UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY, HUMANE SOCIETY INTERNATIONAL, *and* HUMANE SOCIETY OF THE UNITED STATES,

Plaintiffs,

vs.

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, DEPARTMENT OF THE INTERIOR, AURELIA SKIPWITH, in her official capacity as Director of the U.S. Fish and Wildlife Service, *and* U.S. FISH AND WILDLIFE SERVICE,

Defendants.

Case No. 18-CV-6903 (AJN)

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSING DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants do not contest the merits of Plaintiffs' claims for relief, and it is therefore undisputed that the International Wildlife Conservation Council ("Council") violated the Federal Advisory Committee Act ("FACA"). Indeed, Defendants' Motion to Dismiss reveals wholly new FACA violations, including unannounced Council meetings and unreleased Council work product. To take only one example, Defendants' Motion publicly reveals, for the first time, that the Council secretly offered fifteen policy recommendations to the Secretary of the Interior in 2018.

Defendants' accounting of these violations raises more questions than it answers and, in particular, does not purport to speak for the particular Defendants—the Secretary of the Interior and the Director of the Fish and Wildlife Service—who steered the Council from its inception through its dissolution. These gaps, in conjunction with Defendants' concessions and new revelations, entitle Plaintiffs to summary judgment on each of their claims for relief.

Contrary to Defendants' arguments, those claims are not moot simply because the Council has dissolved. There remain three forms of effectual relief. First, the Court can order Defendants to release Council materials, since the evidence shows that Defendants have not fully complied with FACA's requirements on that score. To the contrary, Defendants' ongoing revelations of unreleased documents underscores the Council's lack of transparency.

Second—and as other courts have done in similar circumstances—the Court can enjoin Defendants from relying on Council work product that has survived the Council itself, including the dozens of policy recommendations that Defendants' evidence has revealed.

Finally, the Court can grant declaratory relief, which would recognize Defendants' significant violations of FACA and provide Plaintiffs with some safeguards against Defendants' future reliance on Council recommendations. Accordingly, the Court should grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Motion to Dismiss.

ARGUMENT

I. Defendants Bear a Heavy Burden in Showing Mootness

On the merits, the government does not contest that it has violated FACA in the numerous ways Plaintiffs have identified. At this point in the litigation, therefore, it is undisputed that the Council was improperly designed and chartered, and that it unlawfully operated outside the public eye. Nor is it disputed that Council membership—rife with conflicts of interests and excluding the conservation community—ran counter to FACA's requirements. Plaintiffs are therefore entitled to summary judgment on each of their claims for relief. *See, e.g.*, *Blessinger v. City of N.Y.*, No. 17CV108, 2017 WL 3841873, at *3 (S.D.N.Y. Sept. 1, 2017) (arguments not addressed in opposition memoranda are deemed conceded).

The Department's sole argument for dismissal and against Plaintiffs' motion for summary judgment is that Plaintiffs' claims are moot. "The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *Green v. Mazzucca*, 377 F.3d 182, 183 (2d Cir. 2004) (citation omitted). Thus, "a case becomes moot only when it is *impossible* for a court to grant *any* effectual relief *whatever* to the prevailing party[.]" *Chevron Corp. v. Donziger*, 833 F.3d 74, 124 (2d Cir. 2016) (first emphasis added) (citation omitted). This test generally imposes "a heavy burden" on Defendants. *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992).

Defendants' burden in this case is even more "formidable," since they have invoked mootness based upon their own voluntary measures, such as releasing Council materials and allowing the Council's charter to lapse. *Klein on behalf of Qlik Techs., Inc. v. Qlik Techs., Inc.*, 906 F.3d 215, 224 (2d Cir. 2018), *cert. dismissed sub nom. Cadian Capital Mgmt., LP v. Klein*, 139 S. Ct. 1406 (2019). "To prevent a defendant from strategically pausing their wrongdoing, getting a case dismissed as moot, and then beginning it again after the suit ends . . . , federal law places the burden on the

defendant who has voluntarily ceased her wrongdoing to prove that mootness should result." *Id.* Specifically, "the Government may . . . demonstrate mootness by showing that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *Pierre-Paul v. Sessions*, 293 F. Supp. 3d 489, 493 (S.D.N.Y. 2018) (emphasis added) (citation omitted). The Court's resolution of these factors is discretionary. *In re Charter Commc'ns, Inc.*, 691 F.3d 476, 483 (2d Cir. 2012).

Defendants have not carried their "formidable burden." *Klein*, 906 F.3d at 224. As an initial matter, it is by no means certain that the Secretary of the Interior or the Director of the Fish and Wildlife Service will not re-charter the Council or a similar advisory committee: while Department *employees* indicate there are no such plans, it is "agency heads" who make such decisions. *See* 5 U.S.C. App. II § 9(c). Indeed, as Plaintiffs have already shown (and as Defendants do not contest), the Secretary of the Interior decided to establish the original Council without even consulting career experts, taking the Department by surprise. *See* Mem. in Supp. Pls.' Mot. Summ. J. ("Pls.' Mem.") at 7-8, ECF No. 74. In any event, and as set forth below, "the effects of [Defendants'] alleged violation[s]" persist in the form of unreleased Council materials and its policy recommendations. *Klein*, 906 F.3d at 224. The Court should therefore reject Defendants' arguments and issue appropriate relief.

II. Plaintiffs' Claims Under FACA Section 10(b) Are Not Moot

There is no dispute that FACA Section 10(b) required Defendants to make public all materials produced for or by the full Council. 5 U.S.C. App. II § 10(b). Nor is there any dispute that General Services Administration ("GSA") regulations, in conjunction with the then-governing Department Manual, extended that requirement to the Council's subcommittees. *Compare* Pls.' Mem. at 17-18, 7 n.2 (explaining that GSA regulations and the Department Manual independently extended Section 10(b) to subcommittees) *with* Mem. in Supp. Defs.' Mot. to Dismiss ("Defs.'

Mem.") at 11 n.6, ECF No. 76 (contesting only that the Department Manual, by itself, imposed such a requirement). The only question, therefore, is whether there may yet be public materials that Defendants have not released. *Donziger*, 833 F.3d at 124. The answer to this question is "yes:" Defendants have never complied with Section 10(b). Instead, they have released Council materials long after FACA required disclosure and have remained silent as to the possibility of additional materials held by Department or Council leadership. The Court remains capable of issuing relief to address these violations, and Plaintiffs' claim is therefore not moot.

Defendants' most recent filings reveal—for the first time—two categories of Section 10(b) material that were required to have been produced contemporaneously with their use or development by the Council and, at the latest, when Defendants' lodged the administrative record in this matter. *First*, Defendants have released notes of subcommittee meetings. ECF Nos. 77-1, 77-2. Those materials, in turn, reference *additional* documents that Defendants have still not produced in connection with subcommittee business. *See, e.g.*, ECF No. 77-1 at 2 ("Mr. John Jackson distributed two documents"); *id.* ("The group requested to receive additional documentation from Mr. Richard Sowry"); ECF No. 77-2 at 3 ("Committee members reviewed information . . . related to . . . grant awards"). The materials also allude to subcommittee recommendations of importance to Plaintiffs and their members. *See, e.g.*, ECF No. 77-1 at 3 (contemplating "extending the validity of import permits"); ECF No. 77-2 at 4 (discussing recommendations including "[e]stablish[ing] an ombudsman to . . . address import/export problems for hunting public" and "[the U.S. Fish and Wildlife Service] . . . publicly encourag[ing] sport hunting"). In short, these submissions indicate that Defendants still have not complied with FACA Section 10(b) vis-à-vis subcommittee materials.

Second, the government's Motion to Dismiss includes or references previously unreleased materials prepared for or by the *full* Council. The first such record is described on the Council's website as [its] "summary report for 2018-2019" ("Summary Report") and, according to internet

archiving services,[1] was not released until after Plaintiffs filed their summary judgment memorandum. *See* Ex. A. The Summary Report appears to be the Council's fulfillment of its commitment, made at its final meeting, to provide Defendants with a compilation of Council findings and conclusions. *See* AR:2980: ("Action items: The [Council] will put together a summary of the last two years.") (emphasis omitted). It is prefaced by a cover letter from Council Chair Bill Brewster to Secretary of the Interior David Bernhardt, which clarifies that Mr. Brewster speaks for the Council and states that the report was prepared *at the Secretary's request*. Ex. A at 1.[2] Referring to a presentation from the "Property and Environment Research Center," Ex. B, the Summary Report also specifies "concrete steps that the US [sic] government could take" to advance the Council's objectives, Ex. A at 7. The Research Center presentation, in turn, includes policy recommendations such as the liberalization of elephant trophy imports and the creation of certain presumptions in favor of issuing import permits. Ex. B. at 13, 15.

Defendants' filings also include a July 16, 2018 letter from Mr. Brewster to then Secretary of the Interior Ryan Zinke ("Zinke Letter"). In the Zinke Letter, Mr. Brewster again purports to speak for the entire Council and states that "many meaningful ideas and subsequent recommendations came through [the Council's June, 2018] meeting and we are formal[ly] transmitting those recommendations to you for [the Secretary's] consideration." ECF No. 78-1 at 14. The letter concludes by committing to "keep[ing] [the Secretary] posted" regarding future Council activities and directing Secretary Zinke to either Mr. Brewster or (then acting Fish and Wildlife Service

[1] *See International Wildlife Conservation Council*, U.S. Fish & Wildlife Service, *available at* https://web.archive.org/web/20200103184232/https://www.fws.gov/iwcc/(Jan. 3, 2020 screenshot of Council's homepage, omitting references to Summary Report).

[2] Citations to Exhibit A correspond to the Exhibit's Bates numbers.

Director) Greg Sheehan for questions. *Id.* Attached to the letter are fifteen policy recommendations. *Id.* at 22.[3]

Defendants' lengthy trail of Section 10(b) violations easily leaves open the possibility of "effectual relief" from the Court. *Donziger*, 833 F.3d at 124. An *enforceable* order requiring Defendants to search for and release Section 10(b) material would, at last, compel the Department to fully account for its management of the Council and release all materials to which the public is entitled. That is exactly the path that other courts have followed in similar cases. *See, e.g.*, Order, *Lawyers Comm. for C.R. Under Law v. Presidential Advisory Comm'n on Election Integrity*, 265 F. Supp. 3d 54 (D.D.C. 2017) (ECF No. 28) (attached as Ex. C). In *Lawyers Committee*, the court responded to evidence of repeated noncompliance with Section 10(b) by ordering defendants to produce (1) a declaration detailing their definition of FACA Section 10(b) documents, (2) a declaration detailing their steps to identify such documents, and (3) a privilege log for withheld documents. *Id.* at *1. The court also left open the possibility of discovery should defendants' submissions be found wanting. *Id.* at *2. A similar order is available and appropriate here. *See also Cummock v. Gore*, 180 F.3d 282, 293 (D.C. Cir. 1999) ("[t]he District Court must engage in the necessary discovery and fact finding to determine whether any additional materials fall within the parameters of information to which [plaintiff] is entitled"); *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 879 F. Supp. 103, 104

[3] The Court previously dismissed Plaintiffs' claim under Section 10(b) in part, concluding that Plaintiffs failed to state a claim regarding "materials that Defendants presented *at the public meetings* but not before." *Nat. Res. Def. Council v. Dep't of Interior*, 410 F. Supp. 3d 582, 600 (S.D.N.Y. 2019) (emphasis added). That order left intact the remainder of Plaintiffs' Section 10 claim, which encompasses Defendants' *wholesale* failure to release Section 10(b) materials prepared *after* Council meetings. *See* Compl. ¶¶ 92, 104(a), ECF No. 1. Consistent with that understanding, Defendants argue that the Court should reject Plaintiffs' Section 10(b) claim "because Defendants have already disclosed all [Council] records covered by Section 10(b) . . . as to . . . the full Council," not because the Court previously dismissed Plaintiffs' claim. *See* Defs.' Mem. at 11.

(D.D.C. 1994) (recognizing prior order allowing plaintiffs alleging Section 10(b) violations "to conduct discovery on the mootness question").

Defendants contend that judicial relief is unnecessary because additional Section 10(b) materials do not exist. This argument relies entirely on testimony from the Council's Designated Federal Officers ("DFOs"), who are "employee[s] of the Federal Government" empowered to "chair or attend each meeting of each advisory committee" and "to adjourn any such meeting." 5 U.S.C. App. II § 10(e). *See also* AR:0019 (Council charter provisions for DFOs). According to the DFOs, they have searched *their* files for additional Section 10(b) material and returned empty handed, *see* Alvarez Decl., ECF No. 77 ¶ 6.

This testimony leaves several questions unanswered. Most obviously, the declarations do not explain why Defendants apparently have not yet released materials reviewed by the subcommittees and specified in the subcommittee minutes. *See supra* at 4. What is more, the Summary Report and Zinke Letter appear to show that the Council opened direct lines of communication with the Office of the Secretary of the Interior and the Office of the Director of the Fish and Wildlife Service, both of whom are named Defendants in this lawsuit. It is through *these* lines of communications—not the DFOs—that the Council transmitted some of its most important material, but the government makes no representations and proffers no evidence concerning the possibility of unreleased material deposited with Council or Department leadership. Indeed, the government purports to have asked Council members if they possess any additional Section 10(b) documents, but notably does not supply the members' response or otherwise represent that no such material exists. Alvarez Decl. ¶ 6(c). Likewise, one DFO cryptically alludes to "receiving" multiple drafts of the Zinke Letter via the Office of the Director of the Fish and Wildlife Service, but is conspicuously silent as to who edited those drafts, how they came to be transmitted to the DFO, and whether the DFO inquired as to the existence of similar documents or the process by which

Council leadership interacted with the Office of the Secretary or the Director of the Fish and Wildlife Service. Hobbs Decl., ECF No. 78 ¶¶ 5-6.

The Court should also reject the DFOs' unsupported arguments that the Zinke Letter and Summary Report are not materials "prepared . . . by" the Council within the meaning of 5 U.S.C. App. II § 10(b). One Council DFO testifies that "[t]he Department and the [Fish and Wildlife Service] do not regard [the Summary Report] as a Council document [subject to FACA Section 10(b)] because it was not subject to deliberation or adoption in a full public meeting of the Council." Alvarez Decl. ¶ 11. Instead, the DFO "regard[s] it *only* as correspondence to the Secretary from Mr. Brewster." *Id.* Accepting this argument would create a gaping, absurd loophole in FACA Section 10(b), whereby advisory committees could forgo public disclosure *because* they unlawfully conducted business in secret and thereby situated their work product outside the DFO's arbitrary definition of "committee documents." In any event, and contrary to the DFO's characterization, the Summary Report purports to speak for the entire Council, not simply the Council's Chair and Co-Chair. *See* Ex. A at 1. Finally, it is unclear if the DFO's conclusions are shared by the Director of the Fish and Wildlife Service or the Secretary of the Interior, the latter of whom (not the DFO) evidentially solicited the Report and was its intended recipient.

For similar reasons, the Court should discount a second DFO's assertion that recommendations in the Zinke Letter (and, by extension, in the Summary Report) are not Council recommendations because they had not been *publicly* "proposed as such, deliberated on, seconded, or voted upon." Hobbs Decl. ¶¶ 6-7. As above, this argument would perversely encourage advisory committees to operate irregularly and in secret, shielding the resulting work product from public scrutiny while requiring the release of lawfully produced material. Moreover, the DFO's testimony as to Council recommendations suffers from the additional flaw that nothing in the body's charter *requires* recommendations to follow the procedures described by the DFO, leaving the Council Chair

free to summarize Council meetings and offer associated recommendations. *See generally* AR:18-21 (charter).

The gaps in the DFOs' declarations are all the more striking given the Council's history of operating outside the public eye. Under FACA Section 10(b), the Department was obligated to release the subcommittee materials, Summary Report, and Zinke Letter soon after they were generated. Those materials also should have been included in the government's initial administrative record, which purported to contain "a complete and accurate . . . record of [the Department's] creation and management of the [Council]," Cert. of Admin. R. ¶ 3, ECF No. 69-1, including, ostensibly, all Section 10(b) material. *See generally* 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party"). Defendants' filings do not explain these oversights, or why the DFOs apparently searched their files only "[i]n anticipation of [their] declaration[s]" instead of in anticipation of record compilation. Alvarez Decl. ¶ 6. The holes in Defendants' most recent accounting of Council business are therefore not an isolated oversight, but instead represent the latest evidence of the Department's half-hearted commitment to transparency.

There is no reason to believe that Defendants, left to their own devices, have finally cured these defects.[4] The Department's lackadaisical approach to Council transparency—culminating in an eleventh-hour revelation of secret recommendations to the Secretary of the Interior—fatally undermines its conclusory, self-serving assurance that a court order would be useless to Plaintiffs. *See Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 909 F.3d 534, 541 (2d Cir. 2018) ("an individual claim . . . becomes moot when a plaintiff *actually receives* all of the relief he or she could receive on the claim through further litigation"). Certainly, such assurances cannot carry Defendants' "heavy burden" in

[4] Nor may Defendants belatedly offer new testimony on this issue in their reply memorandum. *See Nat'l Union Fire Ins. Co. of Pittsburg v. Beelman Truck Co.*, 203 F. Supp. 3d 312, 321 n.6 (S.D.N.Y. 2016) ("[n]ew arguments may not be made in a reply brief").

arguing that Plaintiffs' Section 10(b) claim is moot. *Harrison*, 981 F.2d at 59. Accordingly, the Court should declare that Defendants have violated FACA Section 10(b) and issue appropriate relief.

III. Injunctive Relief is Appropriate to Remedy Defendants' Remaining Violations

Outside of FACA Section 10(b), Plaintiffs claim that: (1) Defendants ignored the chartering requirements of FACA Section 9; (2) Defendants excluded conservation interests (including Plaintiffs) from Council membership in violation of FACA Section 5(b)(2); (3) Defendants did not adequately safeguard the Council from special interests in violation of FACA Section 5(b)(3); and (4) Defendants improperly closed Council meetings and subcommittee meetings to the public in violation of FACA Section 10(a). As with Plaintiffs' claims under FACA Section 10(b), Defendants have conceded these violations on their merits. *Blessinger*, 2017 WL 3841873, at *3. Indeed, Defendants' submissions appear to show *additional* violations of FACA, such as the Council's unannounced and closed meeting on June 20, 2018. *Compare* ECF No. 78-1 at 3 (describing meeting) *with* 5 U.S.C. App. II § 10(a) (FACA's open meeting requirements). Two forms of injunctive relief are appropriate in these circumstances: an order requiring Defendants to release deliberative material and an order enjoining Defendants from relying on Council work product.

A. The Court Should Order Defendants to Release Deliberative Material

First, Plaintiffs' Motion for Summary Judgment seeks "an order requiring Defendants to provide Plaintiffs with all . . . records to which Plaintiffs' nominee for Council membership would have been entitled as a Council member." Mot. for Summ. J., ECF No. 73 at 1. *See also* Compl. at 33; Pls.' Mem. at 2, 18. That request reflects advisory committee members' possession of rights "beyond those enjoyed by the public-at-large," *Cummock*, 180 F.3d at 290, including a right to internal committee correspondence and material "made available . . . during the course of its deliberative process[.]" *Id.* at 292. In this case, Plaintiffs were deprived of the Council's internal deliberative material due to the Department's uncontested violations of FACA Sections 5 and 9: as

set forth in Plaintiffs' opening memorandum, Defendants might have appointed Plaintiffs' nominee to Council membership if they had consulted with GSA or paid closer attention to membership balance and conflicts of interest. *See* Pls.' Mem. at 14-15.

Defendants do not acknowledge this request for relief, much less contend that it is moot. To the contrary, Defendants' submissions allude to a subset of Council documents that apparently circulated among its members but were not released under FACA Section 10(b). *See supra* at 8 (discussing government's characterization of Council recommendations as "not . . . a Council document"). As set forth above, at least some of this material is subject to Section 10(b) and warrants relief under *that* provision. *Id.* But as *Cummock* explains, Plaintiffs are also entitled to any of the Council's deliberative material not covered by FACA Section 10(b) as a means to rectify the Council's unbalanced composition. 180 F.3d at 292-93. The Court should order Defendants to review and release such material in a manner similar to that in *Lawyers Committee*. *See supra* at 6.

B. The Court Should Enjoin Defendants from Relying on Council Work Product

Second, the Court should issue a use injunction. As Plaintiffs explained in their opening memorandum, the Fifth, Eleventh, and D.C. Circuits have explicitly recognized that courts may enforce FACA by enjoining federal agencies from relying on policy recommendations or work product generated by unlawful advisory committees. *See* Pls.' Mem. at 19. A use injunction is appropriate in this case given the breadth and depth of Defendants' uncontested FACA violations. *See W. Org. of Res. Councils v. Bernhardt*, No. CV 18-139-M-DWM, 2019 WL 3805125, at *10 (D. Mont. Aug. 13, 2019). Such an order would also redress Plaintiffs' organizational injuries by obviating the need to monitor implementation of the Council's recommendations, staunching Plaintiffs' associated outlay of resources. *See generally Nat. Res. Def. Council*, 410 F. Supp. 3d at 593 (cataloguing Plaintiffs' injuries). Defendants do not dispute these grounds for relief.

The Department's sole argument against a use injunction is that the Council "did not make any recommendations nor create any work product on which Defendants could rely." Defs.' Mem. at 9 (citing Alvarez Decl. ¶ 10). But that assertion is untenable given the gaps in Defendants' evidentiary filings, *see supra* at 7-8, and is directly contradicted by the Council's Summary Report and the Zinke Letter, which collectively encompass reams of substantive work product and explicitly offer particular policy recommendations. *See, e.g.*, 78-1 at 22 (recommending that Defendants appear at "hunting shows and conventions" to facilitate import permits, and that they "[c]reate an appeals process for confiscations [of trophies]"). In these circumstances—where an advisory committee's tainted work product outlives the advisory committee itself—courts have recognized the propriety of use injunctions. *See W. Org. of Res. Councils*, 2019 WL 3805125, at *10; *Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 613 (D.C. Cir. 1996). Such an order is particularly appropriate in this case, where Defendants persist in denying the existence of Council work product despite all evidence to the contrary.

The Council's work product (including any work product not yet released) also distinguish this case from decisions where courts have recognized mootness after an advisory committee's dissolution. Many of these cases consider requests for access to committee proceedings, which (in normal circumstances) do not continue when a committee's charter has lapsed and are therefore beyond the reach of a court decree. In *Freedom Watch, Inc. v. Obama*, for example, the court concluded only that "the case [was] moot with respect to [plaintiff's] claims . . . [regarding] any future meetings of the [committee], and with respect to its claim for the appointment of at least one person with a different point of view to the committee." 859 F. Supp. 2d 169, 174 (D.D.C. 2012) (citation omitted). *See also Citizens for Resp. & Ethics in Wash. v. Duncan*, 643 F. Supp. 2d 43, 46 (D.D.C. 2009) (denying request for injunction against defunct committee's "future violations"); *accord Clinton*, 879 F. Supp. at 104 (discussing mootness only for claims under FACA Section 10(b)).

Here, however, Plaintiffs remain aggrieved by the Council's recommendations, including any as-yet undisclosed recommendations, even though Council proceedings appear to have ceased.

Defendants' remaining authority addresses claims against agency actions that have *already* relied on the committee's recommendations. In these circumstances, some courts have determined that a plaintiff cannot overturn an otherwise valid agency order solely by reference to an earlier FACA violation. Thus, in *National Nutritional Foods Association v. Califano*, the Second Circuit explained that "no court has held that a violation of FACA would invalidate *a regulation* adopted under otherwise appropriate procedures, simply because it stemmed from [an unlawful] committee's recommendations, or even that pending rulemaking must be *aborted* and a fresh start made." 603 F.2d 327, 336 (2d Cir. 1979) (emphasis added). *See also Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1310 (W.D. Wash. 1994) (denying plaintiff's request to invalidate agency action relying on committee work product, but noting that injunctive relief may be appropriate *before* a committee's "report [is] . . . used by the government"). Because Plaintiffs do not seek an order setting aside final agency action or terminating agency processes, the Court remains free to issue a use injunction against *future* reliance on Council material.

IV. The Court Can Issue Declaratory Relief Independent of Injunctive Relief

Independent of any injunctive relief, the Court should declare that Defendants have violated FACA. "Where the defendant voluntarily ceases the conduct at issue . . . [a] declaratory action is not necessarily mooted." *Kidder, Peabody & Co. v. Maxus Energy Co., Inc.*, 925 F.2d 556, 563 (2d Cir. 1991) (citation omitted). Instead, the availability of declaratory relief depends on the relief's practical utility for preventing further unlawful acts or for dispensing with additional litigation. *Id. See also Russ. Standard Vodka (USA), Inc. v. Allied Domecq Spirits & Wine USA, Inc.*, 523 F. Supp. 2d 376, 381 (S.D.N.Y. 2007) ("the court must ask the following: 1) whether the judgment serves a useful

purpose in explaining or settling the legal issues involved; and 2) whether a judgment would finalize the controversy and offer relief from uncertainty").

Declaratory relief is appropriate here given the sweep of Defendants' uncontested FACA violations and the concomitant utility of an opinion recognizing those violations. *See Califano*, 603 F.2d at 336 (noting "wide discretion afforded district judges by the Declaratory Judgment Act" and affirming denial of declaratory relief in part because the Second Circuit's opinion, which recognized violations of FACA Section 5, "g[a]ve[] appellants substantially the same relief as a declaratory order"). Declaratory relief is also appropriate because it would provide Plaintiffs with "ammunition for [their] attack on the [Council's] findings in subsequent agency proceedings that make use of [its work product]," such as proceedings implementing Council recommendations in whole or part. *Byrd v. EPA*, 174 F.3d 239, 244 (D.C. Cir. 1999) (citation omitted). *Cf. Ctr. for Biological Diversity v. Tidwell*, 239 F. Supp. 3d 213, 227 (D.D.C. 2017) (denying declaratory relief where there was "no suggestion . . . that the advisory committee . . . has completed its work and made its recommendations to the convening agency"). The Court should therefore exercise its discretion to declare that Defendants have violated FACA Sections 5, 9, and 10.

CONCLUSION

The Court should deny Defendants' Motion to Dismiss, grant Plaintiffs' Motion for Summary Judgment, and issue appropriate relief.[5]

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[5] Consistent with Section 3(d) of the Court's standing order, Plaintiffs are submitting courtesy copies of its opening memorandum and this memorandum concurrently with this filing. Defendants have indicated that they will submit courtesy copies of their memoranda concurrently with the filing of their reply memorandum.

Dated: March 2, 2020.

Respectfully submitted,

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