IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

WILD VIRGINIA, VIRGINIA WILDERNESS COMMITTEE, UPSTATE FOREVER, SOUTH CAROLINA WILDLIFE FEDERATION, NORTH CAROLINA WILDLIFE FEDERATION, NATIONAL TRUST FOR HISTORIC PRESERVATION, MOUNTAINTRUE, HAW RIVER ASSEMBLY, HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT, DEFENDERS OF WILDLIFE, COWPASTURE RIVER PRESERVATION ASSOCIATION, CONGAREE RIVERKEEPER, THE CLINCH COALITION, CLEAN AIR CAROLINA, CAPE FEAR RIVER WATCH, ALLIANCE FOR THE SHENANDOAH VALLEY, and ALABAMA RIVERS ALLIANCE, Plaintiffs, v. COUNCIL ON ENVIRONMENTAL QUALITY and MARY NEUMAYR IN HER OFFICIAL CAPACITY AS CHAIR OF THE COUNCIL ON ENVIRONMENTAL QUALITY, Defendants.	Case No. 3:20-cv-00045-NKM

DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR EXPEDITED BRIEFING and MOTION FOR EXTENSION OF TIME

Three weeks after filing their complaint—and with no prior notice to Defendants—Plaintiffs' have filed a motion for preliminary injunction. The memorandum in support is 108 pages long. Its Table of Authorities cites 120 cases. It contains 260 footnotes. Plaintiffs append

nearly 60 declarations. And yet they seek to expedite Defendants' response. Defendants oppose this request. To the contrary, there are threshold jurisdictional matters that must be heard before—but no later than at the same time as—Plaintiffs' motion. For this good cause, Defendants not only oppose expedition, but also respectfully request an extension of time to respond to Plaintiffs' preliminary injunction motion.

Defendant Council on Environmental Quality (CEQ) recently completed a comprehensive update of the regulations governing implementation of the National Environmental Policy Act (NEPA). 85 Fed. Reg. 43,304 (July 16, 2020). With more than three decades having passed since the last revision of these regulations, the NEPA process had becomes a morass. Outdated procedures from the 1978 regulations were overlaid with a myriad of complex guidance documents, made worse by conflicting case law, wrapped by red tape, and shot-through with confusion and intricacy, forcing agencies to take years to complete steps that Congress thought would be simple and efficient in 1969. Indeed, NEPA was warped in a way that only a lawyer could (and did) love. So CEQ undertook a comprehensive re-analysis. It hit the reset button. Consistent with the original goals of CEQ when last reforming this process in 1978, the NEPA regulations have been reworked to reduce paperwork and delays, as well as honed to foster better decision making, promote consistency, and foster the kind of accountability that the current Byzantine process frustrates. *See* 85 Fed. Reg. at 43,304

Plaintiffs have filed an expansive APA complaint challenging the new NEPA regulations. ECF No. 1. But these new regulations do not govern the *conduct* of the public or regulated entities. They do not authorize "new highway infrastructure, where to log forests, and whether to open up our shores to drilling." ECF No. 30-1 at 1. They do not set clean air or clean water numerical emissions limits. They instead provide redesigned procedures merely to guide the

substantive decision making of other federal agencies—as-yet-unmade decisions that all will be considered and issued at unknown times *in the future*.

Contrary to Plaintiffs' claim of imminent environmental harms, CEQ's new federal procedures will not impact anything touching the public anytime soon. These regulations instead direct federal agencies on how, going forward, they should analyze future infrastructure projects, future regulations, and future agency actions of other kinds. These procedural changes *may* impact decisions made by federal agencies. Or they *may not* impact the ultimate decision of federal agencies at all. NEPA's purpose is to provide information to decision makers; its purpose is not to lock the decision makers into any decision that might impact the environment. So when the new NEPA regulations take effect, they will not cause *any current harm whatsoever*–much less immediate irreparable harm justifying a preliminary injunction and an expedition of the briefing of that motion. No permit will issue on September 14, 2020 (the effective date of the new NEPA regulations) that will begin authorizing new releases of effluent to the water or new emissions to the air. Instead, on September 14, 2020, the agencies will simply need to use the new regulations to solicit and develop information about as-yet non-final agency actions to be decided on and consummated at some point months or years later.

For these very reasons, not only is Plaintiffs' motion for preliminary injunction unfounded and unjustified at this time, but this Court is without jurisdiction to consider Plaintiffs' hypothetical and abstract disputes with CEQ's new regulations at all. Unless and until application of the regulations to a specific decision injures their interests in actual and concrete ways, Plaintiffs are not injured by the mere going into effect of these new regulations governing federal agency processes. Their claims should be dismissed on grounds of both standing and ripeness. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 494, 493 (2009) (holding

plaintiff lacking standing to challenge regulation absent "concrete application that threatens imminent harm to his interests"); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[A] regulation is not ordinarily considered the type of agency action 'ripe for judicial review under the 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.").

While Plaintiffs emphasize that the NEPA regulations take effect on September 14, 2020, they err in suggesting there is urgent need for any resolution of their motion by that date. As noted, on September 14, 2020, federal agencies will merely *begin applying* the new regulations to new NEPA processes. 85 Fed. Reg. at 43, 339 (§ 1506.13). But any final project decisions after applying the new regulations that could conceivably cause concrete injury to Plaintiffs' interests may only occur later. Indeed, such decisions may not happen until distant points in the future.

Moreover, when a federal project decision is later made—and if such a decision allegedly injures Plaintiffs, in a manner fairly traceable to a modification in CEQ's NEPA regulations—that decision can be redressed by judicial review. In short, Plaintiffs will have the ability at the point in time that the APA specifies—*i.e.*, when final agency action issues—to challenge that project (or any application of NEPA to regulations or other kinds of agency adjudications) and the agency's reliance on CEQ's new regulations. *See, e.g.*, *Lujan v. NWF*, 497 U.S. at 894 (noting "case-by-case" resolution of claims is "understandably frustrating" to litigants seeking programmatic change, but "is the traditional, and remains the normal, mode of operation of the courts."). There is simply no emergency posed by the effective date of the regulations that could

plausibly be said to require expedited briefing and hearing of Plaintiffs' *three-week delayed* and sweeping motion for preliminary injunction.

Notably, this is the second time the Southern Environmental Law Center has recently sought an overly hyped emergency injunction against the CEQ's NEPA regulations. In *Southern Environmental Law Center ("SELC") v. Council on Environmental Quality*, SELC—the organization whose lawyer now *represents* the plaintiffs as counsel in this litigation—sought a preliminary injunction to block the closing of the public comment period during the rulemaking.[†] Judge Conrad denied that motion. This was, in part, because SELC's ability to bring later challenges to federal decisions applying the new NEPA regulations meant that SELC was not irreparably injured then. *Southern Environmental Law Center v. Council on Environmental Quality*, --- F. Supp. 3d --- , 2019 WL 1302517, *9, n.12 (W.D. Va. Mar. 18, 2020). And that remains true now. When the new NEPA procedures are used reach a decision truly impacting Plaintiffs, Plaintiffs will have the opportunity to challenge such a decision. Until then, they are not injured.

Regardless, any perceived inconvenience to Plaintiffs posed by the coming effective date is solely the result Plaintiffs' unreasonable delay and unclean hands in seeking emergency injunctive relief. Granting expedited briefing would be inequitable. The NEPA regulations were issued on July 16, and CEQ made clear in the *Federal Register* that they will take effect on

[†] Kimberley Hunter is listed as the lead lawyer on the Preliminary Injunction Motion, *i.e.*, she sits in the first position in the signature block. This signature block omits the affiliations of the lawyers who signed the Motion. But we note that Ms. Hunter's listed address is the address of the Southern Environmental Law Center's office in Chapel Hill North Carolina. *See* https://www.southernenvironment.org/staff/kym-hunter; https://www.southernenvironment.org/about-selc/offices/chapel-hill-nc. The fact that the Southern Environmental Law Center is participating through its lawyer but not as a plaintiff and that this entity's name was not listed on the complaint initiating this action may have had consequences as to whether this matter was handled as a related case pursuant to Standing Order No. 2018-10. But that omission of not adding an eighteenth plaintiff organization to the sixteen Plaintiffs that brought this action should not be permitted to obscure the connection of this case to *SELC v. CEQ*, No. 3:18-cv-00113-GEC and the preliminary injunction motion rejected there.

September 14. 85 Fed. Reg. at 43, 339 (§ 1506.13). Despite having two months' notice of their putatively dire effects, Plaintiffs waited more than month after the regulations issued to file their 100+ pages of briefing and nearly 60 declarations on Defendants with no prior notice, coordination, or cooperation. The ostensible emergency is thus of Plaintiffs' own making. It is no more of an emergency than the prior attempt of aligned litigants and/or their lawyers to try to stop the regulation from issuing in the first place by preventing the comment period from closing. *See Southern Environmental Law Center v. Council on Environmental Quality*, --- F. Supp. 3d --- , 2019 WL 1302517. And it certainly does not justify forcing Defendants to brief, and this Court to decide, the complex issues before the Court on an expedited basis.

Instead, given the foregoing, there is good cause to extend the presumptive Local Rule 11(c)(1) timelines for ordinary motions. Defendants should be able to respond as thoroughly as necessary to the extensive papers submissions Plaintiffs have made. And the Court should be in a position to simultaneously ponder the serious jurisdictional defects in Plaintiffs' complaint. To this end, Defendants will file a motion to dismiss on standing and ripeness grounds this coming Tuesday, August 25, 2020. These jurisdictional concerns should be addressed before—but at least coextensively with— Plaintiffs' motion for preliminary injunction. Indeed, an appropriate dismissal of the Complaint will obviate the need for consideration of the legal, factual, and equitable questions presented in Plaintiffs' preliminary injunction motion.

Defendants therefore cross-move the Court to extend time for their response to Plaintiffs' motion for preliminary injunction and, in light of Defendants' forthcoming motion to dismiss, respectfully request the following schedule for briefing of the parties' crossing motions:

August 18, 2020	Plaintiffs' Motion for Preliminary Injunction
August 25, 2020	Defendants' Motion to Dismiss

September 8, 2020	Plaintiffs' Opposition to Motion to Dismiss, Defendants' Opposition to Motion For Preliminary Injunction
September 15, 2020	Plaintiffs' Reply Supporting Preliminary Injunction, Defendants Reply Supporting Motion to Dismiss

Dated: August 19, 2020

Respectfully submitted,

THOMAS T. CULLEN
United States Attorney

/s/ Krista Consiglio Frith
Assistant United States Attorney
Virginia Bar No. 89088
United States Attorney's Office
P.O. Box 1709
Roanoke, VA 24008
TEL (540) 857-2250
FAX (540) 857-2614
Krista.frith@usdoj.gov

JEFFREY BOSSERT CLARK
Assistant Attorney General
JONATHAN BRIGHTBILL
Principal Deputy Assistant Attorney General
PAUL SALAMANCA
Senior Counsel

/s/Barclay T. Samford
BARCLAY T. SAMFORD
NM State Bar No. 12323
Senior Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Tel: (303) 844-1475
E-mail: clay.samford@usdoj.gov

MATTHEW R. OAKES
Senior Counsel
Environment and Natural Resources Division, Law and Policy Section
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
Tel: (202) 514-2686
E-mail: matthew.oakes@usdoj.gov

CLARE BORONOW
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Tel: (303) 844-1362
clare.boronow@usdoj.gov