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

SOUTHERN ENVIRONMENTAL LAW CENTER, Plaintiff, v. COUNCIL ON ENVIRONMENTAL QUALITY, Defendant.	)	Case No. 3:18-cv-00113

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

The National Environmental Policy Act of 1969 (NEPA) established Defendant Council on Environmental Quality (CEQ) as a federal agency within the Executive Office of the President. Pursuant to its statutory mandate, presidential directive, and its recognized expertise in interpreting NEPA, CEQ is currently engaged in a rulemaking that proposes to update — for the first time in four decades — the regulations implementing NEPA's procedural provisions. The pending motion is an improper attempt by Plaintiff Southern Environmental Law Center (SELC) to misuse the Freedom of Information Act (FOIA) to derail that rulemaking.

The Court should reject that attempt for two independent reasons. First, the Court lacks the power to grant the relief SELC seeks, which is why no court, to our knowledge, has ever enjoined ongoing agency rulemaking pending completion of a FOIA request. Second, SELC has not made the clear showing necessary to justify the extraordinary relief of a preliminary injunction: (1) SELC is not likely to succeed on the merits because CEQ has responded to the FOIA request

in good faith and with due diligence; (2) SELC will suffer no irreparable harm because it and other members of the public may comment on the merits of the proposed rule and will have an opportunity to seek judicial review of any final rule under the Administrative Procedure Act (APA) in an appropriate case where both standing and ripeness can be demonstrated; and both (3) the equities and (4) the public interest weigh in favor of CEQ. The motion should be denied.

II. Factual Background

A. The National Environmental Policy Act

NEPA requires federal agencies to determine and consider the environmental impacts of proposed "major Federal actions." 42 U.S.C. § 4332(2)(C). To oversee implementation of this procedural requirement, NEPA established CEQ within the Executive Office of the President (EOP). *Id*. at §§ 4342, 4344. NEPA gives CEQ the responsibility, among other things, "to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation." *Id.* at § 4344(4).

NEPA is a procedural statute that serves twin aims: obliging a federal agency "to consider every significant aspect of the environmental impact of a proposed action" and ensuring that the agency "will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal quotation marks omitted) (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978); *Weinberger v. Catholic Action of Haw./Peace Educ. Project,* 454 U.S. 139, 143 (1981)). "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

B. CEQ Publishes NEPA Guidelines and Regulations in the 1970s

President Nixon issued Executive Order 11514 in 1970, directing CEQ to "[i]ssue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment." 35 Fed. Reg. 4247 (Mar. 5, 1970). CEQ issued guidelines in 1971 and amended those guidelines in 1973. *See* 36 Fed. Reg. 7724 (Apr. 23, 1971); 38 Fed. Reg. 20550 (Aug. 1, 1973). Although CEQ issued what it intended to be "non-discretionary" guidelines, some agencies viewed the guidelines as advisory and non-binding, and courts struggled to determine how to assess agency compliance with CEQ's guidelines. *See* 43 Fed. Reg. 55978 (Nov. 29, 1978).

To address these concerns, President Carter issued Executive Order 11991 in 1977. This Order directed CEQ to "[i]ssue regulations … after consultation with affected agencies and after such public hearings as may be appropriate" and further ordered federal agencies to "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements." 42 Fed. Reg. 26967 (May 24, 1977). The following year, CEQ published proposed regulations, received and considered hundreds of public comments, and published final regulations. *See* 43 Fed. Reg. at 55978-56007. Less than a year later, CEQ's new mandatory regulations were first addressed by the Supreme Court, which held that "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

Furthermore, as CEQ explained, the law on deference to CEQ has not stood still since *Andrus*. It is now clear that CEQ's regulations are subject to full-on *Chevron* deference:

> "The [CEQ], *established by NEPA with authority to issue regulations interpreting it*, has promulgated regulations to guide [F]ederal agencies in determining what actions are subject to that statutory requirement." [Quoting *Department of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004) (emphasis added)]. Citing 40 CFR 1500.3; *United States v. Mead Corp.*, 533 U.S. 218, 227-30 (2001) (properly promulgated agency interpretative regulations addressing ambiguities or gaps in a

> statute qualify for *Chevron* deference); *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) (applying *Chevron* deference to Federal Communications Commission regulations).

85 Fed. Reg. 1684, 1685-86 (Jan. 10, 2020).

Since the NEPA regulations were promulgated in 1978, CEQ has substantively amended them only once and in one limited respect. *See* 51 Fed. Reg. 15618 (Apr. 25, 1986) (amending 40 C.F.R. § 1502.22).

C. CEQ Proposed Update to the NEPA Regulations

In 2017, President Trump issued Executive Order 13807, directing CEQ within 30 days to "develop an initial list of actions it will take to enhance and modernize the Federal environmental review and authorization process … includ[ing] issuing such regulations, guidance, and directives as CEQ may deem necessary" to ensure optimal interagency coordination and concurrent and timely environmental reviews, provide for use of existing environmental studies, analysis and decisions, and apply NEPA in a manner that reduces unnecessary burdens and delays. 82 Fed. Reg. 40463, 40467-68 (Aug. 24, 2017). In response, CEQ published an initial list of actions and stated its intent to review its existing NEPA regulations in order to identify potential updates and clarifications. 82 Fed. Reg. 43226, 43227 (Sept. 14, 2017).

In June of 2018, CEQ published an Advance Notice of Proposed Rulemaking (ANPRM) requesting comment on potential revisions to the regulations. *See* 83 Fed. Reg. 28591 (June 20, 2018). CEQ received more than 12,500 comments in response, including a comment letter from SELC, which are available for review online. *See* https://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=CEQ-2018-0001&refD=CEQ-2018-0001-0001 (Docket ID: CEQ-2018-0001; RIN: 0331-AA03).[1] On January 10, 2020, CEQ issued a Notice of

[1] SELC's comment is publicly available at https://www.regulations.gov/document?D=CEQ-2018-0001-11215.

Proposed Rulemaking (NPRM) to update its NEPA regulations. 85 Fed. Reg. 1684 (Jan. 10, 2020). CEQ hosted public hearings on the proposed rule on February 11 in Denver and on February 25 in Washington, D.C. *Id.* at 1684. The NPRM gave the public 60 days to comment, or until March 10, 2020. *Id.* The NPRM describes in detail the proposed regulatory changes and the rationale undergirding the proposed changes. *Id.* at 1691-1712.

To aid the public's review of the proposed changes, CEQ has made available on its websites a plethora of relevant materials and links regarding those changes. *See* NEPA Modernization, https://www.whitehouse.gov/ceq/nepa-modernization/; https://www.nepa.gov. After CEQ has considered all of the comments that it receives at the public hearings and in writing, it will consider development of a final rule. *See* 5 U.S.C. § 553(c).

III. Procedural History

A. SELC's FOIA Requests

Following CEQ's publication of the ANPRM, on July 19, 2018, SELC submitted its first FOIA request as follows:

> Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and 40 C.F.R. § 1515 *et seq.*, the Southern Environmental Law Center ("SELC") respectfully requests all records in the possession of the Council on Environmental Quality ("CEQ") that in any way relate to CEQ's Advance Notice of Proposed Rulemaking ("ANPRM") titled "Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," published in the *Federal Register* on June 20, 2018. 83 Fed. Reg. 28591. SELC requests all records generated between January 2017 and the date this request is filled.

That same day, CEQ confirmed receipt of SELC's FOIA request and requested SELC to provide the request on "organizational letterhead" because SELC was seeking preferential treatment in the assessment of fees as a special requestor. SELC did not provide CEQ with a copy of its request on organizational letterhead until September 5, 2018, when SELC submitted a new FOIA request.

Instead of providing CEQ a copy of the July 2018 FOIA request on organizational letterhead, SELC substantially broadened its FOIA request. In particular, SELC sought all records

that in any way relate to CEQ's proposed rulemaking to update its NEPA implementing regulations, including records related to the ANPRM:

> Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and 40 C.F.R. § 1515 *et seq.*, the Southern Environmental Law Center ("SELC") respectfully requests all records in the possession of the Council on Environmental Quality ("CEQ") that in any way relate to CEQ's proposed rulemaking to update CEQ's implementing regulations for the procedural provisions of the National Environmental Policy Act ("NEPA"), including but not limited to all records that in any way relate to CEQ's Advance Notice of Proposed Rulemaking ("ANPRM") titled "Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act," published in the *Federal Register* on June 20, 2018. 83 Fed. Reg. 28591.

As exhaustively detailed by Howard C. Sun in his First and Second Declarations, CEQ immediately began working on SELC's FOIA requests, which cover the date range of January 1, 2017 to September 7, 2018. *See* ECF Nos. 13-1, 24-1.

B. SELC Files Suit

Despite the breadth of its request, SELC rushed to litigation a mere two months later. On November 30, 2018, SELC filed this action under FOIA, seeking declaratory and injunctive relief, as well as attorneys' fees and costs. *See* ECF No. 1. On December 26, 2018, CEQ filed a Motion to Stay Proceedings due to the shutdown of the federal government, and this Court granted the motion. ECF Nos. 6, 7. Once the shutdown ended, CEQ filed a timely Answer on February 2, 2019. ECF No. 9. Two weeks later, SELC filed a Motion for Judgment on the Pleadings under Federal Rule 12(c). ECF No. 11. This Court denied SELC's motion and issued a Memorandum Opinion and Order on September 16, 2019. ECF Nos. 13, 14, 18, 19. Thereafter, the Court directed the parties to file cross-motions for summary judgment. ECF No. 21. The parties completed summary judgment briefing on February 12, 2020. ECF Nos. 22-26.

The very next day, SELC filed the instant Motion for Preliminary Injunction, asking this Court to enjoin CEQ from closing the comment period for its NPRM. ECF Nos. 27-28. Specifically, the motion asks the Court to protect the asserted status quo by:

> (1) ordering CEQ to produce the documents at issue before the close of the public comment period for the rulemaking;
>
> (2) ordering CEQ to delay the close of the public comment period for the rulemaking until CEQ anticipates completing SELC's request — November 2020; or
>
> (3) enjoining CEQ from closing the comment period until it provides SELC with the requested documents.

ECF No. 28 at 26.

IV. Argument

SELC's motion for a preliminary injunction should be denied for two independent reasons: the Court lacks both jurisdiction and the remedial power to enjoin agency rulemaking, and SELC has not made the clear showing necessary to justify the extraordinary relief of a preliminary injunction.

A. This Court Lacks Jurisdiction Over CEQ's NEPA Rulemaking and Lacks the Power To Enjoin It (Even If Jurisdiction Existed) Because The APA Is The Exclusive Remedy, No APA Challenge Has Been Brought, and CEQ's NEPA Rulemaking Is Not Yet Final.

At the threshold, this Court cannot give SELC what it is asking for – an injunction stopping the rulemaking process – because (1) SELC has not established jurisdiction to enjoin CEQ's ongoing NEPA rulemaking because SELC has not filed a suit in this Court challenging the rulemaking that is underway—it has merely filed a FOIA action; and (2) NEPA does not provide a private right of action and therefore the Administrative Procedure Act (APA) provides the exclusive means for challenging agency rulemaking and this suit runs afoul of the APA in numerous respects. *See Muhly v. Espy*, 877 F. Supp. 294, 298 (W.D. Va. 1995) (citing *Lujan v.*

National Wildlife Federation, 497 U.S. 871, 882 (1990); *Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

The APA (not FOIA or NEPA) provides the basic procedures for NEPA rulemaking. *See* 5 U.S.C. §§ 551-559 (especially § 553). And it is the APA that provides the right of review for that rulemaking. *Id.* at § 702, § 706.

Critically for present purposes, APA § 704 limits the universe of actions subject to review by the district court to only those "[a]gency actions made reviewable by statute and *final* agency action for which there is no other adequate remedy in court." *Id.* at § 704 (emphasis added). As pertaining to CEQ's ongoing NEPA rulemaking, the APA therefore precludes judicial review of (and thereby judicial intervention into) the agency's internal rulemaking processes and deliberations because the rulemaking process is not "final agency action."

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court explained what it means for an agency action to be final: "First, the action must mark the "consummation" of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178-79 (internal citations omitted). Here, neither criteria is met, and SELC does not contend otherwise. Because it is indisputable that the NEPA rulemaking is ongoing, the APA precludes the Court from exercising any authority over the non-final rulemaking.

Relatedly, the APA's minimum procedural requirements, along with any additional procedures that agencies impose on themselves, provide the "maximum procedural requirements" governing rulemaking. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015) (citing *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519, 549 (1978)). Beyond those

requirements, the Supreme Court has said, a court generally cannot impose its views "on which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* (citing *Vermont Yankee*, 435 U.S. at 549). "To do otherwise would violate 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.'" *Id.* (citing *Vermont Yankee*, 435 U.S. at 544). Here, CEQ's determination of when to close its rulemaking comment period is a quintessential procedural matter, and one which a court is not supposed to disturb, even if a court were reviewing a final agency action.

This Court therefore (1) lacks jurisdiction to enjoin CEQ's rulemaking process; and (2) under the finality requirement of the APA and under the *Vermont Yankee* doctrine (a special landmark in administrative law that provides that courts cannot augment the APA's procedures with procedures invented by parties litigating against the government), this Court lacks the power to order the injunctive relief sought, even if a properly-filed APA action challenging the NEPA rulemaking had been filed in this Court, which has not even occurred. [2]

B. FOIA Does Not Give Courts Jurisdiction to Interfere in APA Rulemakings.

The FOIA statute does not provide this Court with jurisdiction or authority to enjoin agency rulemaking. FOIA grants the public certain rights to agency information, and provides mechanisms for obtaining that information. But FOIA does not provide courts with an independent grant of jurisdiction over non-final APA rulemakings outside the strictures of the APA. Nor does FOIA allow courts to impose on those ongoing APA rulemakings the court's views on the procedures that the agency must follow during the rulemakings. Quite the opposite: because the

[2] The Court has jurisdiction over CEQ's document production schedule in response to the FOIA request, but not to the extent of interfering with the rulemaking process. Moreover, for the reasons stated below in Section D, SELC has not met its burden of establishing any of the four factors set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008) necessary to justify the injunction it seeks.

APA expressly prohibits jurisdiction over non-final agency actions, any contemplated injunction in a FOIA action must also adhere to these limitations because "a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *United States v. Oakland Cannabis Buyers' Co-op*., 532 U.S. 483, 497 (2001) (internal quotations omitted).

SELC's authority for seeking an order delaying or enjoining the rulemaking proceedings apparently draws from *dicta* in *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 20 (1974) (*Bannercraft*), where the Court weighed arguments both for and against using its equitable powers to enjoin agency action pending the resolution of a FOIA claim. 415 U.S. at 18-19. Ultimately, however, the Court's discussion was clearly *dicta* because the Court found it "unnecessary" to decide whether, or under what circumstances, it would be proper to enjoin agency action pending resolution of a FOIA claim. *Id.* at 20. Instead, the Court ruled narrowly that allowing contractors in a suit under the Renegotiation Act of 1951 to use FOIA to interfere in the procedures established in the statute would frustrate enforcement of that statute. *Id.* Critically, the Renegotiation Board's functions are exempted from the APA, so the Court had no occasion to weigh in on the APA's role in precluding the requested relief. *Id.* at 14.

At best for SELC, *Bannercraft* stated that, as a general matter, FOIA does not limit "the inherent powers of an equity court." 415 U.S. at 20. Regardless of that *dicta*, the Supreme Court did not say that a district court's equitable powers extend to *every* action under FOIA to enjoin ***every*** possible agency action, even every *final* agency action, particularly where, unlike here, the agency action is not governed by the APA. The APA makes clear that the "inherent powers of an equity court" do not extend to exercising jurisdiction over a non-final agency action. *See Village of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013). The *Bannercraft* Court's general statement regarding courts' inherent authority *in a case not even*

governed by the APA does not save SELC's argument. Put differently, where a statute (like the APA) expressly forbids something, another statute (like FOIA) cannot be read to ***implicitly*** allow it.

In sum, the APA precludes any basis for delaying or enjoining CEQ's ongoing rulemaking, and nothing in FOIA or Supreme Court precedent provides otherwise.

C. Even If Courts in FOIA Actions Have Jurisdiction to Enjoin Ongoing Agency Rulemakings, This Court Should Decline to Exercise That Jurisdiction.

Even if the APA does not preclude the relief that SELC seeks, the logic of *Bannercraft* does. In holding that the district court and the court of appeals should ***not*** have exercised jurisdiction to enjoin the Renegotiation Act proceedings, *Bannercraft* emphasized that the plaintiffs first sought judicial intervention through FOIA rather than exhausting the administrative process. *Id.* at 20-21. If short-circuiting that administrative process were to be sanctioned, the Supreme Court observed, the nature, character, and the "entire atmosphere of the [Renegotiation Act] process" "would be supplanted and defeated by a FOIA suit." *Id.* at 20-21. The Supreme Court expressed concern that, if parties were permitted to use FOIA and injunctive relief to halt agency proceedings, FOIA could be transformed into a "tool of discovery … over and beyond that provided by the regulations" issued by the agency for its proceedings. *Id.* at 24. The Supreme Court stressed that FOIA was not designed to provide discovery or disclosure to interested parties or to assist those parties in present or future litigation. *Id.* at 22; *see also Columbia Packing Co.*, 563 F.2d at 499 ("[I]t is settled that the disclosure provisions of FOIA are not a substitute for discovery and a party's asserted need for documents in connection with litigation will not affect, one way or the other, a determination of whether disclosure is warranted under FOIA.").

In short, *Bannercraft* held that the lower courts should not have exercised jurisdiction over the Renegotiation Act process because, when the statutory framework demands completion of the

administrative process before judicial intervention (as the APA does in precluding judicial review of non-final agency action), a plaintiff should not be permitted to side-step Congress' design and frustrate an agency's mandate by seeking judicial interference through FOIA. *Id.*

1. FOIA Should Not Be Used To Supplant The APA Rulemaking Process.

For reasons similar to those expressed by the Supreme Court in *Bannercraft*, this Court should not permit SELC to weaponize FOIA to indirectly challenge CEQ's NEPA rulemaking before that administrative process is even complete.

First, CEQ is engaging in rulemaking under the APA; it not engaging in an enforcement action against SELC or any other person or otherwise adjudicating controversies with those persons. In every other case in which a court has exercised jurisdiction and considered enjoining agency action, the agency action at issue arose out of a backward-looking matter, controversy, or enforcement proceeding between that agency and a private party. By definition, rulemaking is forward-looking: under the APA, a "rule" is "an agency statement of general or particular applicability and ***future*** *effect*." 5 U.S.C. § 551(4) (emphasis added); *see also id.* at § 551(5) ("'rule making' means agency process for formulating, amending, or repealing a rule"). Under the APA, that process is designed to "proceed expeditiously without interruption for judicial review" until it is final. *Bannercraft*, 415 U.S. at 20.

Second, just as considered in *Bannercraft*, SELC has alternative avenues for relief, rendering it unnecessary for this Court to interrupt the agency's rulemaking process. 415 U.S. at 23. Specifically, to the extent that SELC disagrees with CEQ's proposed rule, SELC may submit written comments expressing its data, views, or arguments. 5 U.S.C. § 553(c); 85 Fed. Reg. at 1684 ("CEQ invites comments on the proposed revisions."). If CEQ finalizes its rulemaking, SELC may (assuming other jurisdictional prerequisites are met) challenge the final rule under the

APA in an appropriate case where it can otherwise meet the Article III justiciability requirements and otherwise plead a proper lawsuit in the administrative law area. 5 U.S.C. § 704; *Bannercraft*, 415 U.S. at 20-21. Even SELC recognizes that it will be able to seek relief for any future harm under the APA. *See* ECF No. 28 at 21.

SELC argues that it might be precluded as a prudential matter from raising issues in a subsequent APA challenge if it fails to raise those issues during the comment period. *Id.* (citing *Pleasant Valley Hosp., Inc. v. Shalala*, 32 F.3d 67 (4th Cir. 1994)). But SELC does not identify a single litigation position that it would forfeit in future APA litigation if it cannot have its entire FOIA production now. Even if SELC does not have all of the documents it desires, there is nothing preventing SELC from raising an issue of concern to CEQ. Moreover, any bar on raising an issue during an APA challenge that was not raised during the administrative process is only a prudential bar. *See Pleasant Valley*, 32 F.3d at 70. Therefore, even if SELC were to discover a new issue as a result of newly disclosed documents, SELC retains the ability to persuade a court that it would have raised the issue during the rulemaking proceedings had it discovered the issue earlier. *Id*. More pointedly, however, SELC's argument amounts to an assertion that it must be able to obtain the equivalent of complete discovery through FOIA before commenting on any ongoing rulemaking. But that assertion must fail because it is contrary to the Supreme Court's statement in *Bannercraft* that FOIA not be used as a tool for discovery. 415 U.S. at 24; *see also Columbia Packing*, 563 F.2d at 500 ("FOIA was not enacted to provide litigants with an additional discovery tool.").

Permitting SELC to stall CEQ's rulemaking through an injunction under FOIA rather than pursuing a claim under the APA once the rulemaking process is complete encourages the very delay through resort to preliminary litigation over a FOIA claim the Supreme Court cautioned

against in *Bannercraft*. 415 U.S. at 23. Such delay harms CEQ, because it would be stymied from complying with its mandates under NEPA and Executive Order 13807.

Third and finally, if SELC is permitted to turn the FOIA statute into a substantive sword instead of a beacon of disclosure, the statute will devolve into a mechanism to grind the rulemaking process of any federal agency to a halt. If using FOIA as the equivalent of a discovery tool is an improper use of the statute as the government submits, then using FOIA as a tool to thwart agency rulemaking *must be* improper because it is far more extreme. SELC's perversion of FOIA greatly exceeds what *Bannercraft* contemplated (even assuming any intrusion into non-final agency action is appropriate at all) and illustrates precisely why this Court lacks jurisdiction to enjoin CEQ from engaging in lawful rulemaking. Simply put, this case is beyond limits conceivable even under the framework of the dicta in *Bannercraft*, and the Court should not exercise jurisdiction over this requested relief.

2. No Court Has Ever Granted the Unprecedented Relief Sought By SELC.

Although the cases cited by SELC freely invoke the proposition that courts retain "inherent equitable jurisdiction" under FOIA, none of those cases addressed whether a court could or should derail a non-final ***rulemaking*** until the agency could complete production of records under FOIA.[3] Instead, each of those cases arose from a discrete dispute between an administrative agency and a citizen who sought records under FOIA to advance his own litigation occurring before an agency in a quasi-adjudicatory mode. And virtually every court to address the issue, even in a quasi-adjudicatory setting has declined to enjoin agency action under the guise of FOIA. *See, e.g., Lewis*

[3] Apart from a footnote (in an otherwise inapplicable decision) stating that "FOIA does not limit the inherent powers of an equity court to grant relief," *Sears v. Gottschalk*, 502 F.2d 122, 128 n.13 (4th Cir. 1974), no cases in the Fourth Circuit address the question of jurisdiction to issue collateral injunctive relief under FOIA, let alone in an APA rulemaking. Nor do any Fourth Circuit FOIA cases grapple with the APA § 704 finality or *Vermont Yankee* implications of relief like what SELC is seeking here.

v. Reagan, 660 F.2d 124 (5th Cir. 1981) (denying injunction where wife of missing pilot sought records from the Air Force of her husband's plane crash and sought to enjoin Air Force from convening hearing to review husband's Missing in Action status); *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91, 92 (D.C. Cir. 1972) (summarily reversing district court's enjoining NLRB from proceeding with a complaint of unfair labor practices and finding meritless Sears' argument that it could not "meaningfully participate in the unfair labor practice charge without the requested information"); *Lennon v. Richardson*, 378 F. Supp. 39 (S.D.N.Y. 1974) (denying John Lennon an injunction to halt deportation proceedings pending FOIA request seeking records relevant to non-priority cases); *United Tel. Co. v. FCC*, 375 F. Supp. 992 (M.D. Pa. 1974) (denying injunction to stay hearing before the FCC until after FCC complied with FOIA request seeking records giving rise to hearing); *see also e.g.*, *Tartan Marine Co. v. NLRB*, 446 F. Supp. 1174 (M.D.N.C. 1978); *Production Molded Plastics, Inc. v. NLRB*, 408 F. Supp. 937, 939 (N.D. Ohio 1976); *Southwest Motor Freight, Inc. v. NLRB*, 411 F. Supp. 1019, 1020 (E.D. Tenn. 1976); *Howard Johnson Restaurant, Inc. v. NLRB*, No. Civ. 77 124, 1977 WL 1700 (W.D.N.Y. Apr. 14, 1977).

Even in the rare circumstance where a court has enjoined ongoing agency proceedings pending the disclosure of documents under FOIA, the circumstances are so unique that the decisions are of no use here. In *St. Elizabeth's Hosp. v. NLRB*, 407 F. Supp. 1357 (N.D. Ill. 1976), the NLRB refused to provide copies of its investigative materials in six consolidated cases before the Board, even after plaintiff had exhausted its administrative remedies in pursuing review of the denial. *Id.* at 1358. At the same time the NLRB indicated it would not exercise its full prosecutorial powers over the cases because it thought it would have to take inconsistent positions in those consolidated cases. This abdication of prosecutorial authority left the charging parties themselves with a "substantial prosecutorial task," making the sought-after investigative materials

necessary. *Id.* It was in view of these "narrow facts" that the district court preliminarily enjoined the agency's proceedings pending the disclosures. *Id.* at 1359.

Such unique facts are not presently before this Court. Nor is this a situation like *St. Elizabeth's*, where the agency refused to provide the requested materials and the party seeking the disclosures had exhausted its administrative remedies in pursuing review of the denial. Instead, CEQ has disclosed thousands of pages of requested documents and is working to produce more.

The only other case we can find where a court in a FOIA action enjoined agency proceedings pending disclosure of the sought-after documents is *Columbia Packing Co., Inc. v. U.S. Dep't of Agriculture*, 563 F.2d 495 (1st Cir. 1977). Importantly, the court there did not enjoin agency rulemaking. Rather, the court declined to disturb the injunction of an administrative proceeding to withdraw federal inspection services from plaintiff company pending disclosure of records where the injunction would no longer have any effect. The court emphasized that injunctions of this nature must only issue if without the records, "the litigant faces a probability of very serious, specific injury which cannot be averted by any of the administrative remedies available in the course of the proceeding." The court also noted that the issue of whether it was proper to enjoin agency proceedings was "largely academic" because the court of appeal's decision requiring disclosure of the documents would overtake the need for the injunction and the injunction therefore would have "little further effect." *Id.* at 501. Notably, the court of appeals also recognized that the question of whether a court may issue an injunction halting agency proceedings in a FOIA action is "exceedingly close" and "emphasize[d] that injunctions of this nature are not to be entered routinely." *Id.* Thus, even in the rare case where an injunction to halt an agency adjudication in a FOIA case was upheld, the case hardly can be read to endorse the practice generally, let alone in the context of an APA rulemaking.

Nor could the 1977 *Columbia Packing* decision have taken proper account of the Supreme Court's 1997 decision in *Bennett v. Spear*, explaining the APA's finality requirement, or even its 1978 decision in *Vermont Yankee*, establishing the exclusivity of the procedural ceilings and floors set out in the APA. Yet this Court is now bound by those seminal decisions that form key pillars of administrative law continuing into 2020.

Moreover, any jurisdictional analysis by the courts in the cases SELC cites is either scant or absent altogether. *See e.g.*, *Columbia Packing Co.*, 563 F.2d at 500 (devoting three sentences to jurisdiction and proclaiming with no analysis that "the court below was not without power to issue collateral injunctive relief if circumstances warranted"); *St. Elizabeth's Hosp.*, 407 F. Supp. at 1358 (devoting a single sentence to jurisdiction with no analysis at all: "This court clearly has jurisdiction in the present situation."); *Lewis*, 660 F.2d at 128 (devoting a single paragraph to the issue of jurisdiction and concluding that, because other courts had exercised jurisdiction, "[w]e too now hold that a district court has jurisdiction to enjoin agency action for violation of an FOIA claim"); *Sears, Roebuck & Co.*, 473 F.2d at 93 (devoting two sentences to the issue of jurisdiction and opining that "it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue"). And in that scant analysis, none of the courts analyzed whether a court in view of the APA may exercise jurisdiction over a non-final agency action.

In sum, even assuming (*arguendo*) that the APA does not preclude the court from exercising jurisdiction over a non-final agency rulemaking (and the government submits that under current precedent the holdings of the Supreme Court are clearly to the contrary of SELC's position), the logic of *Bannercraft* and the precedent applying that decision also weigh heavily in favor of the Court declining to exercise jurisdiction over CEQ's ongoing NEPA rulemaking.

D. SELC Cannot Make Any of the Necessary Showings for a Preliminary Injunction.

SELC's Motion for Preliminary Injunction should be denied for the additional, independent reason that SELC cannot establish any of the four factors set forth in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). A preliminary injunction is "an extraordinary remedy never awarded as of right." *Id.* at 24; *accord Munaf v. Green*, 553 U.S. 674, 689-90 (2008). A plaintiff seeking a preliminary injunction bears the burden of proving all of the following factors:

[1] that he is likely to succeed on the merits,

[2] that he is likely to suffer irreparable harm in the absence of preliminary relief,

[3] that the balance of equities tips in his favor, and

[4] that an injunction is in the public interest.

Winter, 555 U.S. at 20; ECF 3-1 at 5; *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

SELC cannot meet its burden here.

1. SELC Is Not Likely to Succeed on the Merits of Its FOIA Complaint.

As the Court is aware, the parties have filed cross-motions for summary judgment and have extensively briefed the merits of the pending FOIA case. *See* ECF Nos. 22, 23, 24, 25, 26. CEQ incorporates by reference its prior filings as well as the declarations of CEQ's Attorney Advisor and FOIA Public Liaison, Howard C. Sun. *See* ECF Nos. 13-1, 24-1. Without repeating all of those arguments here, in short, SELC is unlikely to succeed on the merits of its FOIA action because CEQ has put forth, and continues to put forth, a good-faith effort and is diligent in

processing and producing responsive records pursuant to SELC's request, which is all the law requires.

FOIA requires a governmental agency to make properly requested documents "promptly available" to a requestor. 5 U.S.C. §§ 552(a)(3)(A), 552(a)(6)(C)(i). FOIA, however, does not define "promptly available," nor does it proscribe any time limitation for production. In its briefing on summary judgment, SELC misstates the meaning of "promptly available." *See* ECF No. 25 (SELC erroneously argues that the "exceptional circumstances" standard is applicable to the "promptly available" standard.) The correct legal standard evaluates whether an agency meets its FOIA obligations under the unique and particular facts of each case. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Homeland Security*, 895 F.3d 770, 783 (D.C. Cir. 2018); *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Dir. 1976); *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013) ("*CREW*"). The "touchstones" of whether an agency is in compliance with FOIA are "good faith effort and due diligence." *Judicial Watch*, 895 F.3d at 783 (quoting *Open America*, 547 F.2d at 616 (internal quotations omitted)).

Good faith and due diligence require the agency "to conduct a reasonable search for responsive records," "using methods which can be reasonably expected to produce the information requested." *Carter, Fullerton & Hayes, LLC v. FTC*, 601 F. Supp. 2d 728, 734 (E.D. Va. 2009) (quoting *McCoy*, 2006 WL 463106 at *5 (N.D. W.Va. Feb. 24, 2006)). "An agency may prove the reasonableness of its search through affidavits of responsible agency officials as long as the affidavits are relatively detailed, nonconclusory and submitted in good faith." *Id.* Here, CEQ has put forth, and continues to put forth, a good-faith effort and is diligently identifying, processing, and producing responsive records pursuant to SELC's extremely broad FOIA request. And

Howard C. Sun's declarations confirm CEQ's efforts. To date, CEQ has made five productions to SELC on a rolling basis as follows:

- May 15, 2019: 470 pages containing 736 redaction instances pursuant to 5 U.S.C. § 552(b)(6) and 241 redaction instances pursuant to 5 U.S.C. § 552(b)(5);
- September 19, 2019: 353 pages containing 572 redaction instances pursuant to 5 U.S.C. § 552(b)(6) and 287 redaction instances pursuant to 5 U.S.C. § 552(b)(5);
- December 17, 2019: 459 pages containing 837 redaction instances pursuant to 5 U.S.C. § 552(b)(6) and 279 redaction instances pursuant to 5 U.S.C. § 552(b)(5);
- January 31, 2020: 643 pages containing 2 redaction instances pursuant to 5 U.S.C. § 552(b)(2), 869 redaction instances pursuant to 5 U.S.C. § 552(b)(6), and 522 redaction instances pursuant to 5 U.S.C. § 552(b)(5).
- February 26, 2020: 851 pages containing 549 redaction instances pursuant to 5 U.S.C. § 552(b)(5) and 781 redaction instances pursuant to 5 U.S.C. § 552(b)(6).

In total, CEQ has produced 2,776 pages that contain some 5,675 unique redactions based on exemptions under FOIA. At present, CEQ maintains that "the speed at which the team processes a large review inevitably would increase as progress is made" and production will be complete by November 2020. Second Declaration of Howard C. Sun, ECF No. 24-1 at ¶ 22. CEQ committed to providing documents "on a monthly basis beginning January 2020" and it has delivered. *Id.* CEQ had also been processing the coding of the second set of search results totaling 4,471 unique results as other CEQ staff continue work on interagency coordination, redaction, and production of the original search results. However, as of mid-February 2020, CEQ completed 100 percent of the coding and searching of all records, and what remains is 26,972 pages of digital records and the 848 pages of paper records, to be reviewed and produced on a monthly basis until November 2020. This remaining 26,972 pages for review accounts for 38.8 percent of all digital pages that CEQ needs to review across all currently open FOIA cases at CEQ in the review phase. CEQ is making the records promptly available as required by FOIA. As CEQ Declarant Howard C. Sun notes, SELC was 60th in the queue when it submitted its revised FOIA request on

September 5, 2018. As of February 26, 2020, it is 24th in the queue. *See* Third Declaration of Howard Sun. Further, CEQ's search of the total 7,066 potentially responsive digital records in SELC's FOIA request amounts to 14.8 percent of all digital records searched across all FOIA cases at CEQ since SELC submitted this request on September 5, 2018. Since September 5, 2018, CEQ has closed 184 FOIA requests, 7 appeals, and 19 consultations. *Id.*

Put simply, this is not a case where the "government [is] sitting on its hands for months at a time and doing nothing." *Coleman v. Drug Enf't Admin.*, 714 F.3d 816, 828 (4th Cir. 2013). CEQ has provided in great detail its actions to respond promptly to SELC's broad FOIA request. CEQ is reviewing and producing records as quickly as it reasonably can in light of its modest budget, tiny workforce, and competing demands on its limited employees' time and resources. CEQ has acted reasonably, in good faith, and with due diligence, and SELC provides no evidence to the contrary. FOIA does not require an agency to cease all other operations to respond to FOIA requests. CEQ has complied with FOIA's requirement that it produce records "promptly," and SELC cannot establish that it is likely to succeed on the merits here.

2. SELC Will Not Suffer Irreparable Harm If CEQ Proceeds with Rulemaking.

Even if SELC could establish it is likely to succeed on the merits, which it cannot, SELC does not establish it will be irreparably harmed if CEQ's rulemaking proceeds without SELC first receiving all non-exempt records responsive to its FOIA request. To establish irreparable harm, the movant must make a "clear showing" that it will suffer harm that is "neither remote nor speculative, but actual and imminent." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 (4th Cir. 2019) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)); *TechINT Solutions Grp., LLC v. Sasnett*, 2018 WL 4655752, *6 (W.D. Va. Sept. 27, 2018) (Dillon, J.). "Additionally, the harm must be irreparable, meaning that it

'cannot be fully rectified by the final judgment after trial.'" *Mountain Valley Pipeline LLC*, 915 F.3d at 217 (quoting *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 680 (7th Cir. 2012)). That standard is to be strictly applied in this case, where SELC seeks to use FOIA to interrupt agency action. *See, e.g.*, *Sears v. NLRB*, 473 F.2d at 93 ("it is only in *extraordinary circumstances* that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue.") (emphasis added)); *United Tel.*, 375 F. Supp. at 995-96 ("While it has been stated that one who seeks disclosure of agency information does not have to establish a need for the information in order to invoke the remedies specified in the F[O]IA, it is quite another matter to invoke the power of a district court in order to intervene in the affairs of a Congressionally-created agency.") (internal citations omitted).

Applying this exacting standard, it is unsurprising that the overwhelming majority of courts, when asked to enjoin agency action pending a FOIA request, have declined to do so because the moving party could not establish the sort of irreparable harm necessary to warrant so extraordinary a remedy. In *Columbia Packing*, for instance, the First Circuit explained just how serious and irreparable any harm alleged must be for a court to enjoin collateral agency action pending a FOIA request:

> [T]he *very serious step* of enjoining an agency proceeding should not be taken merely because the maximum degree of disclosure permitted by the FOIA has not been ordered in time for possible use in that ongoing agency proceeding. We think it must ordinarily be demonstrated, at least, that without access during the proceeding to the information sought, the litigant faces a *probability of very serious, specific injury which cannot be averted by any of the administrative remedies available* in the course of the proceeding."

563 F.2d at 500 (emphasis added). In *Columbia Packing*, the plaintiff faced "forced bankruptcy when its inspection services are withdrawn," but the court found it to be speculative whether the

plaintiff's inability to use the requested records in the administrative proceeding would cause this dire result. *Id.* at 501.

Similarly in *Sears Roebuck*, the D.C. Circuit found that the harm suffered by plaintiff, failure of the NLRB to provide documents under FOIA for use in an unfair labor practices hearing, fell well short of irreparable harm. 473 F.2d at 93. The court recognized just how high a burden a plaintiff must carry to enjoin an agency proceeding, even one of much less magnitude than the agency rulemaking at issue here:

> It may be that Sears will be held entitled to the documents under the Information Act, and it may be that its possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a *different order from the kind of irreparable injury required to interrupt an administrative proceeding*.

Id. (emphasis added). In *Lewis*, the Fifth Circuit quoted the language from *Sears Roebuck*, adding "that the mere pendency of requests under the Freedom of Information Act, or appeals from denials of access to information thereunder, do not give rise to the irreparable injury necessary to enjoin status-review proceedings [before the Air Force under the Missing Persons Act]." 660 F.2d at 128 (emphasis added).

In this case, SELC claims that it will suffer irreparable harm in three ways: (1) it will be deprived of an opportunity to comment on CEQ's NPRM; (2) it will be hampered in its efforts to fully educate others about the proposed rulemaking; and (3) it will be disadvantaged in future litigation regarding the rulemaking. But SELC will not suffer any of those allegedly irreparable injuries if it does not obtain the requested records before the close of the comment period.

a. SELC Is Not Being Deprived of an Opportunity to Comment on the NPRM.

Regarding the first alleged injury, SELC is not being deprived of an opportunity to comment on CEQ's NPRM. SELC is using this red-herring argument to hold hostage the rulemaking process.

i. SELC Can Effectively Comment on the NPRM Without the Documents.

SELC desperately tries to connect its FOIA request for documents related to the ANPRM and the rulemaking with its ability to "provide fully-informed, meaningful comments" on the NPRM. But it cannot. SELC argues that it is irreparably harmed because, without the documents it has requested, it cannot make "intelligent, informed, meaningful comments," regarding the NPRM. But SELC never explains *how*, without the requested documents, it is precluded from commenting on the proposed rule. The APA requires CEQ to provide sufficient information in the NPRM to enable interested or affected parties to meaningfully comment on the proposed rules, and it has done so. *See, e.g., Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019) ("To meet the rulemaking requirements of section 553 of the APA, an agency must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully."). Every day, commenters submit intelligent, meaningful comments on agencies' notices of proposed rulemaking based on the information in the notices. In fact, despite its assertion that it cannot meaningfully participate in the public comment period for the proposed rule, SELC has already provided comments. On February 25, 2020, two representatives of SELC, including one counsel of record for SELC in this case, Kym Hunter, and Megan Kimball, participated in CEQ's public hearing on the proposed rule in Washington, D.C. and provided both oral and written comments opposing the proposed rule. *See* First Declaration of Michael R.

Drummond and attached exhibits. And SELC has unfettered access to the over 12,500 comments CEQ received in response to the ANPRM. Those comments are publicly available for SELC or any other member of the public to review, analyze, and consider. *See supra*.

SELC argues it cannot offer meaningful comments to the NPRM because the documents it seeks relate to CEQ's ***motivations*** in proposing the revised rules. But it is unclear why SELC needs information about CEQ's *motivations* (which are entitled to a presumption of good faith, *see United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001)), in order to weigh in on the ***substance of the proposals*** in the NPRM.

For example, SELC points to the NPRM's proposed removal of references to conflicts of interest in Section 1506.5(c) in the current regulations, and claims the NPRM does not provide reasons for this change or whether CEQ considered its ramifications. ECF No. 28 at 17-18. But SELC can object to the change on those bases now, without access to documents showing "where the idea to permit conflicts of interest came from." *Id*. at 18. In addition, agency deliberations about its proposals are likely to be exempted from disclosure under the deliberative process privilege. *See* 5 U.S.C. § 552(b)(5). As detailed above, CEQ has identified and redacted 1,878 unique instances using the exemption pursuant to 5 U.S.C. § 552(b)(5) because that information comprises protected deliberative and predecisional materials. SELC bears the burden of establishing how, without the specifically requested documents, it cannot meaningfully comment on the proposed rule. It has not done so.

Instead, SELC cites *Washington Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981) and *United States v. Nova Scotia Food Products Corp.*, 586 F.2d 240, 252 (2d Cir. 1977) for the proposition that withholding of FOIA documents is "akin to rejecting comment altogether." ECF

No. 28 at 16-19. But that is misleading and wrong. Neither case related in any way to a request for documents or the supposed withholding of documents under FOIA.

In *Washington Trollers*, for example, the statute at issued was the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 *et seq.* (FCMA), which set forth statutory requirements for any Fishery Management Plan to publish a summary of the plan and provide 45 days for public comment. 645 F.2d at 686. The question before the court was whether the agency was required under the FCMA to provide the underlying data for a published computer-generated summary, not whether FOIA demanded production of certain records to enable the public to comment. *Id.* at 687. Similarly, in *Nova Scotia*, the court considered a challenge under the APA concerning whether the FDA was required to proactively disclose scientific data supporting a proposed rule as part of the rulemaking process. The court held "[w]hen the basis for a proposed rule is a scientific decision, the scientific material which is believed to support the rule should be exposed to the view of interested parties for their comment." *Nova Scotia*, 586 F.2d at 252. Because the FDA failed to disclose that critical information as part of the informal rulemaking process, the court determined that the FDA's process failed to comport with the requirements of the APA. Neither of the situations presented in *Washington Trollers* or *Nova Scotia* is applicable here. The proposed rule speaks for itself and provides the necessary basis for comments by SELC and any other interested member of the public.

ii. SELC's Perceived Injury Can Be Addressed Under the APA, After the Rulemaking Process Is Complete.

To the extent that SELC's goal is to challenge the substance of any final rule that CEQ promulgates, it does not need the record from the rulemaking now to do so. SELC has made clear that its real objective is to challenge CEQ's rulemaking, which, as discussed above, is a challenge that can (and should) only be mounted under the APA and only after the agency has been able to

complete its rulemaking process. Indeed, in its brief, SELC makes numerous arguments that relate to concerns about the ultimate rulemaking and not to the documents currently outstanding:

- "CEQ has given SELC and other members of the public only a brief window of time to comment of [*sic*] the Agency's sweeping proposed changes to NEPA's implementing regulations…." ECF No. 28 at 16.
- "CEQ's failure to explain the basis for its decision-making is not consonant with the purpose of a rule-making proceeding and deprives SELC and the public of a meaningful opportunity to comment." *Id.* at 17.
- "The NPRM does not explain why it has proposed changing the regulations to allow private parties with a conflict of interest to prepare EISs and whether it has considered the potentially serious ramifications of this change." *Id.* at 17-18.
- "The NPRM also fails to meaningfully engage with comments that disagreed with CEQ's proposed changes. … [CEQ] fails to discuss the content of those comments and whether they were grounded in law or fact." *Id.* at 18.
- "While the NPRM frequently references comments on the ANPRM to justify its proposed changes, it fails to identify why certain comments were given weight and other seemingly ignored." *Id.*

SELC has a full and fair opportunity to comment on the NPRM, and, if SELC determines that the rulemaking process was somehow deficient, it can bring an APA challenge should the rule be finalized and SELC disagrees with it. SELC should not be permitted to hijack FOIA to stop a lawful agency function that can be challenged *after* the agency has an opportunity to actually complete the rulemaking process.

Finality is an equal-opportunity requirement, not one that applies only to disadvantage groups like SELC. SELC is not being specially disadvantaged. *See, e.g.*, *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (Kavanaugh, J.) ("Petitioners [including lead petitioner, a coal company] are champing at the bit to challenge EPA's anticipated rule restricting carbon dioxide emissions from existing power plants. But EPA has not yet issued a final rule. It has issued only a proposed rule. Petitioners nonetheless ask the Court to jump into the fray now. They want us to do something that they candidly acknowledge we have never done before: review the

legality of a proposed rule.") (holding, *inter alia*, that not even the broad equitable powers embodied in the All Writs Act could authorize such an unprecedented step). SELC's attempt to use FOIA to enjoin a proposed rulemaking is similarly unprecedented and equally infirm.

iii. SELC Would Pervert the Rulemaking Process.

When an agency promulgates new regulations, it must give the public an opportunity to comment on the proposed rule. 5 U.S.C. § 553. Normally, an agency will proceed, as required by the APA, by issuing a Notice of Proposed Rulemaking (NPRM) in the Federal Register. *Id*. at § 553(b). As noted previously, however, CEQ went above and beyond its legal obligations and instead first issued an Advance NPRM (ANPRM). There was no legal obligation for CEQ to issue an ANPRM, but it did so to proactively solicit for public input into how, if at all, CEQ might consider revising its NEPA regulations. 83 Fed. Reg. 28591 (June 20, 2018).

SELC then submitted a FOIA request for all documents related to the ANPRM. SELC now seeks to take advantage of the time-consuming FOIA process – which it initiated – in two ways: (1) it seeks to punish CEQ for inviting public comment through an ANPRM to which thousands of people and organizations including SELC responded[4] – by complaining that CEQ is taking too long to produce documents related to that ANPRM; and then, worse, (2) it seeks to use FOIA as a tool to stop the agency from proceeding with its final rulemaking pending the completion of the FOIA production. This is an obvious perversion of the FOIA process and a blatant attempt to subvert the APA.

This Court must not allow SELC's radical strategy to succeed. If validated, this strategy will deter agencies from issuing ANPRMs to inform proposed rules. Even more critically, it will undermine the entire APA notice and comment rulemaking process, as well as agencies' ability to

[4] SELC's comment is available at https://www.regulations.gov/document?D=CEQ-2018-0001-11215.

carry out their statutory mandates. SELC's argument, taken to its logical conclusion, is a recipe for disaster: if an agency receives a FOIA request during rulemaking that it cannot comply with at the volume and speed the requesting party demands, then the final rule can be delayed until documents are produced. Entities that oppose the substance of proposed rules would be sure to follow this formula at every opportunity. The natural consequence of indulging SELC's strategy will be that organizations and citizens who disagree with proposed regulations will file FOIA requests as a way to delay those rules from being finalized. The more FOIA requests filed, the longer it will take an agency to produce the documents. The longer it takes the agency to complete the FOIA production, the longer the proposed rules will remain ineffectual. Even after document productions are made, political opponents will contest the productions, claiming the agency conducted an insufficient search, or improperly applied exemptions to withhold information. The longer that litigation takes, the longer the proposed rules are still in limbo. Litigants could tactically deploy FOIA to outlast a presidential administration and prevent it from ever being able to effectively direct the implementation of new regulations. This Court must not allow entities like SELC to take hostage the ordinary rulemaking process with FOIA requests.

In short, SELC cannot meet its burden to show the sort of extraordinary and irreparable harm required to enjoin lawful agency action. SELC cannot be permitted to conflate the APA and FOIA, create a new so-called legal standard for this case, and then claim that it cannot meaningfully participate in an administrative rulemaking process that is on-going. SELC may challenge CEQ's rulemaking the way that every other plaintiff is required to do: under the APA ***after*** the agency has had an opportunity to complete the rulemaking process. SELC should not be permitted to weaponize FOIA to stall agency rulemaking in the hopes that this Administration, or a new one, loses interest or decides upon a different policy.

b. Neither SELC's Educational Mission, Nor Its Potential Future Legal Position Will Suffer Harm.

SELC's allegedly two other injuries – related to its educational mission and future legal position – are also illusory. For many of the same reasons discussed above, SELC's educational mission will not suffer harm if it does not obtain all records responsive to its FOIA request before the close of the comment period. Nothing prohibits SELC from educating the public about its position on these proposed revisions or CEQ's approach to rulemaking generally. In fact, with the filing of this very action, SELC has sought to further its educational mission and will continue to do so. *See* Press Release, February 20, 2020, *SELC files to halt Trump administration attempts to gut key environmental law*, available at https://www.southernenvironment.org/news-and-press/news-feed/selc-files-to-halt-trump-administration-attempts-to-gut-key-environmental-law (last visited February 21, 2020);[5] Press Release, February 13, 2020, *SELC moves to postpone NEPA changes over FOIA failures*, https://www.southernenvironment.org/news-and-press/press-releases/selc-moves-to-postpone-nepa-changes-over-foia-failures (last visited February 21, 2020). And it is pure speculation that SELC's educational mission will be irreparably harmed if CEQ does not complete production of responsive records by the close of the comment period,

[5] CEQ obviously disagrees that its proposal, if finalized, will "gut" the NEPA statute. SELC will be able to make any such (overdrawn) arguments once a final rule issues and it can establish jurisdiction in an appropriate case.

particularly when much of the agency's deliberations that SELC claims to need may be properly exempted from disclosure.

Finally, as demonstrated above, SELC will not be irreparably harmed in future litigation challenging any final rule if it does not receive all non-exempt records responsive to its FOIA request before the comment period closes. *See* pages 12-13, *supra*.[6]

3. The Balance of Harms Disfavors the Requested Injunction.

SELC premises its analysis of the equities on two claims. First, it claims that CEQ will not be harmed by merely having to comply with its duties under FOIA. Second, it argues that CEQ will benefit from delay in the rulemaking process because it will receive more public input. ECF No. 28 at 22-23. These arguments should be rejected. Taken to their logical conclusions, these arguments would prevent any agency from ever revising a rule, or ever closing the period for comments. The government obviously must act on the people's business. At some point, regulations must be revised and updated, and the benefit of receiving more comments becomes less than the cost of additional delay. And NEPA reform, in particular, has been a long-overdue project. *See, e.g., Eli Dourado, Clearing a Path for New Infrastructure, available at* https://www.city-journal.org/environmental-review-process-reform (Jan. 21, 2020) ("The United States seems incapable of developing modern infrastructure, despite bipartisan support for that goal. Since 2008, China has built more than 15,000 miles of high-speed rail, while the U.S. has built none and is unlikely to do so anytime soon. According to the American Society of Civil

[6] SELC also fails entirely to explain how, without the requested injunction, it "will likely lose access to evidence that would support SELC's position that the proposed rule, if finalized, would be unnecessary and unlawful." ECF No. 28 at 22. There is no basis for a claim that evidence will be spoliated, and CEQ, like any other agency, is entitled to a presumption of good faith. *See Gregory*, 534 U.S. at 10.

Engineers' most recent report card, the U.S. scores a D+ on infrastructure. Environmental review plays a major role in America's infrastructure paralysis.").

In enacting the APA, Congress made responsible decisions about the procedures for proposing agency action, finalizing it, and challenging any final agency actions. But SELC wants its own version of the APA. It ignores decades of Supreme Court jurisprudence holding that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Vermont Yankee*, 435 U.S. at 524. The procedures and processes have been approached as "'an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.'" *Id.* at 525 (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)). SELC would have this Court set aside nearly 100 years of precedent in administrative law and declare that CEQ could benefit from more public input than what is required under the law because SELC thinks it would be beneficial. SELC's claim is particularly ironic, given that CEQ has already far exceeded the requirements of the law by issuing its ANPRM, evaluating over 12,500 comments, hosting multiple public hearings, and holding a 60-day comment period. Although the APA requires notice and an opportunity for public comment, it does not require ANPRMs or public meetings and it does not specify a minimum comment period. 5 U.S.C. § 553.

Furthermore, as the Supreme Court has explicitly recognized time and again, Federal agencies, such as CEQ, as experts in their field are "in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." *Vermont Yankee*, 435 U.S. at 525. CEQ and every federal agency that

anticipates promulgating new rules or revisions to existing regulations to implement statutes passed by Congress will be harmed if the FOIA process can be used to halt rulemakings. On the other side of the balance, SELC's interest in this rulemaking will not be harmed if it must comment on the NPRM without the requested records, as demonstrated above.

4. Orderly, Transparent Rulemaking Is in the Public Interest.

President Trump has prioritized improvements to the Federal environmental review and permitting process for infrastructure projects. 82 Fed. Reg. 40463, Exec. Order No. 13807 (August 24, 2017). As the Ninth Circuit recently recognized, "the public has a powerful interest … in the ability of an elected president to enact policies." *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017). The elected President of the United States has directed CEQ to consider revisions to the NEPA regulations. 82 Fed. Reg. 40463, 40467-68 (Aug. 24, 2017). Therefore, the public has a powerful interest in CEQ's implementation of the President's environmental policy as well as ensuring transparent rulemaking in accord with the APA. Stalling the President's policy by coopting FOIA to stymy lawful rulemaking is not in the public interest. SELC should not prevail. Finally, Congress has plainly weighed the equities here in the text of the APA and decided that review of non-final agency action is not in the public interest. That point alone is dispositive, requiring SELC's motion to be denied.

V. Conclusion

For all of the foregoing reasons, CEQ respectfully requests the Court deny SELC's Motion for a Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that February 28, 2020, I caused a true copy of the foregoing Response to Plaintiff's Motion for Preliminary Injunction to be electronically filed with the Clerk of the Court using the CM/ECF system which will provide copies to all counsel of record.

/s/ Justin Lugar
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