IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:18-cv-00406 (JEB)
SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

In the D.C. Circuit, only extremely narrow challenges to an agency's compliance with the Federal Records Act ("FRA") are available: a party may challenge the sufficiency of an agency's recordkeeping guidelines and directives, and it may challenge an agency's failure to refer the unauthorized destruction or removal of records to the Attorney General pursuant to 44 U.S.C. § 3106. A party may not challenge an agency's implementation of its recordkeeping guidelines and directives. *See Armstrong v. Bush*, 924 F.2d 282, 291-296 (D.C. Cir. 1991).

In this case, the heart of Plaintiffs' claims against EPA (Claims One and Two) is that EPA is failing to adequately document decisions and commitments reached orally. Yet it is undisputed (and indisputable) that EPA has a records policy unambiguously stating that "[a]ll EPA employees are responsible for . . . [c]reating and managing the records necessary to document the Agency's official activities and actions." EPA Information Policy, Records Management Policy, Ellis Decl. (ECF No. 11-1) Ex. A ("Records Mgmt. Policy") at 13; *accord, e.g.*, *id.* at 1-2 (FRA "requires all federal agencies to make and preserve records containing adequate and proper documentation of their organization, function, policies, decisions, procedures and essential transactions"). Absolutely nothing in the policy suggests that decisions reached orally should be treated differently from decisions reached in any other fashion. Dispelling even the possibility of doubt, EPA's specific guidance addressing verbal communications provides that "[a]ny oral communication where an Agency decision or commitment is made, and that is not otherwise documented, needs to be captured and placed in your recordkeeping system." Verbal Communications and Records, Ellis Decl. Ex. B ("Verbal Communications Guidance"). Because EPA's recordkeeping guidelines and directives are plainly sufficient, Plaintiffs have no claim against EPA. Plaintiffs may not bring a backdoor challenge to EPA's compliance with these guidelines and directives by alleging that the noncompliance amounts to a new, *de facto* policy subject to judicial review.

Nor may Plaintiffs bring a claim against the Archivist (Claim Three) pursuant to 44 U.S.C. § 2115(b). That statute directs the Archivist to take certain steps "[w]hen the Archivist finds that a provision of [the FRA] has been or is being violated," 44 U.S.C. § 2115(b), but Plaintiffs do not allege that the Archivist has made such a finding — and indeed, he has not. The Archivist's discussions with EPA about its recordkeeping practices are ongoing, and absolutely nothing in the FRA or any other statute requires the Archivist to complete those discussions in a particular time period or to provide updates to advocacy groups about the status of those intergovernmental discussions.

For these reasons, Defendants respectfully request that the Court grant their motion to dismiss.

ARGUMENT

I. The Court Should Dismiss Claim One Because The FRA Precludes Review Over Claims That An Agency Is Violating The FRA Or Its Own FRA Guidelines, Including By Failing To Create Records.

Claim One alleges that EPA is failing "to create records of essential agency actions in violation of the FRA." ECF No. 15 ("Pls' Opp.") at 12. This claim is barred under D.C. Circuit precedent providing that while federal courts may review the sufficiency of an agency's FRA guidelines, the FRA "preclud[es] private litigants from suing directly to enjoin agency actions in contravention of agency guidelines." *Armstrong*, 924 F.2d at 294; *see also, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.* ("*CREW v. DHS*"), 527 F. Supp. 2d 101, 111 (D.D.C. 2007); *Competitive Enter. Inst. v. EPA*, 67 F. Supp. 3d 23, 32 (D.D.C. 2014).

Plaintiffs' opposition memorandum concedes that there can be "no judicial review of a specific subset of FRA provisions that prohibits the improper destruction or removal of agency records based on the availability of an administrative enforcement scheme in the FRA specifically for such actions." Pls' Opp. at 12 (referencing 44 U.S.C. § 3106). Plaintiffs suggest that "no such

administrative mechanism exists for violations of § 3101," the statutory provision directing agencies to keep records, and that they are therefore free to bring APA claims challenging the alleged failure to create records. Under Plaintiffs' interpretation, a party would survive a motion to dismiss whenever it alleged that a federal record had been mishandled (or never created), so long as the allegation did not focus on removal or destruction.[1]

There is no basis for such a holding. Rather, *Armstrong* explained that "Congress . . . decided to rely on administrative enforcement, rather than judicial review at the behest of private litigants," to address compliance with the FRA. 924 F.2d at 294. And the administrative processes under the FRA are not limited to referral to the Attorney General for destruction of records under 44 U.S.C. § 3106. To the contrary, under the FRA, the Archivist shall "provide guidance and assistance to Federal agencies with respect to . . . ensuring . . . proper records disposition," 44 U.S.C. § 2904(a)(3), "promulgate standards, procedures, and guidelines with respect to records management," *id.* § 2904(c)(1), and "conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies," *id.* § 2904(c)(7). "In carrying out the duties and responsibilities under this chapter, the Archivist . . . may inspect the records or the records management practices and programs of any Federal agency for the purpose of rendering recommendations for the improvement of records management practices . . . ." *Id.* § 2906(a)(1); *see generally* 36 C.F.R. pt. 1239. Congress has also directed the Archivist to make recommendations to federal agencies when he finds that they are violating the FRA. *See* 44 U.S.C. § 2115. If Congress intended for private plaintiffs to be able to use the federal courts to test

[1] Defendants previously observed that under Plaintiffs' interpretation, a court could issue an injunction compelling an agency to create a record, but would be powerless to enjoin the agency from destroying that very same record immediately after creating it. *See* ECF No. 11 ("Defs' Mot.") at 7. Plaintiffs offer no defense of this inexplicably bizarre result.

agencies' compliance with the FRA on a day-to-day basis, this extensive administrative role for the Archivist would have been entirely unnecessary. The reality is that Congress "opted in favor of a system of administrative standards and enforcement," *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980), for all claims that an agency's decisions with respect to particular records do not comply with the FRA — not just for the unlawful destruction or removal of records.

To be sure, the FRA authorizes an additional administrative mechanism for the unlawful destruction or removal of federal records by agencies — *i.e.*, referral to the Attorney General under 44 U.S.C. § 3106. Plaintiffs would have the Court conclude that because 44 U.S.C. § 3106 addresses only these specific violations, that must mean that Congress intended other violations to be actionable by private litigants under the APA. The far more logical inference is that Congress treated claims of unlawful removal or destruction differently because the unauthorized destruction or removal of records — unlike the failure to create records — may constitute a federal crime, *see* 18 U.S.C. § 641, which the Attorney General is responsible for prosecuting. That Congress selected an administrative mechanism led by the Attorney General where the violation is a potential federal crime and a different mechanism led by the Archivist where it is not does not change the fact Congress intended to rely on administrative processes to ensure compliance with the FRA. Indeed, Plaintiffs have suggested no logical reason why Congress, having selected exclusively administrative remedies for the alleged unlawful removal and destruction of records, would not have intended a similar choice for the alleged failure to create records.[2]

[2] To be sure, the D.C. Circuit found in *Armstrong* that these various modes of administrative enforcement did not bar a claim challenging the sufficiency of an agency's recordkeeping guidelines and directives. *See* 924 F.2d at 291-92. The D.C. Circuit was explicit, however, that claims alleging noncompliance with those guidelines and directives remained barred.

Defendants' reading is also consistent with that of other district courts. In *CREW v. DHS*, the court explained that, while "the APA authorizes judicial review of a claim . . . that the DHS's recordkeeping policies are arbitrary and capricious and do not comport with the requirements of the FRA," it "precludes a private action . . . that seeks to require agency staff to comply with the agency's recordkeeping guidelines or the FRA, or to retrieve records lost." 527 F. Supp. 2d at 111-12. That the Court "recognized . . . it was empowered to review whether the Archivist or agency head 'have properly performed their FRA enforcement duties'" under 44 U.S.C. § 3106, Pls' Opp. at 15, is irrelevant to the question before this Court, as Plaintiffs are not challenging anyone's asserted failure to refer anything to the Attorney General. Similarly, the district court in *Competitive Enterprise Institute* noted that "*Armstrong I* distinguished between reviewable challenges to an agency's record-keeping guidelines under the APA, and unreviewable challenges to the agency's day-to-day implementation of its guidelines," 67 F. Supp. 3d at 32, and it is irrelevant that it also observed that *Armstrong I* had held that an agency's failure to involve the Attorney General under § 3106 is reviewable, *contra* Pls' Opp. at 15.

At bottom, *Armstrong* recognized that federal courts would not be policing agency employees' compliance with FRA guidelines, indicating that that "agency personnel, not the court, will actually decide whether specific documents . . . constitute 'records' under the guidelines." *Armstrong*, 924 F.2d at 293-94. Plaintiffs are nonetheless asking this Court to establish a new species of FRA litigation by permitting private plaintiffs a cause of action whenever they allege that an agency has failed to adequately and properly document even one of its essential transactions under 44 U.S.C. § 3101. In the decades that this statute has been on the books, no court has ever even hinted that such a claim might be available. *See also, e.g.*, *Pub. Citizen v. Carlin*, 2 F. Supp. 2d 1, 9 (D.D.C. 1997) ("While judicial review is precluded to the extent that allegations are made

that agency officials are not acting in compliance with their duties under recordkeeping guidelines, the Court has a role to play in reviewing the guidelines themselves under the APA."), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999).[3]

II. The Court Should Dismiss Claim Two Because EPA Has Already Issued The Guidance That Plaintiffs Contend Is Missing.

Claim Two contends that EPA's records guidelines are inadequate because they do not "address the obligation . . . to memorialize in writing all substantive decisions and commitments reached orally." ECF No. 1 ("Compl.") ¶ 65. While such a claim is theoretically cognizable under D.C. Circuit precedent, the documents referenced in the complaint demonstrate that EPA's records guidance is adequate, and in any case specific guidance on verbal communications even more directly answers Plaintiffs' challenge.

A. The EPA Records Policy Attached To Plaintiffs' Complaint Fully Implements The FRA.

At the outset, Claim Two fails to state a claim because the records policy cited in Plaintiffs' Complaint is faithful to the FRA. That document repeatedly instructs EPA employees that they are obligated to create records in compliance with the FRA and its implementing regulations. *See, e.g.*, Records Mgmt. Policy at 1-2 (FRA "requires all federal agencies to make and preserve records containing adequate and proper documentation of their organization, function, policies, decisions, procedures and essential transactions"); *id.* at 13 (noting that "all EPA employees are responsible

[3] Indeed, it bears underscoring just how sweeping Plaintiffs' theory is. In addition to directing the creation of records and barring their unlawful destruction or removal, the FRA imposes numerous other, more prosaic obligations on federal agencies: as just two examples, agencies are to "facilitate the segregation and disposal of records of temporary value," 44 U.S.C. § 3102(3), and periodically "provide for the transfer of records to a records center maintained and operated by the Archivist," *id.* § 3103. Under Plaintiffs' theory, because an agency's failure to take such steps cannot be the subject of a referral to the Attorney General under 44 U.S.C. § 3106, it must be reviewable under the APA. Such an interpretation would expand the federal courts' role in policing agencies' FRA compliance far beyond what it has ever been thought to be.

for . . . [c]reating and managing the records necessary to document the Agency's official activities and actions"); *see also id.* at 6, 8. The document also specifically references 36 C.F.R. Chapter XII, Subchapter B, *see id.* at 2, which states the obligation to make records of oral communications. *See* 36 C.F.R. §§ 1222.22, 1222.28.

In *Armstrong*, the D.C. Circuit held that "the district court . . . may entertain plaintiffs' claim that appellants' recordkeeping guidelines and directives to the NSC staff are inadequate because they permit the destruction of 'records' that must be preserved under the FRA." 924 F.2d at 291. Absolutely nothing in the EPA policy permits the destruction of records that must be preserved or excuses the creation of records that must be made. While the EPA policy referenced in Plaintiffs' complaint does not specifically highlight the obligation to make records of oral communications, it repeatedly advises employees of the obligation to document *all* decisions and essential transactions, with no suggestion whatsoever that decisions reached orally should be treated any differently from any other decisions. Indeed, in the section of EPA's Records Policy titled "Creating and Receiving Records," EPA instructs all employees that "[r]ecords document the Agency's business and can be found in all media," including voicemail, and that records can consist of information "[c]ommunicated to assert EPA requirements or guidance." Records Mgmt. Policy at 3-4. On the basis of this records policy alone, Claim Two should be dismissed.

B. EPA's Verbal Communications Guidance Specifically Addresses The Obligation To Make Records Of Decisions Reached Orally.

If the Court had any doubt about whether EPA's record management policy fully implements the FRA, EPA's verbal communications guidance leaves no doubt. That document makes explicit that "[a]ny oral communication where an Agency decision is made, and that is not otherwise documented, needs to be captured and placed in your recordkeeping system." *See* Verbal Communications Guidance.

While this guidance was not referenced in Plaintiffs' Complaint, it is properly before the Court because it goes directly to Defendants' jurisdictional challenge. *See* Defs' Mot. at 5-6. Plaintiffs do not dispute that the Court may look beyond the pleadings in evaluating its own jurisdiction, but they do suggest that Defendants' argument goes only to the merits. That is incorrect; Defendants' argument that they have already created the guidance Plaintiffs assert is lacking goes directly to Plaintiffs' standing, and thus to this Court's jurisdiction. *See, e.g.*, *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (case is moot where plaintiff has "obtained everything that he could recover by a judgment of [the] court in his favor"); *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) ("[T]he defect of standing is a defect in subject matter jurisdiction.").

Plaintiffs contend that Defendants are seeking to draw the Court "into a premature resolution of disputed factual issues," Pls' Opp. at 18, but that argument rests on a misunderstanding of what factual issues are actually relevant to this case. As discussed above, *Armstrong* permits an APA claim that an agency's "recordkeeping guidelines and directives do not adequately describe the material that must be retained as 'records' under the FRA." 924 F.2d at 293. If the agency's guidelines are adequate, as they plainly are here, Plaintiffs cannot manufacture a claim by contending that failure of EPA employees to follow those guidelines amounts to a separate policy that can be separately challenged. *See* Defs' Mot. at 10 n.3; *Competitive Enter. Inst.*, 67 F. Supp. 3d at 33 ("CEI cannot challenge EPA's decision to destroy text messages by casting its claim as a challenge to an illusory record-keeping policy. While the form of CEI's claim sounds in a cognizable APA claim, the substance of its allegations constitutes a challenge to EPA's records disposal decisions."). Plaintiffs may wish to argue that "Administrator Pruitt and others have freely overridden or ignored their FRA obligations," Pls' Opp. at 18, or that there has been a "widespread failure to create records," *id.*, but such allegations

of noncompliance with the guidelines do not state a claim that the guidelines themselves are inadequate. S*ee Armstrong*, 924 F.2d at 297 n.14 (explaining that guidelines should be evaluated for "whether they adequately explain" relevant factors). Rather, as discussed in Section I, *supra*, those claims are precluded under the D.C. Circuit's decision in *Armstrong*.

Plaintiffs further suggest that Administrator Pruitt has exercised his authority to "formulate agency guidance that binds agency employees" to "direct agency employees not to create and preserve records of certain essential agency actions and decisions." Pls' Opp. at 18. To the extent Plaintiffs mean to argue that Administrator Pruitt has created new *de facto* records guidance that is reviewable under the APA, that claim fails for at least two reasons. First, Plaintiffs' complaint does not allege that Administrator Pruitt has created new, *de facto* guidance that is reviewable under the APA; rather, their Complaint targeted the records policy cited in Plaintiffs' Complaint. *See, e.g.*, Compl. ¶ 65. It is well settled that a party may not amend its complaint through a brief in opposition to a motion to dismiss. *See, e.g.*, *Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F. Supp. 2d 165, 170 (D.D.C. 2003).

Second, and more fundamentally, a challenge to an agency's supposed *de facto* guidelines is still ultimately a challenge to the agency's compliance with its record-keeping guidelines — precisely the type of claim that is precluded under the FRA. In other words, Plaintiffs are still attempting to challenge EPA's actual record-keeping *practices*, rather than any record-keeping *guidelines.* That Plaintiffs are challenging a high-level official's actions is irrelevant, as confirmed by *Armstrong*'s discussion of the *Kissinger* FRA litigation. That litigation involved then-Secretary of State Henry Kissinger's removal of notes of his telephone conversations from the Department of State. Even in that factual context — action by an agency head, who theoretically had the power to issue records guidelines — the D.C. Circuit made clear that the FRA precluded a claim by

private litigants. *See Armstrong*, 924 F.2d at 294 ("The 1984 amendments to the FRA support the reasoning of *Kissinger* and indicate that Congress again decided to rely on administrative enforcement, rather than judicial review at the behest of private litigants, to prevent the destruction or removal of records." (citing *Kissinger*, 445 U.S. at 148)). Other courts have similarly rejected attempts by litigants to challenge what they alleged were *de facto* record-keeping policies within agencies. *See, e.g.*, *CREW v. DHS*, 527 F. Supp. 2d at 103 (rejecting a challenge to "the policy of the Secret Service and the DHS to erase from its computer system all WAVES records" (internal modification omitted)). Where the guidelines are adequate, as they are here, Plaintiffs cannot manufacture a claim by contending that EPA employees, up to and including the EPA Administrator, are failing to abide by them.

Finally, Plaintiffs contend that in order to prevail on Defendants' jurisdictional challenge, Defendants must address "how widely the NRPM [sic] has circulated this document within the EPA, in what context, and specifically whether it has been shared with the EPA Administrator and top agency officials." Pls' Opp. at 19. At the outset, the Ellis Declaration addresses many of these topics, making clear that EPA's Verbal Communications guidance appears on EPA's National Records Management Program's Intranet page and that it is the subject of regular annual training. *See* Ellis Decl. ¶¶ 6-7.[4] More fundamentally, because the only question that is properly before the Court is the adequacy of the guidelines, EPA need only demonstrate that the guidance exists and is consistent with the FRA.

[4] Plaintiffs fault Defendants for not providing a copy of the fiscal year 2018 training slide, which the Ellis Declaration observed was "functionally identical" to the 2017 slide. *See* Pls' Opp. at 19-20. EPA included the 2017 slide to demonstrate that such guidance has been a part of the annual training since fiscal year 2017. Its sworn statement that functionally identical guidance appears in the 2018 training is undisputed.

III. The Court Should Dismiss Claim Three Because The Archivist Has Made No Finding That EPA Has Violated The FRA.

Finally, the Court should dismiss Claim Three, which challenges the Archivist's compliance with 44 U.S.C. § 2115(b). The language of that provision is crystal clear: it applies "[w]hen the Archivist finds that a provision of [the FRA] has been or is being violated." 44 U.S.C. § 2115(b). Plaintiffs do not allege that the Archivist has made such a finding. While it is true that Plaintiffs allege that NARA made certain "initial 'investigative findings,'" Pls' Opp. at 21 (quoting Compl. ¶ 70), they never allege that such findings include a finding that EPA has violated the FRA.[5]

Plaintiffs suggest that "[n]o authority" other than "the government's preferred interpretation of the statute" supports the notion that the government must make an "affirmative finding that the EPA has violated the FRA." Pls' Opp. at 22. While it is true that there is no judicial authority construing 44 U.S.C. § 2115(b), a function of the fact that no other plaintiff appears to have ever brought suit to enforce it, Defendants' reading flows directly from the text of the statute. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[I]n any case of statutory construction, our analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well.").

Plaintiffs incorrectly contend that a finding that the FRA has been violated "is implicit when the Archivist takes the first step of notifying the agency head." Pls' Opp. at 23. The

[5] Plaintiffs fault Defendants for characterizing this as a failure of pleading, indicating that Defendants, "not plaintiffs, uniquely possess all the facts and can easily confirm for the Court what additional steps the Archivist and EPA have or have not taken and when." Pls' Opp. at 22 n.12. Of course, Defendants could have asserted (or attached a declaration stating) that the Archivist has made no finding that EPA has violated the FRA, and that his evaluation of EPA's records management practices remains ongoing, as is in fact the case. Had Defendants done so, Plaintiffs inevitably would have objected that Defendants were attempting to insert extraneous facts into their Rule 12(b)(6) challenge. For purposes of this motion, it suffices to observe that Plaintiffs have failed to plead a necessary element of their cause of action.

Archivist is authorized to look into agencies' compliance with the FRA, and the Archivist routinely makes inquiries of agencies in carrying out this function. *See* 44 U.S.C. § 2906(a)(1) ("In carrying out the duties and responsibilities under this chapter, the Archivist (or the Archivist's designee) may inspect the records or the records management practices and programs of any Federal agency for the purpose of rendering recommendations for the improvement of records management practices and programs and for determining whether the records of Federal agencies have sufficient value to warrant continued preservation or lack sufficient value to justify continued preservation."). And that is all Plaintiffs allege has happened here. *See* Compl. ¶ 50 ("[NARA] informed CREW that [it] had sent a letter to [EPA], requesting a meeting within 30 days"); *id.* ¶ 51 ("[NARA] responded on November 9, 2017, stating [it] had 'been in communication with the Senior Agency Official for [records management] at EPA and underst[oo]d that senior management at EPA are finalizing proposed actions to communicate back to NARA.'"); *id.* ¶ 52 (confirmation that NARA and EPA were discussing the matter).

Because the Archivist has not found that a provision of the FRA has been or is being violated, the most that Plaintiffs can do is argue the Archivist *should* have made such a finding. Plaintiffs suggest that they may bring a claim targeting such failure to act under the APA because "the FRA imposes a clear duty on the Archivist to act." Pls' Opp. at 23. Their description of that duty, however, is to inform the agency head "upon a finding that an agency has violated or is violating the FRA." *Id*. Even Plaintiffs do not contend that there is a duty to make the threshold finding of an FRA violation in the first place, and certainly not to do so on any particular schedule.

For that reason, Plaintiffs cannot contend that the Archivist has unreasonably withheld or delayed agency action that he is required to take. *See* Defs' Mot. at 12-13.[6]

CONCLUSION

Defendants respectfully request that the Court grant their motion to dismiss and terminate this case.

Dated: June 5, 2018

Respectfully submitted,

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[6] Finally, providing an intergovernmental report pursuant to 44 U.S.C. § 2115 (or failing to do so) is not agency action that is reviewable under the APA. Plaintiffs observe that in *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 318 (D.C. Cir. 1988), the plaintiffs alleged that a report was inadequate, rather than missing, and that the D.C. Circuit referenced the "lack of judicially manageable standards" in resolving such a question. *See* Pls' Opp. at 25. That is true, but the D.C. Circuit further observed that a report to Congress is not an example of an agency "exercising [a] legislative function" that "affect[s] . . . the lives and liberties of the American people" — an observation that applies with equal force here. *Hodel*, 865 F.2d at 318. Plaintiffs also observe that "all the cases that defendants cite involve agencies with independent enforcement authority over outside private entities," Pls' Opp. at 25, but *Hodel* did not suggest that anything turns on this distinction. Ultimately, the point is that an intergovernmental report (or its absence) does not aggrieve Plaintiffs and is not reviewable for that reason. *Cf. Kissinger*, 445 U.S. at 149 ("The legislative history of the Acts reveals that their purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole.").