

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

|                            |   |                         |
|----------------------------|---|-------------------------|
| ECOLOGICAL RIGHTS          | . |                         |
| FOUNDATION et al.,         | . | CA No. 19-2181 (FYP)    |
|                            | . |                         |
| Plaintiffs,                | . |                         |
|                            | . |                         |
| v.                         | . | Washington, D.C.        |
|                            | . | Thursday, March 3, 2022 |
|                            | . | 2:03 p.m.               |
| U.S. ENVIRONMENTAL         | . |                         |
| PROTECTION AGENCY, et al., | . |                         |
|                            | . |                         |
| Defendants.                | . |                         |
| .....                      | . |                         |

TRANSCRIPT OF STATUS HEARING  
BEFORE THE HONORABLE FLORENCE Y. PAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

|                 |  |
|-----------------|--|
| For Plaintiffs: | STUART WILCOX, ESQ.<br>Environmental Advocates<br>5135 Anza Street<br>San Francisco, CA 94121<br>(720) 331-0385                  |
| For Defendant:  | JOSHUA M. KOLSKY, AUSA<br>U.S. Attorney's Office<br>444 Fifth Street NW<br>Washington, DC 20530<br>(202) 252-2541                |
| Court Reporter: | BRYAN A. WAYNE, RPR, CRR<br>U.S. Courthouse, Room 4704-A<br>333 Constitution Avenue NW<br>Washington, DC 20001<br>(202) 354-3186 |

Proceedings reported by stenotype shorthand.  
Transcript produced by computer-aided transcription.

## P R O C E E D I N G S

(Via Videoconference)

[Reporter's Note: The recordation of this hearing begins at 2:05 p.m. due to video/audio malfunction.]

MR. WILCOX: So we think that the regulation is at least unclearly worded and is going to lead to good-faith or otherwise redactions under this principle. So --

THE COURT: I don't understand how the EPA could read this as not allowing this. The wording is "including to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness."

How do you read that to not allow to you withhold a portion of a record on the basis of responsiveness? It's right there.

MR. KOLSKY: Your Honor, our position is that the types of determinations do not -- or excuse me -- the reasons for the different determinations, which is responsiveness or under one or more exemptions, those reasons do not necessarily apply to each of the types of determinations listed, which are to release a record, to release a portion of a record, to withhold a record, or to withhold a portion of a record.

THE COURT: So you read "on the basis of responsiveness" to modify final determinations whether to release or withhold a record, but not to modify a portion of the record?

MR. KOLSKY: That's correct, Your Honor. And the regulation refers to determinations required by 5 U.S.C.

1 552a(6) (A), the decision to withhold a portion of a record on  
2 the basis of responsiveness is not a determination that  
3 it is required by or permitted by the statute, and therefore  
4 we think the correct way to read the regulation is that the  
5 phrase "to withhold a record" applies to the "on the basis of  
6 responsiveness or under one or more exemptions," and the phrase  
7 "a portion of a record," that corresponds with under one or  
8 more exemptions under the FOIA, because a portion of a record  
9 may be withheld under a FOIA exemption.

10 THE COURT: That's so inconsistent with the way this  
11 is written. You're saying we should skip over the phrase "a  
12 portion of a record"?

13 MR. KOLSKY: I'm saying that the regulation should  
14 be read distributively. So the types of final determinations  
15 listed and the -- you know, in order to determine which final  
16 determinations correspond with which reasons for a determination  
17 we have to consider the context, including the reference to  
18 the statute, and apply them as they most properly seem to fit.

19 THE COURT: I can't understand your reading of it.  
20 My feeling about Claim 4 is that it doesn't make sense for the  
21 Court to rule on the merits of the this if the parties agree  
22 that the EPA is not allowed to withhold portions of records  
23 based on responsiveness.

24 My question is why wouldn't I just remand with vacatur?  
25 Because you asked for a remand without vacatur. If you agree

1 that this is wrong, I think we should just vacate that portion  
2 of the regulation that allows portions of a record on the basis  
3 of responsiveness.

4 MR. KOLSKY: Your Honor, again, we do not agree  
5 that the regulation -- we do not agree with the plaintiff's  
6 interpretation of the reading of the regulation. I am not  
7 aware -- notwithstanding what plaintiff's counsel said a  
8 moment ago, I am not aware of any instances in which EPA  
9 has withheld portions of records on the grounds that those  
10 portions are nonresponsive, at least not since the D.C.  
11 Circuit's decision on this issue.

12 We don't think that there is any -- we don't think that  
13 it is plausible that EPA will start withholding portions  
14 of records on the grounds of responsiveness after it has  
15 repeatedly acknowledged that it doesn't have the authority  
16 to do that after it has recognized that the D.C. Circuit has  
17 already spoken to this issue and --

18 THE COURT: Then you should have no problem with me  
19 vacating that portion of the regulation. Right?

20 MR. KOLSKY: Your Honor, I haven't had a chance to  
21 discuss vacatur with EPA. I'm not sure what the implications  
22 may be as far as, you know, what impact that may have on the  
23 FOIA program to vacate part of that regulation. But given  
24 that there is no basis to conclude that EPA will in fact  
25 withhold portions of records on responsiveness grounds, and

1 given that EPA is in the process of revising this regulation,  
2 we don't think that a vacatur is necessary.

3 THE COURT: I feel like what you just said weighs  
4 in favor of vacatur. Why wouldn't vacate it? You're not  
5 trying to do what I want to vacate. So why can't I just  
6 vacate? That's my inclination. I'll give you a chance to  
7 consult with EPA and you can file something if you disagree,  
8 but my inclination would be to remand Claim 4 with vacatur,  
9 which I assume Mr. Wilcox would be fine with.

10 Right, Mr. Wilcox?

11 MR. WILCOX: Yes, Your Honor. We'd be fine with that.

12 THE COURT: So that's my inclination, but I'm going  
13 to give EPA an opportunity to file something if they think  
14 there's any prejudice to them from the vacatur, because my  
15 understanding of this is that the parties agree that the EPA  
16 may not withhold a portion of the record on the basis of  
17 responsiveness, and this regulation contains those exact  
18 words: You can withhold a record or a portion of a record  
19 on the basis of responsiveness. And if everybody agrees that  
20 you can't do that, I don't see why I don't remand this with  
21 vacatur given that EPA is going to revise this rule anyway.  
22 And nobody's trying to rely on this language that I want to  
23 vacate.

24 So I think that's the correct way to proceed with Claim 4,  
25 but I'm going to withhold on a final ruling until EPA has a

1 chance to file something if they can think of any reason why  
2 they would be prejudiced by this. Okay?

3 MR. KOLSKY: Your Honor, if I may just address one  
4 more textual issue with regard to the regulation.

5 THE COURT: Sure.

6 MR. KOLSKY: So all parties, even plaintiffs, agree  
7 that records may not be released under one or more FOIA  
8 exemptions. I think everyone agrees that each of the bases  
9 for a final determination does not necessarily apply to each  
10 of the types of determinations because again, of course,  
11 records are not released under a FOIA exemption; they're  
12 withheld. So I think it is -- again, all parties agree --

13 THE COURT: But I thought "release" means we're not  
14 going to apply an exemption. Whether to release it, meaning  
15 we're not going to apply and exemption. Or to withhold one.

16 MR. KOLSKY: Well, that's correct, but if a document  
17 is released, that means that there is no -- that a FOIA  
18 exemption is not being applied.

19 THE COURT: Correct.

20 MR. KOLSKY: So I think, given that, the different  
21 bases for a determination do not apply to each type of  
22 determination, and then the only question is, well, how to  
23 we figure out which of the reasons apply to which types of  
24 determinations and --

25 THE COURT: Wait. Shouldn't it be read by this,

1 Mr. Kolsky: Including to issue file determines whether to  
2 release one thing or withhold a record or a portion of a  
3 record on the basis of responsiveness or under one or more  
4 exemptions under FOIA, that's the second thing, or to issue a  
5 "no records" response. There's three things here in order.

6 MR. KOLSKY: So I think there are four different types  
7 of final determinations. There could be a release of a  
8 record, release of a portion of a record; there could be a  
9 withholding of a record or a withholding of a portion of a  
10 record.

11 THE COURT: Oh, I see.

12 MR. KOLSKY: And then there are two types of reasons  
13 for those decisions. There is on the basis of responsiveness  
14 or under one or more exemptions under the FOIA. Then the  
15 question is, well, how do we know -- those two reasons, how do  
16 we know which types of determinations those correspond with?  
17 And my response is we know those two reasons don't correspond  
18 with all of the types of determinations because records are  
19 not released under an exemption. They're withheld.

20 THE COURT: I see. So you're saying you would read  
21 this as including to issue final determinations whether to  
22 release or withhold a record or a portion of a record. That's  
23 one thing. And then it goes on the basis of responsiveness  
24 or under one or more exemptions under the FOIA. Then there's  
25 the third thing, and to issue "no records" responses.

1           You're saying on the second part of it, on the basis of  
2           responsiveness or under one or more of the exemptions under  
3           the FOIA, does not necessarily apply to everything that  
4           precedes it because it can't apply to release, for example.  
5           The exemptions could not apply to release. That's your point.

6           MR. KOLSKY: That's exactly right, Your Honor. And  
7           so for that reason, we have to look at the context -- and  
8           we've cited cases saying that this is how a regulation should  
9           be interpreted in this instance. You look at the context to  
10          see, well, which of those reasons correspond with which types  
11          of determinations?

12          And especially given the reference to the FOIA statute  
13          there to determinations required by the FOIA, it wouldn't  
14          make sense to read this to authorize the agency to issue final  
15          determinations to withhold a portion of a record on the basis  
16          of responsiveness, because that is not a determination that is  
17          required or even permitted by the FOIA. And we've noted that  
18          textual argument in our briefing, and my recollection is that  
19          plaintiffs never responded to that point.

20          MR. WILCOX: Your Honor, if I may --

21          THE COURT: Wait. I don't think we need to get into  
22          the weeds of this right now, because it's still my belief  
23          that vacating this language is appropriate. And it seems to  
24          me, what if you vacated on the basis of responsiveness or one  
25          or more exemptions under the FOIA? Because that's implied.



1 You're allowed to make final determinations whether to release  
2 or withhold a record or portions of a record, excise "on the  
3 basis of responsiveness or one or more exemptions under FOIA,"  
4 and just go on, "and to issue 'no records' responses."  
5 Because it's implied if you're making decisions about  
6 releasing or withholding records, it's going to be based on a  
7 FOIA exemption.

8 I think we could vacate that portion of the rule. I think  
9 there would be no harm and no foul to what the agency is doing  
10 and would remove the possibility of this being interpreted --  
11 but again, I'm going to let Mr. Kolsky brief this if he wants  
12 to, but that's my belief that's the right way to handle it.

13 MR. KOLSKY: Okay. And thank you for the opportunity  
14 to brief the issue, Your Honor.

15 THE COURT: So I guess there are a couple of options  
16 here. We could vacate all the language from "on the basis  
17 of responsiveness or under one or more exemptions" --  
18 [inaudible] -- that were excised from the regulation --  
19 [inaudible]. It would remove all confusion, and it would not  
20 affect the EPA's ability just to manage its FOIA releases and  
21 withholdings according to the law, because that's implied.

22 All right. So let's move on. Claim 2. Claim 2 also  
23 concerns section 2.103(b). And so there's language in  
24 that provision that allows the EPA administrator to make  
25 preliminary and final FOIA decisions. It says that the

1 administrator, as well as a list of other officials, is  
2 "authorized to make determinations required we 5 U.S.C.  
3 § 552a(6) (A) including to issue final determinations whether  
4 to release or withhold a record," et cetera.

5 And so the plaintiff is arguing that the administrator  
6 can't make these preliminary determinations because there's a  
7 statutory right to appeal such a decision that the agency had.  
8 So EPA has committed in the settlement agreement to propose  
9 a new rulemaking with respect to this provision. Are you  
10 expecting to propose revising this part of the provision or  
11 only the part regarding the release of responsive -- portions  
12 of responsive records?

13 MR. KOLSKY: Under the settlement agreement, EPA is  
14 planning to revise the language listing the different types  
15 of determinations. EPA has reserved the right to address  
16 other topics in the rulemaking. At this time I don't have any  
17 indication that EPA is planning to revise other portions of  
18 this particular provision, but EPA is still in the process of  
19 determining what will be proposed in the notice of proposed  
20 rulemaking.

21 THE COURT: So it seems we should resolve this issue  
22 with respect to the EPA administrator. There's no plan at  
23 this time to change or revise that.

24 MR. KOLSKY: I think that's right, Your Honor.

25 THE COURT: And Mr. Wilcox wants to proceed on the

1 Claim 2 as well. Correct, Mr. Wilcox?

2 MR. WILCOX: Yes, Your Honor.

3 THE COURT: Okay. So we will proceed on litigating  
4 Claim 2.

5 So Claim 1 concerns a change to 40 C.F.R. § 2.101(a) to  
6 centralize the collection of written FOIA requests at the  
7 national FOIA office. So under the revised regulation, mailed  
8 submissions must be sent to the national FOIA office in  
9 Washington, D.C., but there previously was an option to  
10 submit written requests directly to regional offices.

11 The settlement agreement states that the EPA will, in its  
12 notice of proposed rulemaking, quote, "solicit public comments  
13 on whether EPA should reinstate any FOIA request submission  
14 method that was removed from 40 C.F.R. 2.101(a)."

15 So this doesn't commit to proposing a change, only to  
16 soliciting comments. What are the parties' positions about  
17 whether we should proceed with litigating Claim 1 on the  
18 merits?

19 MR. KOLSKY: Your Honor, you're correct that the  
20 settlement agreement doesn't commit to making any changes  
21 to that provision, and we think that it's appropriate to  
22 proceed with the litigation on Claim 1.

23 THE COURT: Okay. So we'll proceed with Claim 1  
24 as well. That's what Mr. Wilcox wants. Correct?

25 MR. WILCOX: Yes, Your Honor.

1 THE COURT: And so then there's Claim 5 which concerns  
2 the EPA's failure to comply with notice and comment rulemaking  
3 provisions of the APA when it adopted the 2019 regulations  
4 update, as well as statutory provisions within the FOIA that  
5 require notice and comment rulemaking with respect to certain  
6 issues according to the plaintiff.

7 So it seems like the settlement agreement does not  
8 address this and we should address this on the merits.  
9 Is that correct, Mr. Kolsky?

10 MR. KOLSKY: The settlement agreement will address  
11 parts of Claim 5, because it does call for comment on certain  
12 of the provisions that are challenged. But I agree that the  
13 rulemaking will likely not address all of the topics that  
14 plaintiffs believe they should have been able to submit  
15 comment on.

16 THE COURT: But even if you solicit comments on,  
17 for example, Claim 1, would that moot Claim 5 with respect to  
18 Claim 1? That is now you are soliciting comments with respect  
19 to Claim 1. The claim was you didn't elicit comments. But  
20 you would have to solicit the comments before you make the  
21 rulemaking, right? But you didn't.

22 MR. KOLSKY: I think that to the extent that the  
23 agency is allowing public comment on the very provisions  
24 that plaintiffs have requested the opportunity to comment  
25 on, I think that that would moot those portions of Claim 5.

1 But as I say, the rulemaking is not going to address all of  
2 the provisions that plaintiffs believe they should have been  
3 able to submit comment on.

4 THE COURT: All right. So it seems to me, though,  
5 that we would have to resolve the issue of what the effect  
6 of this additional comment -- [inaudible] -- have on the  
7 validity of this rule, because if you could take comments  
8 after the rule is promulgated, I don't know that that complies  
9 with the APA. You're saying that moots it; I don't think it  
10 does. I mean, I think we should litigate that. I'm just  
11 considering whether we need supplemental briefing [inaudible]  
12 additional comment taking would have with respect to Claim 5.

13 MR. KOLSKY: Our thinking is that would not be  
14 necessary because the claim is not mooted in its entirety,  
15 and so the Court would have to consider that claim at least  
16 in part.

17 THE COURT: Oh, I'm going to consider the claim. The  
18 question is when I write my opinion... [inaudible].

19 MR. KOLSKY: And I'm sorry. I think the audio cut out  
20 a little bit. I didn't hear all of that.

21 THE COURT: Oh, I'm agreeing that of course I'm going  
22 to consider this, but when I write my opinion, I'm going to  
23 have to address what the effect of your new comment making on  
24 the validity of this rule. So the question is whether we  
25 should have supplemental briefing on that issue.

1           And this would only apply to -- well, Claim 1. But then  
2           Claim 2 concerns a regulation that you're also going to have a  
3           notice of proposed rulemaking on, which you've not committed  
4           to addressing the issue in Claim 2. But that could come up,  
5           because you've reserved your rights to do anything you want  
6           with respect to that regulation.

7           MR. KOLSKY: And in Claim 5, plaintiffs identify  
8           other provisions that they believe that they should have been  
9           able to comment on. Specifically, there were changes made  
10          to provisions relating to fees, to aggregation of requests.  
11          Those were mostly grammatical and stylistic changes. We  
12          don't think there was any basis for public comment, but those  
13          arguments have been raised by plaintiffs.

14          MR. WILCOX: Your Honor, if I may, I don't think that  
15          this public comment opportunity moots our claims because, as  
16          you pointed out, it's supposed to be comment before the  
17          decision is made and before the die has been cast.

18          So we don't view this as changing our claims. Even if  
19          they do address some of the issues that we raised, we didn't  
20          have time or the opportunity to comment on those before the  
21          agency made their decision.

22          So if they want to go back through this -- I described  
23          it as a quasi-APA process because it's not necessarily going  
24          to result in a change in the rules, then we don't believe that  
25          that has any effect on our claims moving forward.

1 THE COURT: The question is just -- so do we litigate  
2 this case without regard to the fact that there will be  
3 [inaudible] back to the claims that remain. Because I think  
4 that Claim 4, I think it's pretty clear that the additional  
5 rulemaking that has been promised in the settlement agreement  
6 is going to address [inaudible] and I'm considering just  
7 remanding with vacatur. But then the rest of it, do we just  
8 proceed as if this additional rulemaking isn't even happening  
9 and effect what we're doing with respect to... [inaudible]

10 MR. WILCOX: Yes. That's plaintiff's position,  
11 Your Honor.

12 THE COURT: And I recognize that the new rulemaking  
13 that concerns 103(b) could affect Claim 2, but there's no  
14 commitment that it's going to [inaudible] that's staying it  
15 for that long [inaudible] off chance is not really productive.  
16 And there's no commitment with respect -- [inaudible] --

17 MR. KOLSKY: I'm sorry, Your Honor. The audio was  
18 cutting out a little bit there. I didn't hear all of Your  
19 Honor's statement.

20 THE COURT: So I was just thinking about -- because  
21 there is also the option of staying the proceedings to see  
22 what happens with the rulemaking, because there is going to  
23 be some kind of revision to 2.103(b), which is the provision  
24 that Claim 2 relies upon.

25 There's been no commitment to changing the aspect of that

1 provision that's challenged in Claim 2, which is that the  
2 administrator can make preliminary and final determinations  
3 under FOIA. So I was not inclined to stay the proceedings  
4 given that I don't think there's a substantial likelihood  
5 that that's going to work itself out, but there's a chance  
6 that it could, because that regulation is going to be somehow  
7 modified. There's a commitment to do that in the settlement  
8 agreement.

9 With respect to Claim 1, the settlement agreement just  
10 says we're going to take proposed comments, but they're not  
11 committing to proposing an actual change to the provision at  
12 issue in Claim 1, so I would not be inclined to stay that  
13 claim either. But there is the prospect or the possibility  
14 that both Claim 1 and Claim 2, the provisions at issue could  
15 be altered by the rulemaking that's going to happen.

16 The settlement agreement commits that there will be at  
17 least comments taken with respect to the issue in Claim 1.  
18 There's going to be a revision of the regulation at issue in  
19 both claims 2 and 4, and there is the option of staying the  
20 proceedings to see what happens.

21 It's just my read of this is it doesn't seem to me that  
22 that rulemaking is going to address these particular issues.  
23 There's no commitment to do so. The EPA has made its position  
24 on these issues clear. I don't think they think it needs  
25 revision on these grounds.



1           So I'm inclined to go ahead and not stay it, but then  
2           the question is we just do this as if there's not an  
3           additional rulemaking about to happen? Do the parties agree  
4           that that's the way we should proceed in the litigation, that  
5           we sort of ignore the fact that additional rulemaking is about  
6           to happen? It simplifies things.

7           MR. KOLSKY: Your Honor, we are prepared to move  
8           forward on the motions that have been briefed. If -- and I  
9           don't know how long it may take to resolve those motions, but  
10          I think that if the rulemaking process came to a conclusion or  
11          at least that there was an opportunity to comment on certain  
12          provisions, then we would want to address the impact at that  
13          time. But there is a --

14          THE COURT: When is that going to happen? Because I'm  
15          ready to set a motions hearing date today.

16          MR. KOLSKY: Yes. So the agency has nine months from  
17          the date of the settlement agreement to sign the NPRM, and  
18          then I believe it has 10 months from that point to sign a  
19          notice of final action on the NPRM.

20          THE COURT: I'll have ruled by then. I'm about to set  
21          a motions hearing date. Okay. So I think where we are is I'm  
22          inclined, but I'm not going to make a final decision, about  
23          remanding Claim 4 with vacatur, and I'm going give you -- is  
24          two weeks enough time for you, Mr. Kolsky, to file any objection  
25          to that approach?

1 MR. KOLSKY: Yes, Your Honor.

2 THE COURT: And Mr. Wilcox, if you would like to  
3 respond, you can have two weeks.

4 MR. WILCOX: Thank you, Your Honor. Can I just add  
5 just one more thing about Claim 1? They have mentioned that  
6 they would speak to the submission methods, and Claim 1 is  
7 broader than that in that it would relate to a broader  
8 centralization of certain aspects of FOIA process --

9 THE COURT: I know you say that, but I don't see that  
10 the regulation says processing. We can address that at the  
11 oral argument I'm about to schedule.

12 MR. WILCOX: Sure, Your Honor.

13 THE COURT: Two weeks would be March 17. Mr. Kolsky's  
14 filing with respect to remand with vacatur of Claim 4. After  
15 that, March 31.

16 - [inaudible] -

17 So I said -- what did I say? The EPA's -- any objection  
18 from the EPA to remand with vacatur of Claim 4, that will be  
19 due on March 17, any response will be due on March 31, and  
20 come reply will be due on April 7.

21 And we're going to schedule oral argument on claims 1, 2,  
22 and 5. I don't think we need to wait for all briefing about  
23 Claim 4 to do that, because I'm just going to decide that  
24 separately. So we can do that sooner. How much time do the  
25 parties want to prepare for oral argument?

1 MR. KOLSKY: Your Honor, I have a significant brief  
2 coming due in another case, I think on the 14th, and some  
3 other filings that are coming up. So I would appreciate  
4 having until maybe later in March or sometime in April.

5 THE COURT: Okay.

6 MR. WILCOX: That would work for me as well,  
7 Your Honor.

8 THE COURT: April 6? Two o'clock?

9 MR. KOLSKY: That's fine with me, Your Honor. I would  
10 appreciate an opportunity to check with agency counsel to make  
11 sure that they're available, and I will --

12 THE COURT: Okay.

13 MR. KOLSKY: -- notify the Court if there is any issue.

14 MR. WILCOX: Yes. That works for me, Your Honor.  
15 Thank you.

16 THE COURT: We'll have a hearing on the remaining  
17 issues on April 6 at two o'clock. All right. Anything  
18 else that we need to address today?

19 MR. KOLSKY: Nothing from the government, Your Honor.

20 MR. WILCOX: Nothing from plaintiffs, Your Honor.

21 THE COURT: Okay. Thank you. Parties are excused.  
22 Thank you.

23 (Proceedings adjourned at 2:35 p.m.)  
24  
25

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter. \*

/s/ Bryan A. Wayne  
Bryan A. Wayne

\* PLEASE NOTE:

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