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)
ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS AS MOOT,
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants Andrew Wheeler, Acting Administrator, U.S. Environmental Protection Agency, and the U.S. Environmental Protection Agency, by and through undersigned counsel, respectfully move to dismiss this case as moot under Article III of the Constitution or, in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56. As explained in the accompanying memorandum of points and authorities, EPA has never had a policy — formal, informal or otherwise — of failing to comply with the Federal Records Act, and steps that EPA has taken since the Court's ruling on Defendants' motion to dismiss further confirm that any claims that Plaintiffs once possessed are now moot. A proposed order accompanies this request.

Dated: September 24, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ *Steven A. Myers*

Steven A. Myers (NY Bar No. 4823043)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7334
Washington, D.C. 20530
Tel: (202) 305-8648
Fax: (202) 305-8460
Email: Steven.A.Myers@usdoj.gov

Attorneys for Defendants

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)
ANDREW WHEELER, Acting Administrator, U.S. Environmental Protection Agency, *et al.*	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AS MOOT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Secondary Sources

**The authorities upon which we chiefly rely are marked with asterisks.*

INTRODUCTION

When Plaintiffs filed this case seven months ago, their essential allegation was that the EPA's former administrator, Scott Pruitt, had adopted an informal policy of failing to create records of agency decisions and commitments reached orally, in violation of the Federal Records Act ("FRA"). *See, e.g.*, ECF No. 1 ("Compl.") ¶ 58 ("Administrator Pruitt and other top EPA officials have directed other EPA employees not to create and preserve records adequately documenting the organization, functions, polices, decisions, procedures and essential transactions of the EPA."). In denying Defendants' motion to dismiss with respect to the EPA Defendants, this Court held that an "agency *policy* — formal or otherwise — that refuses to 'make . . . records' in accordance with the FRA is reviewable." ECF No. 19 ("Mem. Op.") (emphasis added; other alterations in original).[1]

Defendants vigorously dispute that they ever had a policy — formal, informal, or otherwise — of failing to comply with the FRA, including its records-creation requirements. For purposes of Defendants' mootness challenge, however, the dispositive question is what EPA's policy currently is: if EPA's policy today complies with the FRA, Plaintiffs' claims are moot and this case must be dismissed for lack of subject matter jurisdiction no matter what its policy allegedly once was. *See, e.g.*, *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868))). Thus, without reaching the parties' dispute as to what EPA's policy was at the time that this case was filed, the Court can look to steps that EPA has taken since the Court's ruling on

[1] Plaintiffs also brought certain claims against the National Archives and Records Administration and the Archivist of the United States. Those claims have been dismissed and are not addressed further in this Memorandum.

Defendants' motion to dismiss to conclude that this case is now moot. *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. SEC*, 858 F. Supp. 2d 51, 62-63 (D.D.C. 2012) (Boasberg, J.).

Those recent steps eliminate any doubt that EPA's policy is in full compliance with the FRA. Specifically, on August 22, 2018, the agency adopted Interim Records Management Policy 2155.4, which expressly states that all EPA employees must "create and maintain records that . . . [d]ocument the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically." Exhibit 1, Second Declaration of John B. Ellis ("Second Ellis Decl.") Ex. A at 4. On September 14, 2018, the agency sent an email to every single EPA employee (as well as certain EPA contractors), advising them that the Interim Records Management Policy had been adopted. *See* Second Ellis Decl. ¶ 7 & Ex B. That email states "that EPA's policy is, and has been, that all substantive decisions and commitments reached orally must be documented as records." Second Ellis Decl. Ex. B. It further makes clear that the "Interim Records Management Policy controls and supersedes any prior policy to the extent such policy is inconsistent with this Interim Records Management Policy." *Id.*

EPA employees are regularly trained with respect to their obligations under the FRA, and all EPA employees must complete such a training by September 30, 2018, as part of their required fiscal year 2018 training. *See* Second Ellis Decl. ¶ 9. Like the previous year's training, this year's training informs EPA employees that "[v]erbal communications, voicemail or meetings, if they are records, must be documented by notes, or transcriptions, and the documentation managed as any other record according to the appropriate records schedule." Second Ellis Decl. ¶ 9 & Ex. D. Acting Administrator Wheeler has already completed this training obligation, *see* Second Ellis Decl. ¶ 10; he has also received a Records Management Briefing stating that senior officials must

"[d]ocument, in an approved Agency records management system, the substance of meetings and conversations where decisions are made, issues are resolved, or policy is established." Second Ellis Decl. ¶ 11 & Ex. E. Because the EPA's policy today is in full compliance with the FRA, this case can go no further.

In the alternative, should the Court determine that it has jurisdiction, Defendants are entitled to summary judgment because EPA's records policies have always fully complied with the FRA's requirement to make records of oral decisions and committments. In denying Defendants' motion to dismiss with respect to the EPA Defendants, the Court declined to consider certain materials making clear what EPA's policy is in this regard, including the EPA National Records Management Program intranet page specifically advising all EPA employees of their obligation to create records of oral decisions and the required annual training for all agency employees stating this obligation. Those materials are unquestionably properly before this Court on summary judgment, and they confirm what EPA's policy has always been: full compliance with the FRA, including its requirement that significant decisions and commitments reached orally be documented.

BACKGROUND

I. Procedural History

Plaintiffs commenced this action by filing a complaint on February 22, 2018. Claim One alleged that former "EPA Administrator Pruitt has operated in extensive secrecy and avoided creating an adequate record of his and the EPA's actions." Compl. ¶ 36. It accordingly sought a "declaratory judgment that the failure of Defendants Pruitt and the EPA to adequately document agency decisions is arbitrary, capricious, and contrary to the FRA," as well as an order "compelling them to make and preserve all records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency."

Id. Claim One (capitalization modified). Claim Two alleged that EPA's records management policy "contains no provision implementing the requirement, at 36 C.F.R. § 1222.22, that records of 'all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference)' be created." *Id.* ¶ 35. It accordingly sought "a declaratory judgment that Defendants Pruitt and the EPA have failed to establish and maintain an adequate program to preserve federal records in compliance with the FRA," as well as an order "compelling Defendants Pruitt and the EPA to establish and maintain an FRA-compliant program." *Id.* Claim Two (capitalization modified).

On July 24, 2018, the Court denied Defendants' motion to dismiss as to the EPA Defendants. *See* Mem. Op. As to Claim Two, the Court held that because EPA Records Management Policy 2155.3 "does not mention any mandate to create records for 'substantive decisions and commitments reached orally' as required by NARA," Plaintiffs had stated a plausible claim for relief. *Id.* at 13 (citation omitted).

The Court also denied Defendants' motion with respect to Claim One. Critically, however, the Court narrowed the scope of the claim that Plaintiffs could bring. Addressing Defendants' concerns of "future suits challenging every purported FRA violation," the Court made clear that it was permitting judicial review only of "policies and regulations regarding what records an agency must create," *id.* at 11 (emphasis omitted), and that Plaintiffs "may not demand judicial review of isolated acts allegedly in violation of § 3101." In other words, under the APA, only "[a]n agency *policy* — formal or otherwise — that refuses to 'make . . . records' in accordance with the FRA is reviewable." *Id.* at 12 (emphasis added; other alterations in original). The result of the Court's ruling is that Claims One and Two largely overlap, each boiling down to an allegation that EPA's policies fail to comply with the FRA's record-creation requirements.

II. Developments Following The Court's Order Denying Defendants' Motion To Dismiss

Since the Court issued its ruling on July 24, 2018, EPA has taken a number of steps that underscore its commitment to compliance with the FRA and further ensure that all agency employees are aware of their obligations under the FRA. First, on August 22, 2018, the agency adopted Interim Records Management Policy 2155.4, which supersedes Records Management Policy 2155.3. *See* Second Ellis Decl. ¶¶ 4-5 & Ex. A. That policy now expressly states as follows:

> EPA must properly and adequately document Agency business in accordance with NARA regulations. To meet these obligations, EPA employees and non-employees who manage records must create and maintain records that:
>
> 1. Document the persons, places, things or matters dealt with by the EPA.
>
> 2. Facilitate action by EPA officials and their successors in office.
>
> 3. Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
>
> 4. Protect the financial, legal and other rights of the Government and of persons directly affected by the Government's actions.
>
> 5. *Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.*
>
> 6. Document important board, committee or staff meetings.

Second Ellis Decl. Ex A. at 3-4 (emphasis added). It further explains that "[d]ocumented substantive decisions and commitments reached orally (e.g., person-to-person, telecommunications, in conference) also constitute records. If electronic records are created using any of these media, they need to be transferred to an electronic records management system." *Id.* at 4.

Second, on September 14, 2018, the agency sent an email from the Principal Deputy Assistant Administrator for the Office of Environmental Information and Deputy Chief

Information Officer to every single EPA employee, as well as certain EPA contractors.[2] *See* Second Ellis Decl. ¶ 7 & Ex. B. That email advised its recipients that Interim Records Management Policy 2155.4 had been adopted, and that it "controls and supersedes any prior policy to the extent such policy is inconsistent with this Interim Records Management Policy." Second Ellis Decl. Ex. B. The email states that the Interim Records Management Policy "[h]ighlights the obligation to document substantive decisions and commitments reached orally," and it "reaffirms that EPA's policy is, and has been, that all substantive decisions and commitments reached orally must be documented as records." *Id.*[3]

In addition to adopting the Interim Records Management Policy and informing all agency employees and certain contractors of their obligation to create records of significant decisions and commitments reached orally, EPA is continuing to ensure that employees are trained with respect to this obligation. The fiscal year 2018 training, which all employees are required to complete by September 30, 2018, states as follows: "Verbal communications, voicemail or meetings, if they are records, must be documented by notes, or transcriptions, and the documentation managed as any other record according to the appropriate records schedule." Second Ellis Decl. ¶ 9 & Ex. D. Acting Administrator Wheeler has already completed this training for fiscal year 2018. *See* Second Ellis Decl. ¶ 10. Acting Administrator Wheeler has also received a Records Management Briefing stating that officials must "[d]ocument, in an approved Agency records management system, the

[2] As explained in the Second Ellis Declaration, the Interim Records Management Policy was not immediately broadcast to all agency employees upon signature because it first needed to be formatted for compliance with Section 508 of the Rehabilitation Act and distributed to Senior Information Officials for implementation across the agency. *See* Second Ellis Decl. ¶ 6.

[3] This agency-wide email was actually sent twice on September 14, 2018: the first transmission inadvertently omitted a hyperlink to Interim Records Management Policy 2155.4, but a second transmission included the hyperlink. *See* Second Ellis Decl. ¶ 7.

substance of meetings and conversations where decisions are made, issues are resolved, or policy is established." Second Ellis Decl. ¶ 11 & Ex. E at 3.

STANDARD OF REVIEW

Defendants move to dismiss this case as moot under Article III of the Constitution, or in the alternative for summary judgment pursuant to Federal Rule of Civil Procedure 56. To have standing to sue under Article III, a plaintiff must satisfy three elements: (1) an injury in fact, (2) a causal connection between the injury and defendants' challenged conduct, and (3) that it be "likely, as opposed to merely speculative," that the injury suffered will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). If at any point during the course of litigation a plaintiff ceases satisfying these requirements, "the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). Under Rule 56, "[s]ummary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Blue Ocean Inst. v. Gutierrez*, 585 F. Supp. 2d 36, 41 (D.D.C. 2008).

ARGUMENT

I. The Case Is Moot Because EPA's Policy Is To Fully Document All Decisions And Commitments, Including Those Reached Orally.

Article III's narrow limits on federal court jurisdiction are "founded in concern about the proper — and properly limited — role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Because Article III courts exist to resolve concrete "cases" and "controversies," U.S. Const. art. III, sec. 2, "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp.*, 569 U.S. at 72. Here, Plaintiffs seek only prospective relief, which means that their claims are moot if they do not

challenge policies that are currently in effect. *See, e.g.*, *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) ("Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury . . . ."); *see also, e.g.*, Erwin Chemerinsky, Federal Jurisdiction § 2.3.3 (6th Ed.) (noting that "lower courts consistently have applied *Lyons* to prevent standing in suits seeking declaratory judgments where standing for injunctive relief would be unavailable"). As explained below, even if Plaintiffs were right that EPA once had a policy of failing to document decisions and commitments reached orally — a proposition that EPA vigorously disputes — it has no such policy today.

A. Claim Two Is Moot In Light Of EPA's Adoption Of An Interim Records Policy Expressly Stating The Obligation To Document Significant Decisions And Commitments Reached Orally.

At the outset, Claim Two is plainly moot. That claim alleged "that the Agency's policies fail to incorporate a NARA regulation that requires agencies to 'prescribe the creation and maintenance of records that [d]ocument . . . the formulation and execution of all basic policies and decisions and . . . all substantive decisions and commitments reached orally.'" Mem. Op. at 12; *see also* Compl. ¶¶ 35, 65. As described above, Interim Records Management Policy 2155.4 contains specific language, drawn directly from NARA regulations, requiring the creation and maintenance of precisely such records. Now that EPA has adopted a policy that expressly includes the language Plaintiffs alleged that EPA's policy should have included, it is "impossible for [the] court to grant any effectual relief" beyond what EPA has already done, *see Chafin v. Chafin*, 568 U.S. 165, 172 (2013), and Claim Two is therefore moot.

B. Claim One Is Moot Because EPA Has Instructed All EPA Employees Of Their Obligation To Document Significant Decisions And Commitments Reached Orally And Made Clear That This Instruction Supersedes Any Alleged Policy To The Contrary.

While Claim Two is now indisputably moot, Plaintiffs have indicated that they believe Claim One may go forward even though EPA has instructed all EPA employees of their obligation to document all substantive decisions and commitments reached orally and made clear that this instruction "supersedes any prior policy to the extent such policy is inconsistent" with that obligation, Second Ellis Decl. Ex. B. *See* Aug. 28, 2018 Status Conf. Tr. at 13:1-14.

Plaintiffs' position is untenable in light of the Court's construction of Claim One. To be sure, Plaintiffs believe that if in the future any single EPA employee ever fails to create a required record, such failure constitutes "failure to act" that is reviewable under the APA. *See* Compl. ¶ 26; Aug. 28, 2018 Status Conf. Tr. at 9:20-25. The Court, however, has emphatically rejected that proposition. It has instead made clear that the FRA does *not* permit "suits challenging every purported FRA violation," Mem. Op. at 11, and that it was permitting judicial review only of "policies and regulations regarding what records an agency must create." *Id.* (emphasis omitted). As the Court explained, "[a]n agency *policy* — formal or otherwise — that refuses to 'make . . . records' in accordance with the FRA is reviewable." *Id.* at 12 (emphasis added; citation omitted). In contrast, Plaintiffs may not "demand judicial review of isolated acts allegedly in violation of § 3101." *Id.* at 11.

As described above, EPA has adopted an Interim Records Management Policy that expressly states EPA employees' obligation to document significant decisions and commitments reached orally. *See* Second Ellis Decl. Ex. A. EPA has also sent a communication to every single EPA employee, (1) advising them that this policy has been adopted, (2) reminding them of their longstanding obligation to document significant decisions and commitments reached orally, and

(3) making it clear that the policy "supersedes any prior policy to the extent such policy is inconsistent with this Interim Records Management Policy." Second Ellis Decl. Ex. B. Just as it has done previously, EPA is ensuring that all agency employees are being trained on this obligation as part of the required fiscal year 2018 training. *See* Second Ellis Decl. ¶ 9 & Ex. D. These acts make it abundantly clear what EPA's policy is: full compliance with the FRA, including its records-creation requirements.[4]

In light of the actions that EPA has taken since the Court's ruling on Defendants' motion to dismiss, the most that Plaintiffs could possibly suggest is that there may be isolated instances of noncompliance with EPA's policy in the future. Even putting aside the entirely speculative nature of such an argument, the Court has already held that Plaintiffs "may not demand judicial review of isolated acts allegedly in violation of § 3101." Mem. Op. at 11; *accord, e.g.*, *CREW v. SEC*, 858 F. Supp. 2d at 62 (finding mootness and declining to consider the plaintiffs' "questions as to whether the new policy is in fact being implemented"). Rather, for an FRA case to be moot, it suffices for the defendant to show that it is "taking seriously Plaintiff's concerns with the prior policy and is undertaking efforts to ensure that any unlawful [action] is discontinued." *Id.* at 62-63. In an FRA case like this, where EPA has an agency policy that complies with the FRA and has instructed all employees to follow that policy, the question of mootness does not turn on whether or not there may be isolated instances of noncompliance with that policy in the future.

[4] In evaluating whether this case is moot, the Court may also consider the fact that former Administrator Pruitt, whose conduct was the near-total focus of Plaintiffs' Complaint, is no longer EPA Administrator. Insofar as Plaintiffs assert that former Administrator Pruitt was responsible for the violations that they allege occurred during his tenure — his name appears in the Complaint some fifty-five times — the fact that he is no longer at EPA lends additional support to the conclusion that this case is now moot.

The question for the Court is instead whether EPA's policy satisfies the APA standard of review, which it plainly does.

The conclusion that Claim One is moot is reinforced by consideration of the relief that is available in an APA case. In an APA case, the Court is authorized to "hold unlawful and set aside" final agency action that does not comport with the APA standard of review. *See* 5 U.S.C. § 706 (2). Here, even assuming that Plaintiffs could ever prove that EPA's records policies once failed to comply with the FRA, they would only be entitled to what EPA has already done: EPA's adopting a records policy that expressly complies with the FRA and taking steps to ensure that all employees are aware of and instructed to follow that policy. EPA has already done what the Court could order it to do even if Plaintiffs prevailed in this case, further confirming that the case is moot. *See LaRoque v. Holder*, 679 F.3d 905, 909 (D.C. Cir. 2012) (case is moot where "appellants have obtained everything that they could recover from this lawsuit" (alterations omitted)).

C. Plaintiffs Cannot Invoke The Voluntary Cessation Exception To Mootness.

At the August 28 status conference, Plaintiffs suggested that the doctrine of voluntary cessation precludes a finding that this case is moot. *See* Aug. 28, 2018 Status Conf. Tr. at 4:16-18. Under that doctrine, the voluntary cessation of allegedly unlawful conduct only moots a case where "(1) there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (citation omitted).

While it is the burden of the party asserting mootness to demonstrate that the conduct cannot be expected to recur, *see, e.g.*, *United States v. W. T. Grant Co*., 345 U.S. 629, 633 (1953), that is a significantly easier showing for a governmental defendant to make. As this Court has observed, "where the defendant is a government actor — and not a private litigant — there is less concern about the recurrence of objectionable behavior." *CREW v. SEC*, 858 F. Supp. 2d at 61.

Government agencies, unlike private defendants, "are accorded a presumption of good faith." *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd sub nom.* 563 U.S. 277 (2011) ("Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing."); *see also, e.g.*, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 & n.15 (10th Cir. 2010); *Beta Upsilon Chi Upsilon Chapter at the Univ. of Florida v. Machen*, 586 F.3d 908, 916-17 (11th Cir. 2009); *America Cargo Transp. v. United States*, 625 F.3d 1176, 1179 (9th Cir. 2010); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004).

Under the appropriate standard, EPA's adoption of an Interim Records Management Policy, agency-wide distribution of that policy, and agency-wide training on the substance of that policy suffices to show that there is no reasonable expectation of EPA adopting a contrary policy in the future. Indeed, the agency has made clear that it "intends to maintain the reference to employees' obligation to document oral decisions in any future update of the Interim Records Policy to a Final Records Policy." Second Ellis Decl. ¶ 5. Mere speculation about future unlawful action "might be sufficient were Defendants private litigants, [but] such conjecture is insufficient here, where the [defendant] is a governmental entity." *CREW v. SEC*, 858 F. Supp. 2d at 63.

Finally, to defeat mootness, any residual effects of the ceased conduct must be "curable by the relief demanded." *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991). None of the relief that Plaintiffs request from this Court, however, can provide a more effective remedy than what EPA has already done: formulating a Records Management Policy expressly consistent with the requirements of the FRA, publicizing it to all agency employees, and instructing them to follow it. Thus, Plaintiffs cannot demonstrate that the "voluntary cessation" exception to mootness applies here.

II. In The Alternative, Defendants Are Entitled To Summary Judgment Because They Never Had A Policy Of Failing To Create Records In Compliance With The FRA.

For the reasons described above, Defendants respectfully submit that the case is moot and the Court lacks subject matter jurisdiction. But while the Court is bound to resolve Defendants' jurisdictional challenge before reaching any other issue, *see Steel Co.*, 523 U.S. at 94, Defendants' principal contention that this case is moot is not a concession that Plaintiffs ever possessed valid claims. Rather, if the Court reaches the issue, Defendants are also entitled to summary judgment because EPA's records-management policies have always fully complied with the FRA.

Defendants' motion to dismiss attached multiple documents making clear that EPA has long required employees to document significant decisions and commitments reached orally, in compliance with the FRA. *See generally* Declaration of John B. Ellis ("First Ellis Decl."), ECF No. 11-1. Those documents included the guidance that has been available to all EPA employees on EPA's intranet since 2013, as well as the annual records training that EPA employees are required to complete. *See* First Ellis Decl. Exs. B, C. In denying the EPA Defendants' motion to dismiss, the Court declined to consider these documents because they were "not incorporated by reference or relied upon by the Complaint." Mem. Op. at 13. It then considered only Plaintiffs' allegation that "EPA's *official* records-management program is inadequate by FRA guidelines." *Id.* But irrespective of whether the documents attached to the First Ellis Declaration were properly considered in the context of Defendants' Rule 12 motion, they are unquestionably admissible in the summary judgment context. *See* Second Ellis Decl. Exs. C, D. Moreover, the Second Ellis Declaration makes clear that the FAQ page available on the NRMP website "reflect[s] authoritative guidance from the NRMP regarding EPA's records management policies, procedures, and standards." Second Ellis Decl. ¶ 8. Because these documents demonstrate that

EPA's policy has always been fully compliant with the FRA, Defendants are also entitled to summary judgment.[5]

CONCLUSION

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

Dated: September 24, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ *Steven A. Myers*
Steven A. Myers (NY Bar No. 4823043)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7334
Washington, D.C. 20530
Tel: (202) 305-8648
Fax: (202) 305-8460
Email: Steven.A.Myers@usdoj.gov

Attorneys for Defendants

[5] Because this is an APA case in which "judicial review is based solely on the administrative record," Defendants do not understand the Local Rules to require them to file a statement of undisputed material facts in support of their alternative request for summary judgment. *See* LCvR 7(h)(2). Defendants instead respectfully request that the Court treat the two Ellis declarations that have been filed in this case (and their attachments) as the certified administrative record for purposes of Defendants' alternative request for summary judgment. *See* LCvR 7(n)(1).