

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

_____)	
OCCUPATIONAL SAFETY & HEALTH)		
LAW PROJECT, PLLC,)		
PO Box 3769)		
Washington, DC 20027,)		
)		
Plaintiff,)		
)		
v.)	Civil Action No.	
)		
U.S. DEPARTMENT OF LABOR,)		
200 Constitution Avenue NW)		
Washington, DC 20210,)		
)		
Defendant.)		
_____)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Occupational Safety & Health Law Project, PLLC (OSH Law Project) brings this action to compel defendant U.S. Department of Labor (DOL) to produce records sought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, defining the compliance obligations of Century Aluminum Company under an Occupational Safety and Health Administration (OSHA) standard regulating occupational exposure to beryllium in general industry, 29 C.F.R. § 1910.1024. DOL produced the requested record in part, but invoked FOIA exemption 4 to justify withholding the parts that set forth the steps that OSHA requires Century Aluminum to take to abate beryllium exposure at its facilities and bring itself into compliance with OSHA’s beryllium standard. DOL’s withholding of information responsive to OSH Law Project’s FOIA request is improper.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff OSH Law Project is a limited liability corporation under the laws of the District of Columbia. The OSH Law Project works to strengthen health and safety protections and empower workers to improve safety and health protections on the job. OSH Law Project submitted the FOIA request at issue in this action.

4. Defendant DOL is an agency of the United States. DOL has possession of and control over the records that OSH Law Project seeks.

FACTUAL BACKGROUND

5. On October 26, 2020, OSH Law Project, through its Executive Director Ms. Rabinowitz, submitted a FOIA request to the DOL's OSHA and Office of the Solicitor for records relating to the standards that will determine, on an ongoing basis, whether Century Aluminum Company is complying with the OSHA's standard for Occupational Exposure to Beryllium, 82 Fed. Reg. 2470 (beryllium standard). Specifically, OSH Law Project's FOIA request sought "all documents in the possession of either OSHA or the Office of the Solicitor relating to Century Aluminum's compliance obligations with the Beryllium standard" as well as "all communications on behalf of Century and OSHA or SOL [Office of the Solicitor] relating to OSHA's Beryllium standard."

6. The FOIA request explained that it concerned a settlement agreement between OSHA and Century Aluminum Company that "resolves litigation pending before the U.S. Court of Appeals for the Eighth Circuit" in which Century Aluminum Company petitioned for review of the beryllium standard. The request stated, "In that agreement, OSHA set forth specific requirements for Century to comply with OSHA's Beryllium standard." The request further stated that the "Office of Solicitor has previously shared copies of earlier drafts of the settlement

agreement with” the OSH Law Project but “has refused voluntarily to provide [Ms. Rabinowitz] with a copy of the final settlement agreement and documents describing Century’s compliance obligations under the Beryllium standard.”

7. By email on November 18, 2020, DOL acknowledged receipt of OSH Law Project’s FOIA request and assigned it tracking numbers 2021-F-01444 (SOL) and 2021-F-00901 (OSHA). In its November 18 email, DOL recommended that OSH Law Project revise its request “to ask only for the final abatement plan agreement between Century Aluminum and OSHA.”

8. By email sent on December 1, 2020, OSH Law Project agreed to revise the scope of its FOIA request to request only “the final abatement plan for Century Aluminum.” Later that day, DOL stated by email that it confirmed receipt of OSH Law Project’s December 1, 2020, email revising the scope of its FOIA request.

9. By letter dated January 13, 2021, DOL provided a final response to OSH Law Project and stated that it had located one record responsive to OSH Law Project’s request for “the final abatement plan contained in the agreement between Century Aluminum and OSHA settling Century Aluminum’s 8th Circuit challenge to the beryllium standard.” DOL attached to its January 13 letter a heavily redacted record titled “Abatement Plan Agreement for Century Aluminum Company” (Abatement Plan Agreement), attached hereto as Exhibit 1.

10. The Abatement Plan Agreement is part of a settlement agreement between DOL and OSHA, on the one hand, and Century Aluminum, on the other, that resolved Century Aluminum’s petition in the U.S. Court of Appeals for the Eighth Circuit challenging the beryllium standard. Pursuant to the settlement agreement, Century Aluminum agreed to withdraw its pending challenge to the beryllium standard in the Eighth Circuit, and DOL and OSHA agreed to define in the Abatement Plan Agreement the standards that OSHA will apply in determining whether

Century Aluminum is complying with the beryllium standard on an ongoing basis. Specifically, the Abatement Plan Agreement states that “OSHA has determined that compliance with the terms of Abatement Plans 1, 2, and 3 below, would satisfy Century’s obligations with respect to paragraphs (f)(2), (j)(1)(i), and (j)(2)(i)-(ii) of the Beryllium Standard for General Industry, 29 C.F.R. § 1910.1024,” for three specified Century Aluminum facilities.

11. In the approximately four pages of the document that set forth the terms of “Abatement Plans 1, 2, and 3,” DOL redacted the terms of the plans in their entirety on the asserted basis of FOIA exemption 4.

12. On February 1, 2021, OSH Law Project submitted an administrative appeal of DOL’s withholding of information under FOIA exemption 4.

13. On February 22, 2021, DOL acknowledged receipt of OSH Law Project’s appeal and assigned it Appeal Reference No. 2021-A-00071.

14. Under 5 U.S.C. § 552(a)(6)(A)(ii), DOL had 20 working days to respond to OSH Law Project’s appeal. More than 20 working days have passed since OSH Law Project’s appeal, and DOL has neither made a final determination on the appeal nor produced the information it wrongfully withheld that was responsive to OSH Law Project’s FOIA request.

15. OSH Law Project has exhausted its administrative remedies.

CAUSE OF ACTION

16. OSH Law Project has a right under FOIA, 5 U.S.C. § 552(a)(3)(A), to the information responsive to its FOIA request.

17. DOL has no legal basis for withholding information that is responsive to OSH Law Project’s FOIA request.

PRAYER FOR RELIEF

WHEREFORE, OSH Law Project requests that this Court:

A. Declare that DOL's redaction of information from the record responsive to OSH Law Project's FOIA request is unlawful;

B. Order DOL to make the information redacted from the requested record available to plaintiff at no cost and without delay;

C. Award OSH Law Project its costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and

D. Grant such other and further relief as this Court may deem just and proper.

Dated: July 27, 2021

Respectfully submitted,

/s/ Wendy Liu
Wendy Liu (D.C. Bar No. 1600942)
Scott Nelson (D.C. Bar No. 413548)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

Exhibit 1

Appendix D

CONFIDENTIAL TREATMENT REQUESTED
RULE 408 COMMUNICATION¹

ABATEMENT PLAN AGREEMENT FOR CENTURY ALUMINUM COMPANY

The federal Occupational Safety and Health Administration, U.S. Department of Labor (OSHA) has reviewed detailed submissions of exposure monitoring data dated 9/25/2017 and 11/28/2017 from Century Aluminum of Kentucky, GP, located at 1627 State Highway 271 North, Hawesville, KY 42348 (“Hawesville”); Century Aluminum Sebree LLC, located at 9404 State Route 2096, Robards, KY 42452 (“Sebree”); and Century Aluminum of South Carolina, Inc., located at 3575 U.S. Highway 52, Goose Creek, SC 29445 (“Mt. Holly”) (collectively, “Century”). Century states that the data reviewed by OSHA accurately reflects airborne exposure to beryllium in all areas of Hawesville, Sebree, and Mt. Holly and that there are no other areas of either of the plants where airborne exposure to beryllium can reasonably be expected to exceed the action level as defined in paragraph (b) of 29 C.F.R. 1910.1024. Century further states that it will not reduce ventilation capacity or reduce frequency of cleaning in any of the plants in a way that could reasonably be expected to increase airborne exposure to beryllium.

In light of the foregoing statements by Century, provided that Century also fully complies with the exposure assessment provisions of paragraph (d) and provides respiratory protection in accordance with paragraph (g), OSHA has determined that compliance with the terms of Abatement Plans 1, 2, and 3 below, would satisfy Century’s obligations with respect to paragraphs (f)(2), (j)(1)(i), and (j)(2)(i)-(ii) of the Beryllium Standard for General Industry, 29 C.F.R. § 1910.1024, in Hawesville, Sebree, and Mt. Holly, respectively. This agreement does not address any other requirements arising under the OSH Act, OSHA standards, or OSHA regulations.

¹ Century designates all the items discussed in this document confidential commercial information, as that term is defined in 29 C.F.R. § 70.26(b). Century claims that this document thus is protected from disclosure under the Freedom of Information Act, and Century requests that this designation remain beyond the ten-year expiration on account of the particular operational and financial sensitivity of the items discussed herein. 5 U.S.C. § 552(b)(4); 29 C.F.R. § 70.26. OSHA will evaluate Century’s designation in accordance with 29 C.F.R. § 70.26 and applicable law should it receive a request for this information under the Freedom of Information Act.

I. Abatement Plans

(b)(4)

Abatement Plan 1 - Hawesville:

(b)(4)

(b) (4)

Abatement Plan 2 - Sebree:

(b) (4)

(b) (4)

(b) (4)

Abatement Plan 3 - Mt. Holly:

(b) (4)

(b) (4)

II. Implementation Dates

All engineering controls specified in this plan must be implemented by the compliance date for the implementation of engineering and work practice controls provided in the Beryllium Standard for General Industry. If that compliance date is delayed, this abatement plan's deadline shall be delayed for a commensurate time period. If for any reason Century cannot implement one or more of these engineering control items by the deadline provided, it shall promptly notify OSHA, provide an explanation of why the item cannot be completed before the deadline, and propose a remediation plan that includes interim protection measures, where practicable. OSHA will determine if Century's explanation is sufficient to justify the failure to complete the item and will not unreasonably withhold consent to such a remediation plan.

All housekeeping measures specified in this plan and the training required by Hawesville Item 13, Sebree Item 13, and Mt. Holly Item 8 must be implemented by the compliance date for the housekeeping and training requirements provided in the Beryllium Standard for General Industry. If that compliance date is delayed, this abatement plan's deadline shall be delayed for a commensurate time period.

III. Additional Terms

If a change in raw material, operation, or process results, or could reasonably be expected to result, in exposures exceeding the OSHA beryllium PEL in operations where the PEL is not currently exceeded, or ten times the OSHA beryllium PEL in operations where the PEL is currently exceeded, Century will notify OSHA, review the procedures contained in the Abatement Plan applicable to that facility, and implement any necessary and feasible revisions to the Abatement Plan to address those exposures as agreed upon by OSHA and Century.

If Century learns of exposures exceeding the OSHA beryllium PEL in operations not covered by the monitoring data referenced in the first paragraph of this agreement or in operations that did not have PEL exceedances in that monitoring data, Century will notify OSHA, review the procedures contained in the Abatement Plan applicable to that facility, and implement any necessary and feasible revisions to the Abatement Plan to address those exposures as agreed upon by OSHA and Century.

Similarly, if Century learns of new technology that could materially decrease airborne exposures to beryllium, Century will notify OSHA, review the procedures contained in the applicable Abatement Plan above, and implement any revisions to the plan to incorporate new feasible controls as agreed upon by OSHA and Century.

If any Item cannot be implemented or adhered to on account of a major change in operating conditions as provided for above, Century will notify OSHA as soon as practicable and propose a remediation plan that includes interim protection measures, where practicable.

In situations where this agreement contemplates future agreement on a course of action, both parties agree to negotiate in good faith and not to unreasonably withhold their consent. However, Century reserves the discretion to make changes to the housekeeping procedures set forth in Appendices D-1, D-2, and D-3 if those changes are not anticipated to materially increase airborne exposures to beryllium and do not materially increase airborne exposures to beryllium and if OSHA is notified of the changes.

No modification of the foregoing Abatement Plans will be effective unless it is in writing and signed by both Century and OSHA.

IV. Contact Information

For all items that require Century to notify OSHA of any circumstances or provide OSHA with information, OSHA will be represented by the Director of the Directorate of Standards and Guidance or his designee.

Appendix D-1

FOIA CONFIDENTIAL
SETTLEMENT PURPOSES ONLY

CENTURY ALUMINUM HAWESVILLE HOUSEKEEPING SCHEDULE

Area	Description	Method of Housekeeping	Frequency
			

FOIA CONFIDENTIAL
SETTLEMENT PURPOSES ONLY

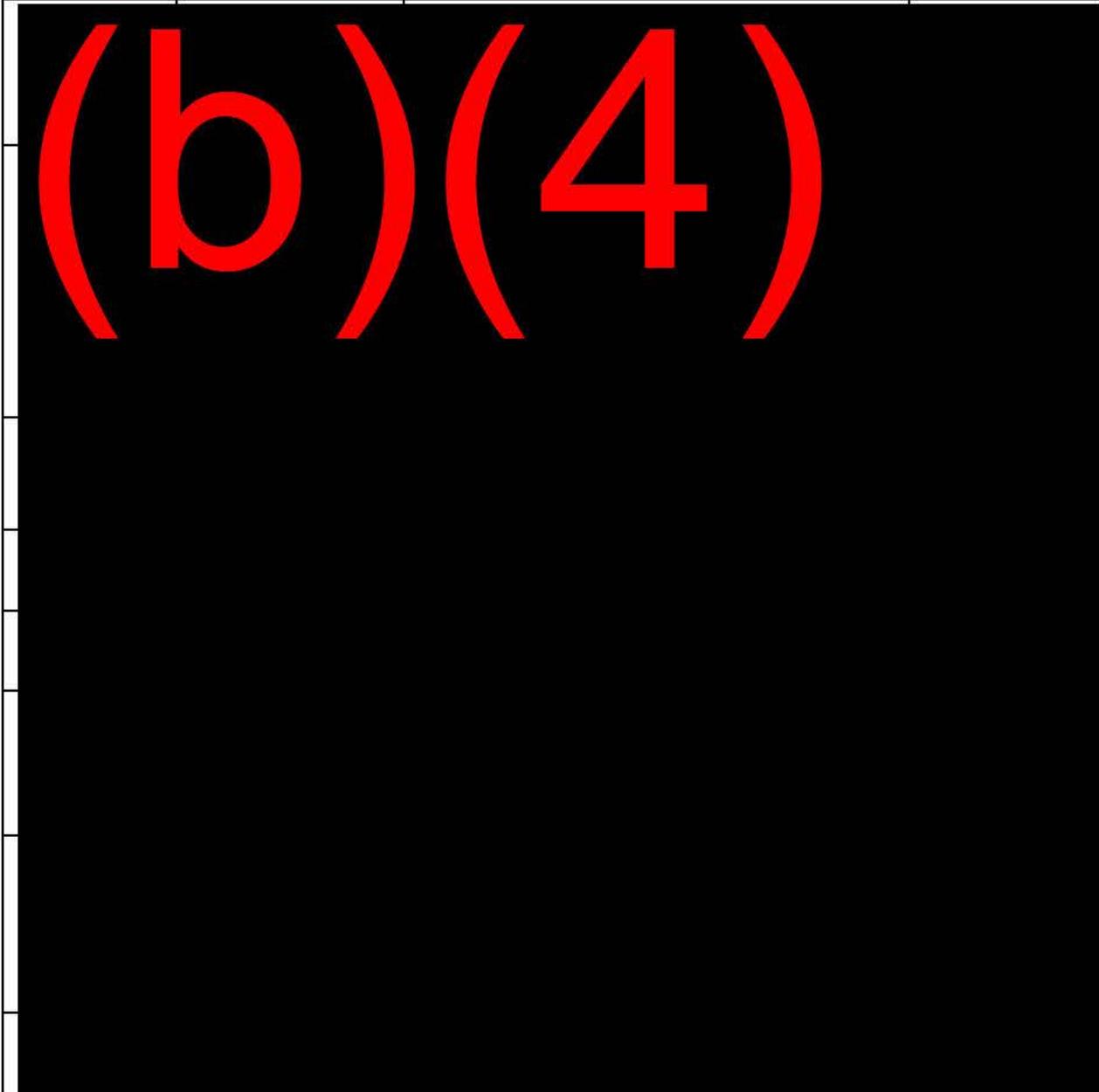
CENTURY ALUMINUM HAWESVILLE HOUSEKEEPING SCHEDULE

Area	Description	Method of Housekeeping	Frequency
			

Appendix D-2

FOIA CONFIDENTIAL
SETTLEMENT PURPOSES ONLY

CENTURY ALUMINUM SEBREE HOUSEKEEPING SCHEDULE

Area	Description	Method of Housekeeping	Frequency
 <p data-bbox="219 352 1120 724" style="font-size: 48pt; color: red; font-weight: bold;">(b)(4)</p>			

FOIA CONFIDENTIAL
SETTLEMENT PURPOSES ONLY

CENTURY ALUMINUM SEBREE HOUSEKEEPING SCHEDULE

Area	Description	Method of Housekeeping	Frequency
(b) (4)			

Appendix D-3

FOIA CONFIDENTIAL
SETTLEMENT PURPOSES ONLY

CENTURY ALUMINUM MOUNT HOLLY HOUSEKEEPING SCHEDULE

Area	Description	Method of Housekeeping	Frequency
(b) (4)			