts were most significant, what potentially classified evidence to rely on, how to achieve accurate results while protecting the reputation of an agency, or whether clandestine operations are sufficiently removed in time to discuss with candor, among similar considerations. *See Mapother*, 3 F.3d at 1538-39.

The considerations in a systematic review like the IRIS Assessment are different in kind and not as sensitive, because the Assessment is, essentially, a scientific literature review. It is a fundamental principle of scientific integrity to include all available relevant information without excluding anything for political or policy reasons. “Systematic review” as defined by the Institute of Medicine and adopted by the National Academy of Sciences in its 2014 REVIEW OF EPA'S INTEGRATED RISK INFORMATION SYSTEM (IRIS) PROCESS “is a scientific investigation that focuses on a specific question and uses explicit, prespecified scientific methods to identify, select,

assess, and summarize the findings of similar but separate studies.”²¹ While scientific judgment is needed to evaluate the scientific merit and weight of a particular study included in the systematic review, it has not been demonstrated that these are policy judgments. In fact, IRIS assessments are intended to provide neutral, objective scientific information to which policy judgments may be applied, but not in themselves to contain policy deliberations. It is especially unlikely that there are statements “so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.” *Morley*, 508 F.3d at 1126.

Ancient Coin Collectors Guild v. Dep’t of State, 641 F.3d 504 (2011), and *Mapother v. Dep’t of Justice*, 3 F.3d 1533 (D.C. Cir. 1993) do not set forth a different rule. In fact, EPA quotes from language in those cases which emphasizes the importance of policy-oriented judgment to the privilege. *Compare* Def’s Opp’n at 11-13, *with* Cross-Mot. at 28-31. Plaintiff argued that those cases made the protection of factual material as deliberative “highly contingent.” Cross-Mot. at 30. The “culled facts” in those cases related specifically to “the making of a discretionary decision.” *Mapother*, 3 F.3d at 1539. It was the nature of the decisions they related to which made the protection of the deliberative process in those cases so important. The interest in protecting the analysis relied upon by the State Department in *Ancient Coin Collectors* was to prevent persons who loot artifacts from learning how to modify

²¹ COMMITTEE TO REVIEW THE IRIS PROCESS; BOARD ON ENVIRONMENTAL STUDIES AND TOXICOLOGY; DIVISION ON EARTH AND LIFE STUDIES; NATIONAL RESEARCH COUNCIL, REVIEW OF EPA’S INTEGRATED RISK INFORMATION SYSTEM (IRIS) PROCESS § 17 (2014), *available at* https://www.ncbi.nlm.nih.gov/books/NBK230060/#sec_0017.

their behavior to evade the law. The interest in protecting the sensitive thoughts and opinions of an agency expert relating to a politically sensitive decision regarding the Nazi past of a foreign head of state, as in *Mapother*, is also of an entirely different character than the interest in hiding the final draft of a general-purpose and publicly-sourced literature review that would have been subject to public review and comment had political officials not interfered.

Plaintiff's position has consistently been that the IRIS process is not deliberative because it does not relate to such sensitive discretionary decisions. While it may someday be relied on by programmatic offices at EPA in rulemaking or other decisions, the process by which EPA evaluates a broad spectrum of scientific studies to generate a research report of general applicability does not involve *policy* discretion, and a completed draft would not reveal policy deliberations even if there were any.

III. DEFENDANT DOES NOT IDENTIFY A FORESEEABLE HARM TO AN INTEREST PROTECTED BY EXEMPTION 5 FROM RELEASING THE DRAFT FORMALDEHYDE ASSESSMENT

EPA has still not specified what harm would befall its deliberative process on this or any other IRIS assessment if the draft formaldehyde assessment were released. EPA claims "Plaintiff does not disagree with the proposition that the premature release of draft assessments could have a chilling effect on the candor of EPA's scientific staff." Def's Opp'n at 17. While the words "the premature release of draft assessments could not have a chilling effect on the candor of EPA's scientific staff" do not appear in PEER's Cross-Motion, it *does* argue that 1) the agency has the burden of proving such an impact is reasonably foreseeable, and 2) it has not done so.

See Cross-Mot. at 36-40. Moreover, framing the question as relating to “premature” release improperly stacks the deck in favor of the result EPA seeks. The agency has not shown that release would be “premature.”

The agency’s argument that premature disclosure “could have a chilling effect” has no weight. Def’s. Opp’n at 17. “[C]ould chill” has been explicitly rejected as a legally sufficient articulation of a foreseeable harm. The agency must demonstrate that a disclosure would chill speech. “The question is not whether disclosure could chill speech, but rather if it is reasonably foreseeable that it will chill speech and, if so, what is the link between this harm and the specific information contained in the material withheld.” *Judicial Watch, Inc. v. United States Dep’t of Commerce*, 2019 U.S. Dist. LEXIS 48374, *15 (D.D.C. 2019) (rejecting affidavit stating “that such disclosures ‘could chill speech’ and could have an effect on interagency discussion” (emphasis in original)). Plaintiff has not conceded that a release “could” chill speech, but even if it did, it would be irrelevant.

The agency has repeated its conclusory statement that disclosure of the draft would harm work on future assessments, but has provided no causal analysis, only a list of current work being performed by IRIS. The agency has not disputed that the proper standard for evaluating harm to the deliberative process is “whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The agency cites *Machado Amadis v. U.S. Dep’t of State* for the similar principle that the privilege protects “debate and candid considerations of alternatives within an agency.” Civ. A.

No. 19-5088, 2020 WL 4914093 (D.C. Cir. Aug. 21, 2020). What the agency does not do is explain what internal debates and candid back-and-forth discussions are contained in the draft assessment, or how their disclosure could harm the development of future assessments.²²

As the agency reminds us, its affidavits are entitled to a “presumption of good faith,” and challenging them requires greater than “speculative claims about the existence and discoverability of other documents.” Def’s Opp’n at 17 (citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). The agency’s record on the formaldehyde assessment is beyond suspicious, however. EPA’s confusing stances in communications with Congress are laid out at length in the factual discussion *supra* to urge the Court to take a closer look at the claims in the agency’s affidavits and its arguments. Despite repeated point-blank questions, a GAO investigation, and two years of correspondence with Congress about the formaldehyde report, EPA had never claimed until now that there is not a complete draft of the assessment. By any reasonable standard Plaintiff has “point[ed] to evidence sufficient to put the Agency’s good faith into doubt” regarding the existence of a fully drafted formaldehyde

²² The agency has repeatedly argued that Plaintiff did not explicitly request a *Vaughn* Index, that would detail the justification for applying the exemption and the foreseeable harm from release, but has not explained what implication that should have for its duties under FOIA. To the extent such a request must be phrased in a specific fashion, PEER’s initial FOIA request “requested an index of any documents or portions of documents withheld under a specific exemption from release pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973[]).” Pl’s Compl. ¶ 4 [Doc. 1]. Moreover, given that it is the agency’s burden of proof to justify its withholdings, the absence of a *Vaughn* Index only makes it more difficult for the court to uphold its withholding.

assessment that is, but for political approval, ready to proceed to public comment review. *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981).

The claims of bad faith put forward in this litigation and by members of Congress also indicate that the agency's withholding of the draft formaldehyde assessment is exactly the sort of behavior that Congress sought to eliminate with its codification of the foreseeable harm standard. *See* Cross-Mot. at 36-38 (explaining Congressional distaste with history of abuse of deliberative process exemption by agencies).

The January 2018 meeting between the American Chemistry Council's ("ACC") Formaldehyde Panel and IRIS staff, including Dr. Orme-Zavaleta, also vitiates the privilege in two ways. First, if the document or its contents was shared with someone outside the agency, it does not even meet the pre-requisite for Exemption 5 of being an inter- or intra-agency document. Second, any harm that would be done from disclosure has already been done by disclosure to the ACC. The agency can't claim that disclosure to one segment of the public posed no harm, but disclosure to the rest of the public would.

The agency's only response to this is to claim that "EPA did not share any information substantial enough to amount to a disclosure of the draft assessment."²³ This overstates Dr. Orme-Zavaleta's declaration, which only states that "at that meeting EPA did not share any copies of the Current Draft Assessment or any portions of the draft with the Panel." Second Decl. of Dr. Jennifer Orme-Zavaleta ¶ 9. She does

²³ Def's Opp'n 5, citing Second Decl. of Dr. Jennifer Orme-Zavaleta ¶ 9.

not state that EPA “did not share *any information*” with the ACC. EPA does not provide any explanation of what information actually was disclosed, which was at least enough for the ACC to make substantive methodological critiques of the science and contents of the draft formaldehyde assessment. *See Cross-Mot.*, at 3-4, 23-24. EPA does not address Plaintiff’s inquiry why further information about this meeting was not included in its production.²⁴

Moreover, even if the draft was not provided directly, enough about it was revealed so that, even assuming there were any deliberative material which would harm the government to reveal, which there is not, it has already been revealed to an outside party and the claim of harm cannot stand.. *See Cross-Mot.* at 4-5, 23-24, 29, 41. This situation vividly illustrates how the withholding here undermines the purpose of FOIA to allow the public to know what its government is doing – and not just favored parties while keeping the public in the dark.

Finally, the allegedly foreseeable harm of public confusion is tenuous, at best. EPA argues that status quo existing public confusion is irrelevant. As a scientific agency, EPA should know that when measuring the impact of a variable, the preexisting condition of that variable is vital information. If the agency is concerned about public confusion either about the state of the report or the science within it, release of the report is the proper course of action. EPA claims that marking the released document as a “draft” would “equat[e] a document EPA specifically released

²⁴ *Cross-Mot.* at 26 (arguing it is impossible to know what information in the draft formaldehyde assessment has been disclosed without detailed information about ACC meeting).

for public comment with a document that EPA did not release for public consumption.” Def’s Opp’n at 18. The specific language used on public comment drafts was provided as an example of a way in which EPA could clarify the status of the released material. Plaintiff is happy to stipulate to some alternative marking that would not cause such ambiguities

In *Petroleum Info. Corp. v. Dep’t of Interior*, an agency argued that public release of older draft documents compiled from publicly available information would cause confusion because they might be inaccurate or inconsistent with the Department’s then-current data. 976 F.2d 1429 (D.C. Cir. 1992). The court ruled that the agency failed to explain how “its concerns with public confusion and harming its own reputation could not be allayed by conspicuously warning FOIA requesters that the LLD file is as yet unofficial and that the Bureau disclaims responsibility for any errors or gaps.” *Id.*, at 1437. The law is clear that “the risk of public confusion as a subsidiary rationale for the deliberative process privilege . . . does not support a blanket exemption for information marred by errors, particularly when the information is in large part already public.” *Petroleum Info. Corp.*, 976 F.2d at 1437 n.10. Even though Defendant claims it is powerless to prevent such confusion, “nothing prevents [the agency] from warning users that the file is unfinished, subject to change, [or] part of a total [] system still in progress.” *Id.*, at 1439.

Release of this report not only would not harm the public’s interest in free and uninhibited policy deliberations at EPA, but would greatly benefit the public interest. The public interest in this buried report about a public health threat is why EPA employees chose to make whistleblower disclosures to Congress and the press about

the report, and why members of Congress have made official requests for the draft report. EPA's scientific conclusions about formaldehyde should be made available to the public that is exposed to this chemical. Withholding the report can only be seen as an effort to keep the agency's own scientific conclusions from the public, so that they cannot be used to press for safety measures. Plaintiff and Congress are not interested in the deepest hidden thoughts of individual agency employees, they are interested in the science which has been politically suppressed.

IV. EPA HAS NOT EXPLAINED WHY THE FORMALDEHYDE ASSESSMENT IS NOT SEGREGABLE

EPA argues that the holdings in *National Security Archives* and *Hamilton Sec. Grp. Inc. v. HUD*, 106 F. Supp. 2d 23, 33 (D.D.C. 2000), establish a rule that if a requester seeks an entire draft document the agency is under no duty to segregate it. First, those cases are each superseded in part by the FOIA Improvement Act of 2016, P.L. No. 114-185, which strengthened agencies' burden to justify withholdings and enhanced their duty to segregate and release nonexempt information. 130 Stat. 539 (amending 5 U.S.C. § 552(a)(8)(A)(ii)(II)). Second, the paragraph of *National Security Archives* which contains the language quoted by Defendant explicitly restricts its ruling on the duty to segregate to "the narrow confines of this case, which involves a draft agency history." 752 F.3d, at 465. Third, *Hamilton Sec. Grp.* involved a draft audit report prepared from personal interviews and other nonpublic information, not a scientific review of publicly available sources.

The agency's argument that it has no duty to segregate because the facts and analysis are so intertwined is a classic example of the structural imbalances inherent to FOIA litigation which the FOIA Improvement Act of 2016 sought to correct. EPA

defends the withholding and nonsegregability of a 700-page document which it has spent the last two years allowing Congress to believe is complete based on two sentences which explain that the report was generated by reading different types of studies. It does not explain how the “scientific judgment”²⁵ EPA alleges that process requires relates to the “policy-oriented judgment” actually protected by FOIA. *Petroleum Info. Corp.*, 976 F.2d, at 1435. For this reason, the agency’s argument that “Plaintiff does not address, and therefore concedes, EPA’s position that any purportedly factual, non-exempt material is inextricably intertwined with indisputably exempt information” is farcical. Def’s Opp’n at 20. Plaintiff argued that the agency has failed to “meet its burden” to adequately explain why it believes segregable and non-segregable material is inextricably intertwined. Cross-Mot. at 41. The agency, as the party with sole control over both the object of the litigation and all the evidence which may support its determination to withhold the draft assessment, can and must do better under the law.

Finally, EPA has not refuted that the removal of redlined edits and comments, if there are any in the most recent draft, is the easiest form of segregation to conduct. *See* Cross-Mot. at 23. Even if the Court does not press EPA to release the complete version of the Formaldehyde Assessment that lacks such markup which it undoubtedly has, it is a trivial matter to remove tracked changes and comments in a

²⁵ Orme-Zavaleta Decl. ¶ 16, Def’s Opp’n at 20.

Microsoft Word document. EPA could segregate and remove all of those changes with fewer than a dozen clicks of the mouse.²⁶

CONCLUSION

The EPA is unable to present a plausible, non-political reason why it chose not to release the draft formaldehyde assessment in response to a proper FOIA request. For these reasons the Court should enter an order granting Plaintiff's cross-motion for summary judgment in full.

Respectfully Submitted on September 25, 2020

/s/ Paula Dinerstein
Paula Dinerstein, DC Bar # 333971
Public Employees for Environmental Responsibility
962 Wayne Ave, Suite 610
Silver Spring, MD 20910
(202) 265-7337
pdinerstein@peer.org

Counsel for Plaintiff

²⁶ See MICROSOFT SUPPORT, ACCEPT OR REJECT TRACKED CHANGES IN WORD (last accessed September 21, 2020), <https://support.microsoft.com/en-us/office/accept-or-reject-tracked-changes-in-word-b2dac7d8-f497-4e94-81bd-d64e62eee0e8> (explaining how to accept or reject all tracked changes and delete all comments in multiple versions of Microsoft Office's Word program).