UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 19-cv-2181 (TJK)
U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Defendants.	)	

MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Environmental Protection Agency and Andrew Wheeler, in his official capacity as Administrator of the EPA, by and through undersigned counsel, respectfully move the Court to dismiss Plaintiff's First Amended Complaint for failure to state a claim and lack of standing. A memorandum of law and proposed order are attached.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. **U.S. ENVIRONMENTAL PROTECTION AGENCY**, et al., Defendants.	)	Civil Action No. 19-cv-2181 (TJK)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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INTRODUCTION

In June of this year, the Environmental Protection Agency published *Freedom of Information Act Regulations Update* (the "Rule") in the Federal Register. The Rule makes limited changes to EPA's Freedom of Information Act ("FOIA") regulations in order to implement statutory updates, correct obsolete information, and reflect internal EPA realignment and processing changes to improve EPA's FOIA response process. The particular aspects of the Rule at issue in this case are especially narrow. EPA revised the locations to which requesters may submit FOIA requests and more clearly identified the EPA officials with authority to make FOIA determinations. Notwithstanding the extremely limited nature of the regulatory changes, Plaintiff has filed suit challenging these aspects of the Rule under the Administrative Procedure Act ("APA") and the FOIA.

Each of Plaintiff's four claims should be dismissed. First, contrary to Plaintiff's assertions in Count One, EPA was not required to solicit public comments on the Rule because the changes at issue are quintessentially "rules of agency organization, procedure, or practice" to which the APA's notice-and-comment requirements do not apply. With regard to the centralization of intake of FOIA requests, EPA merely altered the locations to which a requester could send his or her FOIA requests, and the agency did not change the standards applied in determining whether or not to release records in response to a request. And EPA's clarification of the officials delegated authority to issue FOIA determinations addresses a purely internal agency assessment about how best to allocate responsibilities within EPA but does not alter the standards by which FOIA determinations are made. Because these aspects of the Rule plainly relate to agency organization or procedure, EPA was not required to undertake the resource-intensive process of submitting them

to the public for notice and an opportunity for comment. Plaintiff also lacks standing to bring this claim for the reasons discussed below regarding Count Two.

Next, Plaintiff lacks standing to litigate its substantive APA claim in Count Two challenging the Rule as arbitrary and capricious because Plaintiff cannot show any actual or imminent injury from these minor regulatory changes. Although Plaintiff believes that the Rule may lead to processing delays for Plaintiff's pending and future FOIA requests, Plaintiff's speculation is unsupported and inadequate to establish an impending injury as necessary to confer jurisdiction under Article III. Plaintiff's concern that the changes regarding the location to which a requester may send FOIA requests will lead to processing delays is based on Plaintiff's mistaken belief that the Rule centralizes FOIA *processing* at EPA headquarters, which is incorrect as the Rule only affects the location to which requests are *submitted*. And Plaintiff's belief that the involvement of senior officials in the FOIA process will cause new delays is contradicted by Plaintiff's own allegations in the complaint that those officials have been involved in the FOIA process since long before the Rule was issued and were allegedly already causing delays. Therefore, any alleged delay from their involvement cannot be attributed to the Rule.

Lastly, Counts Three and Four are each premised on Plaintiff's misreading of the pertinent regulation. A reasonable reading of that regulation refutes Plaintiff's claim that it authorizes EPA officials to withhold a portion of a record on the basis of nonresponsiveness. Accordingly, Plaintiff has not adequately alleged that the regulation is contrary to law or that it constitutes an agency policy or practice to unlawfully withhold records in violation of the FOIA. In any event, because Counts Three and Four are unripe, the Court should not waste its valuable judicial resources by prematurely resolving the parties' abstract disagreement, particularly given that Plaintiff would

have a remedy under FOIA to compel disclosure if EPA were ever to withhold a portion of a record as nonresponsive.

BACKGROUND

I. EPA's New FOIA Regulations

On June 26, 2019, EPA published *Freedom of Information Act Regulations Update* (the "Rule") in the Federal Register, 84 Fed. Reg. 30028. The Rule makes limited changes to EPA's FOIA regulations "to implement statutory updates, correct obsolete information, and reflect internal EPA realignment and processing changes to improve the Agency's FOIA response process." *Id*. The Rule elaborated that the changes "affect the process by which any individuals and entities request records from EPA under [FOIA]," and that the changes implement three sets of statutory amendments to FOIA—the 2007, 2009, and 2016 amendments. *Id*. The Rule further explained that "EPA has reserved for a later, second rulemaking phase certain discretionary and modernizing changes that the EPA is considering and on which the EPA will consider taking public comment." *Id*. at 30028-29. The amendments in the Rule are limited in nature and effect and are intended to "bring EPA's regulations into compliance with nondiscretionary provisions of the amended statute and reflect changes in the Agency's organization, procedure, or practice." *Id*. at 30028. Plaintiff concedes that EPA last amended its FOIA regulations in 2002. First Am. Compl. for Injunctive and Declaratory Relief ("Am. Compl."), ECF No. 5, ¶ 13.

The Rule makes various revisions to align EPA's FOIA regulations with statutory amendments such as incorporating by reference the statutory definition of "representative of the news media," providing that EPA may toll the time to respond to a FOIA request in certain circumstances, and making further changes pertaining to when agencies may charge search fees. Rule at 30030-31. Additional amendments include removing the list of FOIA exemptions from

the regulations because that list was unnecessary and redundant of the FOIA statute, requiring that final determinations include information about the right to seek assistance from the FOIA Public Liaison, and extending the time in which a requester may file an administrative appeal. *Id*. at 30030-31. The Rule also makes other non-substantive changes to clarify references to agency offices, correct grammatical errors, remove gendered language, remove second person pronouns, and eliminate passive voice. *Id*. at 30031.

Of particular relevance here, the Rule also revises the location to which requesters may submit a FOIA request. Under the prior regulations, the public could seek access to records under FOIA by sending a request by regular mail or e-mail to EPA headquarters, by submitting a request through EPA's website, or, for records believed to be located in one of ten regional offices, by sending a request by regular mail or e-mail to that regional office. 40 C.F.R. § 2.101(a) (2018). Instead of FOIA requesters submitting requests to one of 11 different locations (10 EPA Regions and the EPA National FOIA Office), the Rule provides that FOIA requests be submitted either electronically (via the Agency's FOIA submission website, FOIAonline, or another government submission website, such as FOIA.gov), or via U.S. Mail or overnight delivery to a single point of entry, which is EPA's National FOIA Office in the Office of General Counsel. Rule at 30030; 40 C.F.R. § 2.101(a). The National FOIA Office will then assign the request to an appropriate region or headquarters office within EPA for processing. Rule at 30033. The Rule explained that the 2007 statutory amendments to the FOIA decreased the amount of time an agency may take to route a request to the appropriate component of the agency. *Id*. at 30030. EPA's changes to the location to which requesters may submit FOIA requests address that statutory amendment and aim to minimize the number of misdirected requests sent to the agency. *Id*.

The Rule also clarifies the agency officials, as well as their delegates, who are delegated

authority to respond to FOIA requests. Specifically, the Rule "clarifies that the Administrator and Deputy Administrator and all assistant administrator-level positions and regional administrator positions in the Agency, or their deputies, and certain other office heads have the authority to respond to FOIA requests." Rule at 30031. The prior regulations had enumerated various senior agency positions which had been "delegated the authority to issue initial determinations" and provided that the authority to issue denials may in some instances be redelegated "only to persons occupying positions not lower than division director or equivalent." 40 C.F.R. § 2.104(h) (2018). The prior regulations elsewhere stated that the "head of an office, or that individual's designee, is authorized to grant or deny any request for a record of that office or other Agency records when appropriate." *Id*. § 2.103(b). By more clearly describing the authority of various officials to make FOIA determinations, the Rule "eliminates a potential conflict in the existing regulations and ensures consistency of responses across the agency." Rule at 30031. The Rule also "clarifies the authorities, and delegation of the authority, because the term 'division director'" utilized in the prior regulations "is not easily interpreted across the Agency." *Id*. The Rule eliminates the previously-used term "division director" and instead clearly states that the delegates of specifically-identified positions are authorized to make FOIA determinations. 40 C.F.R. § 2.103(b).

The Rule became effective on July 26, 2019, 30 days after it was published in the Federal Register. Rule at 30038.

II. This Lawsuit

Plaintiff, a frequent FOIA requester, filed suit on July 23, 2019, and filed an Amended Complaint on August 15, 2019. *See* ECF Nos. 1, 5. Plaintiff's Amended Complaint pleads four claims. First, Plaintiff alleges that EPA violated the APA by not utilizing notice-and-comment

rulemaking procedures when issuing the Rule. Am. Compl. ¶¶ 48-53. Second, Plaintiff alleges that the Rule is arbitrary and capricious in violation of the APA, based on two aspects of the Rule discussed above: (1) revising the location to which requesters may submit FOIA requests and (2) clarifying the EPA officials, as well as their delegates, who have authority to respond to FOIA requests. *See* Am. Compl. ¶¶ 15-19, 27-38, 54-56. Third, Plaintiff alleges, based on a misreading of the regulatory text, that the Rule "purports to authorize agency officials to 'withhold . . . a portion of a record on the basis of responsiveness'" and therefore violates the APA. *Id*. ¶¶ 57-60. Lastly, Plaintiff alleges, in the alternative to the preceding count, that EPA has an unlawful policy or practice of withholding portions of records on grounds of responsiveness in violation of the FOIA. *Id*. ¶¶ 61-62. As relief, Plaintiff asks the Court to declare the Rule unlawful and vacate it. *Id*. Prayer for Relief.

III. Related Litigation

In addition to this case, there are two other cases pending challenging the Rule. The complaint in *Center for Biological Diversity v. EPA*, No. 19-2198-KBJ (D.D.C.), alleges that EPA violated the APA by not providing notice and an opportunity for comment before issuing the Rule and further alleges that certain aspects of the Rule, including those at issue here, are arbitrary and capricious. *See id*., ECF No. 1 ¶¶ 96-13. That complaint also claims that EPA has "adopted several FOIA directives . . . without first providing notice through publication of the proposed directives and affording an opportunity for public comment" allegedly in violation of the FOIA, *id*. ¶ 80, and that EPA has a "pattern, policy, and/or practice of adopting" such internal FOIA directives without notice and comment, allegedly in violation of the APA, *id*. ¶¶ 114-16. The *Center for Biological Diversity* plaintiffs seek declaratory and injunctive relief, including an order vacating the Rule. *Id*. Prayer for Relief.

The complaint in *Ecological Rights Foundation v. EPA*, No. 19-4242-RS (N.D. Cal.) similarly alleges that various aspects of the Rule, including those at issue here, are arbitrary and capricious, and that EPA was required to undertake notice and comment rulemaking when issuing the Rule. *See id*., ECF No. 1, ¶¶ 47-61. Plaintiffs seek declaratory and injunctive relief including an order vacating the Rule. *Id.* Prayer for Relief. On October 18, 2019, the court in *Ecological Rights Foundation* granted EPA's motion to transfer that case to the District of Columbia. *See Ecological Rights Found. v. EPA*, No. 19-cv-04242-RS, 2019 U.S. Dist. LEXIS 180944 (N.D. Cal. Oct. 18, 2019). The court found that the "strongest argument in favor of transfer is the similarity to and possibility of consolidation with" this case and the *Center for Biological Diversity* case. *Id*. at *6. Because all three cases challenge the same regulations, on similar grounds, Defendants intend to move to consolidate the cases before the same District Court Judge.

LEGAL STANDARD

To survive a challenge to the Court's subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), a plaintiff must establish a court's jurisdiction through sufficient allegations. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "Because subject matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim." *Williams v. Apker*, 774 F. Supp. 2d 124, 127 (D.D.C. 2011). When considering motions to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the court may consider materials outside the pleadings. *See Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. In ruling on a motion to dismiss, the Court "must construe the complaint in a light most favorable to the plaintiff and must

accept as true all reasonable factual inferences drawn from well-pleaded factual allegations." *Jovanovic v. US-Algeria Bus. Council*, 561 F. Supp. 2d 103, 110 (D.D.C. 2008). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court clarified the standard of pleading that a plaintiff must meet in order to survive a motion to dismiss under Rule 12(b)(6). The Court noted that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]'" *Id*. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 (1957)); *see also Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Although "detailed factual allegations" are not necessary to survive a Rule 12(b)(6) motion to dismiss, to provide the "grounds" of "entitle[ment] to relief," a plaintiff must furnish "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. While there is no "probability requirement at the pleading stage," *id.* at 556, "something beyond . . . mere possibility . . . must be alleged[.]" *Id*. at 557-58. The facts alleged "must be enough to raise a right to relief above the speculative level," *id*. at 555, or must be sufficient "to state a claim for relief that is plausible on its face." *Id*. at 570.

ARGUMENT

I. Plaintiff's Procedural APA Claim Should Be Dismissed

A. Plaintiff Lacks Standing to Bring Count One

Count One of Plaintiff's First Amended Complaint alleges that Defendants violated the APA when EPA promulgated the Rule without first publishing a proposed rule for public comment. Am. Compl. ¶¶ 48-53. Count One should be dismissed, first, because Plaintiff lacks standing to bring it. Article III requires that the judicial power be exercised only in the concrete context of an actual case or controversy, not in the abstract. U.S. Const. art. III, § 2, cl. 1. As part

of meeting that case or controversy requirement, the plaintiff bears the burden of demonstrating the three elements of Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). First, "the plaintiff must have suffered an injury in fact . . . which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id*. Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561.

"[T]he Supreme Court and the D.C. Circuit have made pellucid that 'deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing.'" *Scenic Am., Inc. v. U.S. Dep't of Trans.*, 983 F. Supp. 2d 170, 176 (D.D.C. 2013) (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009)) (citing *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27 (D.C. Cir. 2002)). "That includes the deprivation of the right to participate in notice-and-comment rulemaking — the harm alleged here — which 'in and of itself, does not establish an actual injury.'" *Id*. (quoting *Int'l Bhd. of Teamsters v. TSA*, 429 F.3d 1130, 1135 (D.C. Cir. 2005)). Instead, "[i]n order to make out a constitutionally cognizable injury, plaintiffs must demonstrate that the allegedly deficient procedures implicate distinct substantive interests as to which Article III standing requirements are independently satisfied." *Freedom Republicans, Inc. v. Fed. Election Comm'n*, 13 F.3d 412, 416 (D.C. Cir. 1994). Thus, a violation of the APA's notice-and-comment procedures "does not, standing alone, constitute a 'concrete and particularized harm.'" *Scenic Am.*, 983 F. Supp. 2d at 176. In other words, a "procedural-rights plaintiff" "must demonstrate that the

defendant caused the particularized injury (or is likely to cause) and not just the alleged procedural violation." *Teva Pharm. USA, Inc. v. Azar*, 369 F. Supp. 3d 183, 205 (D.D.C. 2019) (quoting *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159 (D.C. Cir. 2005)).

Here, Plaintiff lacks standing because it has not alleged any injury resulting from the lack of an opportunity to comment that is sufficiently imminent to support a cause of action. *See Lujan*, 504 U.S. at 560; *see also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 15-16 (D.C. Cir. 2011) (plaintiff lacked standing to challenge agency's failure to provide notice and an opportunity for comment because "no imminent injury in fact has been alleged"). Plaintiff does not allege that it has already suffered any actual injury. Instead, it claims that requiring mailed FOIA requests to be submitted to EPA's National FOIA office rather than its regional offices, and allegedly having political appointees rather than career officials make final FOIA determinations "risk[s] . . . further delays in the agency's processing of CREW's pending and future FOIA requests[.]" Am. Compl. ¶ 46. "[I]n order to qualify as an injury-in-fact for the purpose of having standing to sue, the harm that purportedly results from the challenged conduct must be imminent (aka 'certainly impending'), which ordinarily means that the plaintiff must show that the injury *will* occur as a result of the challenged act." *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 188 (D.D.C. 2015) (emphasis in original). "[A]llegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013); *see also Lujan*, 504 U.S. at 564 n.2 ("Where there is no actual harm, however, its imminence (though not its precise extent) must be established."). Where, as here, a plaintiff relies on an increased risk of harm to show injury, the plaintiffs "must do more than merely assert that there is some conceivable risk that she will be harmed on account of the defendant's actions." *Food & Water Watch*, 79 F. Supp. 3d at 189. "[S]uch plaintiff must demonstrate that due to the challenged conduct there is 'both (i) a

substantially increased risk of harm and (ii) a *substantial* probability of harm [to the plaintiff] with that increase[d risk] taken into account." *Id.* (citing *Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 513 F.3d 234, 237 (D.C. Cir. 2008)).

Plaintiff has not met this standard. Regarding EPA's change to the location to which requesters may submit a FOIA request, Plaintiff has not plausibly alleged that that change will substantially increase the risk of processing delays for Plaintiff's FOIA requests or that there is a substantial probability of such delay. Plaintiff's speculation that the change may lead to delays is based on its assumption and conclusory allegation that the effect of the Rule is to "centralize FOIA processing." Am. Compl. ¶ 44. But as explained in the Rule, which was incorporated into the Amended Complaint by reference, *see id.* ¶ 1, EPA merely designated the National FOIA Office as the location to which mailed FOIA requests must be *submitted*; the Rule does not centralize FOIA *processing* in that office. Rule at 30030. The Rule makes the National FOIA Office "the point of entry for all requests"; it does not say anything about how those requests will subsequently be processed, and indeed mentions routing a request to the appropriate office, which cuts against Plaintiff's centralization- of-processing theory. *Id.* Thus, Plaintiff's discussion of an internal audit from 2016 exploring "centralizing FOIA *processing* at EPA headquarters," Am. Compl. ¶ 32 (emphasis added), is irrelevant to whether the Rule – which does not centralize processing – will lead to delays. For the same reason, the data Plaintiff cites concerning the number of outstanding and backlogged requests at headquarters says nothing about whether the change at issue here will lead to delays for Plaintiff's requests. *Id.*[1] Accordingly, Plaintiff's belief that this aspect of the

[1] In any event, the fact that EPA headquarters has more pending requests and more backlogged requests than the regions could just as easily reflect the fact that headquarters handles far more FOIA requests than the regional offices.

Rule will lead to processing delays is based on pure speculation, which is insufficient to confer standing.

But even if the Court were to credit Plaintiff's speculation about possible delays, Plaintiff has not alleged that the delays actually impact Plaintiff because there is no suggestion that Plaintiff intends to seek records from regional offices. Indeed, Plaintiff has not alleged that it *ever* submitted a FOIA request to a regional office until it did so after filing its initial complaint in this case, apparently in an attempt to manufacture standing. *See* Am. Compl. ¶ 44 (alleging that Plaintiff submitted requests directly to regional offices after the Rule went into effect). And Plaintiff's Amended Complaint highlights FOIA requests it has submitted to EPA that "implicate politically-sensitive issues, the Office of the Administrator, and other high-level EPA officials," suggesting that headquarters would be the appropriate place to submit them. *See id*. ¶ 42. It is well-settled "that self-inflicted harm doesn't satisfy the basic requirements for standing." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). Accordingly, Plaintiff has not shown that this aspect of the Rule interferes with Plaintiff's FOIA activities where Plaintiff has not shown any intention to seek records from regional offices.

Likewise, Plaintiff has not plausibly alleged that EPA's clarification of the individuals with authority to respond to requests will substantially increase the risk of processing delays for Plaintiff's FOIA requests or that there is a substantial probability of such delay. To do so, "a plaintiff must ordinarily show that the defendant's action has made it much more likely that the harm plaintiff fears will occur than would otherwise be the case." *Food & Water Watch*, 79 F. Supp. 3d at 189. Here, the Rule merely clarified pre-existing authorities and therefore did not change how FOIA requests will be handled. Rule at 30031. Specifically, the prior regulations listed various senior agency officials and the "heads of headquarters staff offices," all of which

had been "delegated the authority to issue initial determinations." 40 C.F.R. § 2.104(h) (2018). The prior regulations separately authorized the "head of an office, or that individual's designee" to grant or deny certain FOIA requests. 40 C.F.R. § 2.103(b) (2018). As amended by the Rule, EPA's regulations now include a single provision specifically identifying each of the various agency officials that have been delegated "[a]uthority to issue final determinations." 40 C.F.R. § 2.103(b). Because those officials already were authorized to make FOIA determinations under the prior regulations, the Rule plainly does not make it "much more likely" that Plaintiff will encounter processing delays "than would otherwise be the case." *Food & Water Watch*, 79 F. Supp. 3d at 189.

Plaintiff seizes on the language authorizing officials to make "initial determinations" in the prior regulation which it contrasts with the "final determinations" language in the new regulation. Am. Compl. ¶ 33. But despite different phraseology, both terms refer to the same determinations as evidenced by the fact that the letters describing those determinations include the same content. *Compare* 40 C.F.R. § 2.104(h)(1)-(4) (2018) (describing content of "initial determination" letter) *with* 40 C.F.R. § 2.104(i)(1)-(5) (describing content of "final determination letter"). The phrase "initial determination" was simply meant to reflect the fact that an adverse determination may be modified through an administrative appeal, *see* 40 C.F.R. § 2.104(j)-(l) (2018) (describing administrative appeals process), but in the Rule, EPA settled on the term "final determination" as more accurately describing the nature of the determination at issue, even though it still can be modified after administrative appeal.

But even assuming, *arguendo*, that the change in terminology from "initial determination" to "final determination" indicates a relevant change in authority, Plaintiff still cannot show standing. Plaintiff concedes that the officials identified in the Rule as being authorized to make

"final determinations" already had the authority to participate in the FOIA decisionmaking process before the Rule was issued. Am. Compl. ¶¶ 22, 25. Indeed, Plaintiff specifically claims that this pre-existing review delayed EPA's FOIA processing times. *Id*. ¶ 26; *see also* Pl's Resp. to Def's Partial Obj. to Notice of Related Cases, ECF No. 11, at 7 (arguing that this case implicates a "pattern, policy, or practice of unreasonable delay in FOIA administration that EPA began implementing in 2017"). Thus, the delay that Plaintiff claims as its injury is allegedly from "[p]olitical-appointee review" generally, Am. Compl. ¶ 26, not from political appointees making "final determinations" instead of "initial determinations." In other words, Plaintiffs have not alleged that officials require more time to make a "final determination" than an "initial determination." Plaintiff has not plausibly alleged that the Rule has changed the authority of these individuals in a way that "has made it much more likely" that Plaintiff's FOIA requests will experience processing delays. *Food & Water Watch*, 79 F. Supp. 3d at 189.

For the same reasons, Plaintiff's claim concerning the Rule's clarification of authority over FOIA determinations also suffers from a lack of causation and redressability. *See Lujan*, 504 U.S. at 560. Because the Rule merely clarified authorities that already existed prior to the Rule, even assuming Plaintiffs may be injured by the involvement of senior officials in the FOIA process – a proposition Defendants strongly reject – any such injury would not have been caused by the Rule, let alone by the lack of notice and comment procedures in promulgating the Rule. Any such injury, moreover, would not be redressable by the relief Plaintiff seeks in this case. *See* Am. Compl. at 19 (seeking vacatur of Rule and reinstatement of 2002 rule). In *Association of American Physicians & Surgeons v. Sebelius*, 901 F. Supp. 2d 19 (D.D.C. 2012), for example, the court found that any injuries resulting from the challenged requirement were "caused by statutes and regulations that pre-date the agency actions plaintiffs' challenge." *Id*. at 42. Therefore, the

plaintiffs' claim "suffer[ed] from a causation problem" and the harms were "not redressable by the relief plaintiffs' seek." *Id.* Similarly, the rule at issue in *Atlantic Urological Associates, P.A. v. Leavitt*, 549 F. Supp. 2d 20, 28 (D.D.C. 2008) "did not change anything for these Plaintiffs" so causation was missing and "invalidating it would not afford them any relief." Likewise, here, Plaintiff has not plausibly alleged that any harm will have been caused by the Rule or that vacating the Rule and reinstating the prior rule will redress any harm.

Accordingly, the Court should dismiss Count One for lack of standing.

B. Count One Fails to State a Claim

Even if the Court finds that Plaintiff has standing to litigate Count One, that claim should still be dismissed because EPA properly invoked the procedural and good cause exceptions to the notice and comment requirement, *see* Rule at 30029, and the Amended Complaint fails to allege facts plausibly suggesting otherwise.

Section 553 of the APA generally requires notice and opportunity to comment prior to promulgating rules. *See* 5 U.S.C. § 553. The APA contains an exception to the notice and comment requirement for "rules of agency organization, procedure, or practice." *Id.* § 553(b)(3)(A). That exception applies to "agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *See James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000). To determine whether a rule is procedural, courts consider "whether the agency action . . . encodes a substantial value judgment." *See Public Citizen v. Dep't of State*, 276 F.3d 634, 640 (D.C. Cir. 2002). This standard differs from the inquiry formerly employed to identify a procedural rule—"whether a given procedure has a substantial impact on parties"—because "even unambiguously procedural measures affect parties to some degree." *Id.* The

concept of a "value judgment" is construed narrowly and does not encompass "judgments about what mechanics and processes are most efficient." *JEM Broad. Co. v. FCC*, 22 F.3d 320, 328-29 (D.C. Cir. 1994).

The regulatory changes at issue in this case easily qualify as "rules of agency organization, procedure, or practice" and are therefore exempt from notice and comment requirements. 5 U.S.C. § 553(b)(3)(A). First, revising the FOIA request submission location plainly does not "alter the rights or interests of parties." *James V. Hurson Assocs.*, 229 F.3d at 280. On the contrary, by providing that FOIA requests be submitted either electronically via government submission websites, or via U.S. Mail or overnight delivery to a single point of entry (EPA's National FOIA Office), the Rule leaves unaffected the rights of FOIA requesters and the substantive standard to be applied. Requesters may still submit FOIA requests to EPA and those requests are evaluated pursuant to the same standards as before. Notably, Plaintiff does not claim that it has a right to submit FOIA requests directly to regional offices. And because the Rule "applies to all FOIA requests, making no distinction between requests on the basis of subject matter, it clearly encodes no 'substantive value judgment.'" *Public Citizen*, 276 F.3d at 641.

Courts have repeatedly found rules similar to the one at issue here to fall squarely within the APA's procedural exception. In *James V. Hurson Associates*, for example, the USDA had changed the ways in which commercial food producers could seek approval of a proposed food label. 229 F.3d at 279. The agency had previously allowed producers to do so "by mailing its application, by personally visiting the [relevant office], or by hiring courier/expediter firms whose employees would meet with [agency] representatives during office hours," but the agency eliminated face-to-face appointments without following notice and comment rulemaking. *Id*. The D.C. Circuit held that the agency's decision to eliminate face-to-face review was "the very sort of

procedural measure" that qualifies as an exception to the notice and comment requirements under this Circuit's precedents because the agency "did not alter the substantive criteria by which it would approve or deny proposed labels; it simply changed the procedures it would follow in applying those substantive standards." *Id*. at 281; *see also Public Citizen*, 276 F.3d at 640 (FOIA search cutoff policy was procedural); *JEM Broad Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994) (rule dismissing incomplete application without opportunity to amend was procedural); *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 105-12 (D.D.C. 2013) (dismissing claim alleging that notice and comment procedures were required where agency modified structure for charging fees associated with mandatory declassification review requests). Likewise, here, EPA's decision to designate a single office for the intake of FOIA requests does not alter any substantive criteria applicable to such requests but simply changes the procedures requesters must follow to submit a request.[2]

The same is true of the Rule's clarification of which EPA officials are delegated authority to make FOIA determinations, which addresses a purely internal agency assessment about how best to allocate responsibilities within EPA. Indeed, the very purpose of the procedural exception is "to ensure that agencies retain latitude in organizing their internal operations." *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980). EPA's clarification of which officials are delegated authority to make FOIA determinations allocates responsibility for performing required tasks but

[2] Plaintiff does not allege that there is any increased burden to requesters associated with submitting mailed FOIA requests to the National FOIA Office instead of the regional offices, but any such allegation would not make the Rule substantive. *See James V. Hurson Associates*, 229 F.3d at 281 ("[A]n otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties."). Likewise, although Plaintiff has not adequately alleged that the Rule will cause any processing delays, the theoretical burden associated with such delay would not make the Rule substantive because it would not constitute a "substantive value judgment." *Public Citizen*, 276 F.3d at 641.

does not determine the standards by which those tasks will be conducted. Plaintiff inaccurately alleges that this aspect of the Rule amounts to a change that allows political appointees to issue final FOIA determinations, where previously only career staff could do so, but it does not allege that the standards for disclosing or withholding information in response to a FOIA request are different for political appointees and career officials, in general or under the Rule. *See* Compl. ¶¶ 33, 35, 46. Moreover, as discussed above, the Rule merely clarified pre-existing authorities and therefore did not change how FOIA requests will be handled.

Accordingly, this aspect of the Rule does not alter the rights of FOIA requesters or encode a substantial value judgment, as courts have held numerous times in similar situations. For instance, in *Guardian Federal Savings & Loan Insurance Corporation*, 589 F.2d 658 (D.C. Cir. 1978), the D.C. Circuit found the procedural exemption applicable to a regulation requiring audits to be performed by nonagency accountants and "delegat[ing] the agency's broad authority over such matters" from the Federal Savings and Loan Insurance Corporation to the Board's Chief Examiners for regional districts. *Id*. at 661, 665-66 & n.25. "Both procedural regulations in that case allocate responsibility for performing required regulatory tasks; they do not determine the standards by which those tasks will be conducted nor the criteria affecting private parties' interests." *Batterton*, 648 F.2d at 708 n.74. Another court found that a delegation of authority to adjudicate administrative appeals was a procedural rule because it "does not alter the right to make an appeal; it only identifies the body that will exercise jurisdiction over the appeal once the appeal is made." *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1083-85 (N.D. Cal. 2010). Similarly, the court in *National Association of Manufacturers v. Department of Labor*, 1996 U.S. Dist. LEXIS 10478 (D.D.C. July 22, 1996), found that a regulation excluding administrative law judges from the review of prevailing wage determinations

was "procedural and exempt from the notice and comment requirement. *Id*. at *44-45; *see also Sacora v. Thomas*, 628 F.3d 1059, 1070 (9th Cir. 2010) ("the requirement that the Regional Director approve placements of more than six months merely assigns a particular official the responsibility of exercising the authority" and is therefore "not subject to the notice-and-comment requirements of § 553 of the APA").

For these reasons, the aspects of the Rule challenged by Plaintiff are quintessentially "rules of agency organization, procedure, or practice" and therefore are not subject to the APA's notice and comment requirements. The Court should dismiss Count One.[3]

II. The Court Should Dismiss Count Two For Lack of Standing

Count Two of the Amended Complaint alleges that the aspects of the Rule that Plaintiff challenges are arbitrary and capricious under the APA. Am. Compl. ¶¶ 54-56. As discussed above, Plaintiff failed to plausibly allege that it has suffered any actual or imminent injury as a result of the very modest changes the Rule makes to EPA's FOIA regulations. *See* Section I(A) *supra*. Plaintiff's attempt to establish standing on the basis of a supposed risk of delay is wholly insufficient where the Amended Complaint does not plausibly allege that that Rule will substantially increase the risk of processing delays for Plaintiff's FOIA requests or that there is a substantial probability of such delay. *See id*. This is particularly true where the alleged delay from

[3] In addition to the procedural exception, EPA also invoked the good cause exception for certain changes to its regulations to reflect self-executing statutory provisions and for minor and purely ministerial changes, including non-substantive style and grammatical corrections. Rule at 30029. The good cause exception applies where proceeding through notice and comment would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). This exception is appropriate in various circumstances including when an agency "lacks discretion to reach a different conclusion" than what is put forth in a rule. *EME Homer City Generation LP v. EPA*, 795 F.3d 118, 134-35 (D.C. Cir. 2015). Plaintiff's Amended Complaint does not challenge any aspect of the Rule to which the good cause exception was applied.

review by senior EPA officials allegedly pre-dates the Rule. *See id*. Therefore, the Court should dismiss Count Two for lack of standing.

III. The Court Should Dismiss Count Three for Failure to State a Claim, Lack of Ripeness, and the Availability of an Adequate Alternative Remedy

A. Count Three Fails to State a Claim

In Count Three, Plaintiff alleges that the Rule violates the APA "[i]nsofar as . . . [it] . . . purports to authorize agency officials to 'withhold . . . a portion of a record on the basis of responsiveness.'" Am. Compl. ¶ 59. As Plaintiff correctly observes, the D.C. Circuit held in *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016) that the FOIA does not authorize agencies to "redact particular information within the responsive record on the basis that the information is non-responsive."

Plaintiff's claim hinges on a misreading of the Rule, which does not authorize anyone to withhold a portion of a record on the basis of responsiveness. The Rule at 40 C.F.R. § 2.103(b) provides that certain individuals within EPA, or their delegates, "are authorized to make determinations required by 5 U.S.C. § 552(a)(6)(A), including to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue 'no records' responses." Thus, the regulation lists "final determinations" that individuals are authorized to perform, namely, "to release . . . a record," "to release . . . a portion of a record," to "withhold a record," or to "withhold . . . a portion of a record." *Id*. It then lists the potential reasons for a final determination: "responsiveness" or "one of more exemptions under the FOIA." *Id*. Nothing in the regulation suggests that both of those reasons necessarily apply to each type of "final determination" listed. On the contrary, the most natural reading of the regulation is that the listed reasons for a final determination ("responsiveness" and "one or more exemptions under the FOIA") do not

necessarily apply to each type of final determination ("to release . . . a record," "to release . . . a portion of a record," to "withhold a record," and to "withhold . . . a portion of a record"). Instead, the regulation authorizes EPA to withhold "a portion of a record" "under one or more exemptions under the FOIA" but not on the basis of responsiveness. Entire records, on the other hand, may be withheld "on the basis of responsiveness."

Plaintiff's contrary reading – that each of the reasons for a final determination applies to each type of final determination – is illogical. One of the types of final determinations listed is "to release" records. Under Plaintiff's reading, therefore, the regulation would authorize EPA "to release" records "under one or more exemptions under the FOIA." Of course, records are withheld, not released, under FOIA exemptions. *See* 5 U.S.C. § 552(b) (listing exemptions to FOIA disclosure requirements). The only sensible way to read the regulation is that the various reasons stated for making a determination are not all necessarily applicable to each type of determination identified in the regulation.

Not only is EPA's interpretation supported by the text of the regulation itself but it is entirely consistent with the Rule, which describes the amendment as "clarify[ing]" that certain officials "have the authority to respond to FOIA requests" in order to "eliminate[] a potential conflict in the existing regulations and ensure[] consistency of responses across the Agency." Rule at 30031. The Rule gives no indication whatsoever that the change was also intended to confer authority on officials to withhold portions of records on grounds of nonresponsiveness contrary to D.C. Circuit precedent. "[A]t a minimum, the agency has adopted a reasonable reading of a regulatory provision that is susceptible to more than one interpretation." *Sagarwala v. Cissna*, 387 F. Supp. 3d 56, 66-67 (D.D.C. 2019) (discussing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-16 (2019) (explaining that so-called *Auer* deference is appropriate when the agency rule is "genuinely

ambiguous," the agency's reading is "within the zone of ambiguity," and the "character and context of the agency interpretation entitles it to controlling weight.")). Because Count Three rests on a flawed interpretation of the regulation, the Court should dismiss this claim.

B. Count Three is Unripe

For the reasons discussed above, the Rule does *not* authorize anyone to withhold a portion of a record on the basis of responsiveness. But even if the Rule were to function as Plaintiff contends, Count Three still should be dismissed because it is unripe and because Plaintiff can challenge the withholding of a portion of a record on the basis of responsiveness under FOIA if and when it happens, and thus has an adequate alternative remedy. "Prudentially, the ripeness doctrine exists to prevent the courts from wasting [their] resources by prematurely entangling ourselves in abstract disagreements." *Nat'l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996). In testing whether the facts of a particular case meet that standard of ripeness, courts apply "a two-part analysis, evaluating '[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.'" *Id*. (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). One of the factors weighing against fitness for review is "the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1430-31 (D.C. Cir. 1994) (internal quotation marks omitted). Importantly, "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act (APA)] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Nat'l Park Hosp. Ass'n v. DOI*, 538 U.S. 803, 808 (2003).

Plaintiff can demonstrate no hardship from deferring review of the regulation at issue. "[I]f the hardship to the parties is slight, only a minimum showing of countervailing judicial or administrative interest is needed . . . to tip the balance against judicial review." *Webb v. Dep't of Health & Human Servs.*, 696 F.2d 101, 106 (D.C. Cir. 1982) (quotation marks omitted); *see also Nat'l Treasury Emp. Union*, 101 F.3d at 1431 ("Whatever is on the other side of the scale need not be very heavy to outweigh [a] light hardship."). Plaintiff alleges that the regulation at issue "purports to authorize agency officials to 'withhold . . . a portion of a record on the basis of responsiveness.'" Am. Compl. ¶ 59. Thus, any injury from improperly withheld records, if it were to occur, can be remedied by filing a lawsuit if and when this happens in the context of a specific FOIA request. *See Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 236-37 (D.C. Cir. 1988) ("In determining whether a controversy is ripe, one relevant factor is the availability of judicial review at a later stage if the feared result does in fact materialize."); *Nw. Coal. for Alts. to Pesticides v. EPA*, 254 F. Supp. 2d 125, 133 (D.D.C. 2003) (observing that in *Webb* "the Circuit noted that judicial review would be available if and when a FOIA requester was denied the full relief sought."). As an active FOIA requester and litigant, Plaintiff has proven itself especially capable of bringing FOIA lawsuits when Plaintiff deems it necessary to obtain records. *See* Am. Compl. ¶ 6 ("CREW is a frequent FOIA requester[.]"); *id.* ¶¶ 10, 41. Further, the "burden" of filing another lawsuit is simply not enough to create cognizable hardship. *See Webb*, 696 F.2d at 107 (rejecting hardship where the "only hardship Webb will endure as a result of delaying consideration of this issue is the burden of having to file another suit"); *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) (party did not suffer hardship where the "result of postponement [of judicial review] is the burden of participating in further administrative and judicial proceedings"). Moreover, Plaintiff "suffer[s] no practical harm as a result of" the

regulation, which does not command Plaintiff "to do anything or refrain from doing anything." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 810. Plaintiff's desire for a judicial ruling on the meaning of the regulation does not establish hardship. *Id*. at 11 (disagreeing with argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis").

Turning to the other side of the balance, institutional interests counsel against judicial review here. First, there is the persistent judicial interest of economy, "avoiding unnecessary adjudication." *City of Houston*, 24 F.3d at 1430-31. This concern is particularly relevant here where EPA expressly disclaims the meaning Plaintiff attributes to the regulation. And even if the regulation had the meaning that Plaintiff claims – a point which Defendants squarely reject – it is still entirely speculative to presume that EPA would ever withhold a portion of a responsive record sought by Plaintiff on grounds of responsiveness. *See Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 967 (D.C. Cir. 2011) ("[P]rinciples of judicial restraint and efficiency . . . counsel against spending our scarce resources on what amounts to shadow boxing."); *see also Media Access Project v. FCC*, 883 F.2d 1063, 1071 (D.C. Cir. 1989) ("The mere potential for future injury . . . is insufficient to render an issue ripe to review."). And, second, the EPA has an interest in the adjudication of its actions in the context of specific requests rather than on the basis of abstract generalities. *See Alcoa Power*, 643 F.3d at 967 ("whether consideration of the issue would benefit from a more concrete setting"); *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812 (holding that the litigation was not fit for review because "further factual development would significantly advance our ability to deal with legal issues presented" even though the rule at issue was purely legal and a final agency action). In light of Plaintiff's speculative injury, these basic countervailing considerations are sufficient to make Plaintiff's claim unripe. *See Friends of Keeseville*, 859 F.2d at 236 ("Even

when . . . the governmental interest in withholding adjudication is relatively slight, an issue may nevertheless be unripe if the petitioner's interest in immediate resolution is insignificant.").

C. Plaintiff Has An Adequate Alternative Remedy

The availability of a remedy under FOIA for any improper withholding also precludes APA review in this instance. "The APA permits judicial review of 'final agency action[s] for which there is no other adequate remedy in a court.'" *Harvey v. Lynch*, 123 F. Supp. 3d 3, 7 (D.D.C. 2015) (quoting 5 U.S.C. § 704). The absence of another adequate remedy is "an element of the cause of action created by the APA." *Perry Capital LLC ex rel. Inv. Funds v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017). The APA's judicial review provision "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Harvey*, 123 F. Supp. 3d at 7 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). "The alternative remedy 'need not provide relief identical to relief under the APA, so long as it offers relief of the same genre.'" *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (internal citations omitted); *Greenpeace, Inc. v. Dep't of Homeland Sec.*, 2018 U.S. Dist. LEXIS 73246, *32 (D.D.C. May 1, 2018) ("[T]he D.C. Circuit has explained, an 'adequate' remedy does not necessarily mean an 'identical' remedy."). Thus, the courts in this Circuit "uniformly" conclude that they lack jurisdiction over APA claims that seek remedies that are already available under the FOIA. *Feinman v. FBI*, 713 F. Supp. 2d 70, 76 (D.D.C. 2010); *Citizens for Responsibility & Ethics in v. United States DOJ*, 846 F.3d 1235, 1245-46 (D.C. Cir. 2017) ("FOIA offers CREW precisely the kind of 'special and adequate review procedure[]' that Congress immunized from 'duplic[ative]' APA review."); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 308 (D.D.C. 2007) ("A separate action under the APA is unavailable in this case because FOIA provides an adequate remedy."); *Muttitt v. United States Cent. Command*, 813 F. Supp. 2d

221, 228-29 (D.D.C. 2011) (finding APA relief foreclosed "where a plaintiff challenges an alleged pattern and practice of violating procedural requirements of FOIA in connection with the processing of the plaintiff's FOIA requests" because the Court has the power under FOIA "to provide the requested declaratory and injunctive remedies").

The Court should likewise dismiss Plaintiff's APA claim in Count Three because it is a claim upon which relief may not be granted. Count Three essentially alleges that EPA will violate the FOIA if it later withholds a portion of a record because the information is nonresponsive. Am. Compl. ¶ 59. That claim seeks to do preemptively what can be accomplished through an ordinary FOIA lawsuit if and when EPA withholds information on this basis. Plainly, FOIA offers an adequate remedy because it would allow Plaintiff to seek judicial review regarding any information improperly withheld. Accordingly, Plaintiff is foreclosed from bringing this claim under the APA.

IV. The Court Should Dismiss Count Four

In Count Four, Plaintiff attempts to plead "a claim under FOIA in the alternative to Count 3" "[i]nsofar as the claim alleged above in Count 3 is deemed to seek relief challenging an unlawful FOIA policy or practice within the Court's equitable authority under FOIA[.]" Am. Compl. ¶ 62. Count Four should be dismissed because Plaintiff fails to plausibly allege the existence of a policy or practice constituting an ongoing failure to abide by the terms of the FOIA. In addition, for the reasons discussed above in connection with Count Three, Count Four is unripe.

"Policy and practice" FOIA claims are a narrow exception to the principle that FOIA lawsuits must be litigated based on individual FOIA claims (and that such claims are moot once the requested documents are provided). *See Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). Plaintiff's policy and practice claim fails to fit within this narrow exception. In *Payne Enterprises*, for almost two years, officers at Air Force Logistics Command

("AFLC") bases "refused to fulfill Payne's requests for copies of bid abstracts when there was limited competition for a contract," despite there being no applicable FOIA exemption. *Id.* at 494. The officers were admonished by the Secretary of the Air Force's Office, but no firm action was taken to end their recalcitrance. Thus, "[t]he Secretary's inability to deal with AFLC officers' noncompliance with the FOIA, and the Air Force's persistent refusal to end a practice for which it offer[ed] no justification, entitle[d] Payne to declaratory relief." *Id.*

"To state a claim for relief under the 'policy or practice' doctrine articulated in *Payne* . . . a plaintiff must allege . . . facts establishing that the agency has adopted, endorsed, or implemented some policy or practice that constitutes an ongoing 'failure to abide by the terms of the FOIA.'" *Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 293 (D.D.C. 2013) (quoting *Payne Enterprises*, 837 F.2d at 491). Plaintiff alleges no such identifiable policy or practice constituting a "failure to abide by the terms of the FOIA." Instead, as with Count Three discussed above, Plaintiff's claim is premised entirely on a misreading of the regulation at 40 C.F.R. § 2.103(b), which Plaintiff incorrectly believe authorizes EPA officials to withhold portions of records on grounds of responsiveness. Thus, Plaintiff's policy and practice claim rests on a faulty understanding of the pertinent regulation.

Further, Plaintiff's Amended Complaint contains no factual allegations plausibly establishing the existence of a policy or practice of withholding portions of records on grounds of responsiveness. To state a valid claim, a complaint must allege *facts* that plausibly give rise to an entitlement to relief, rather than make conclusory assertions. *See Ashcraft v. Iqbal*, 556 U.S. 662, 679 (2009). But Plaintiff's Amended Complaint does not contain factual allegations to support the elements of this claim. Instead, Plaintiff's policy and practice claim wholly depends upon the validity of its (incorrect) assertion concerning the meaning of the regulation. Indeed, Plaintiff fails

to cite *any* instance in which EPA withheld a portion of a record on grounds of responsiveness. Accordingly, even if Plaintiff's allegations could be understood to identify a policy or practice by EPA, it is not a policy or practice that "constitutes an ongoing 'failure to abide by the terms of the FOIA,'" as is required to bring a policy or practice claim under FOIA. *See Muttitt*, 926 F. Supp. 2d at 293 (D.D.C. 2013) (quoting *Payne Enterprises*, 837 F.2d at 491).

In summary, Plaintiff's policy or practice claim relies on Plaintiff's misinterpretation of the pertinent regulation and, furthermore, Plaintiff's speculation that the authority Plaintiff mistakenly believes is granted by the regulation may someday be used to improperly withhold information from Plaintiff. Plaintiff's allegations are wholly insufficient to state a plausible claim of the existence of a policy or practice and that the "policy or practice will impair the party's lawful access to information in the future." *Payne Enterprises*, 837 F.2d at 293. For these reasons, Count Four should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Amended Complaint.

Respectfully submitted,

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