IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH DISTRICT

ENERPROG, L.L.C.,
Petitioner,

And

FOSSIL CREEK WATCHERS, INC.,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Brief for Respondent

Consolidated Case Nos. 17-000123 and 17-000124.
Spring Term 2017

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STATEMENT OF ISSUES

1. Where state law requires closure and capping of a dewatered ash pond in order to preserve water quality standards, is that requirement an "appropriate condition of state law" under the Clean Water Act (CWA) to be included in an NPDES permit?

> The Environmental Appeals Board (EAB) held that the requirement was an "appropriate requirement of state law" under Section 401(d) of the CWA. The U.S. Supreme Court has construed Section 401(d) broadly in favor of state-law requirements. Furthermore, Respondent has no authority to reject a state-law provision as part of an National Pollution Discharge Elimination System (NPDES) permit where that provision imposes stricter limitations on pollutant discharges than the CWA's limitations.
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> Apposite authorities:
>
> - *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994)
> - 33 U.S.C. § 1311
> - 33 U.S.C. § 1313(c)(2)(A)

2. Does an ash pond used for coal ash waste treatment qualify as a "water[] of the United States" under the CWA, thereby necessitating an NPDES for discharge of fill material into the pond?

> The EAB held that the pond was not a "water[] of the United States." Waste-treatment ponds are excluded from the definition of "waters of the United States" under the CWA. While federal regulations formerly included waste-treatment ponds, that portion of the definition has been suspended since 1980. Due to the public's reliance on the longstanding suspension, overturning the suspension would violate constitutional due process by subjecting the public to regulations of which they have not had notice.
>
> Apposite authorities:
>
> - 40 C.F.R. § 122.2
> - Consolidated Permit Regulations, 45 Fed. Reg. 48,620, 48,620 (Jul. 21, 1980)

- U.S. Const. amend. V

- *U.S. v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 673-75 (1973)

3. When an ash pond created by damming a portion of the "waters of the United States" ceases to serve as a waste-treatment pond, does the pond become a "water[] of the United States" under the CWA, thereby requiring an NPDES permit for closure and capping?

> The EAB held that the ash pond did not become a "water[] of the United States" when it ceased to serve as a waste-treatment pond. Federal regulations do not contain any provision converting a former waste-treatment system back into a federal water.
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> Apposite authorities:
>
> - 40 C.F.R. § 122.2

4. Was Respondent's August 2017 postponement notice sufficient to suspend compliance dates for the 2015 Effluent Limitations Guidelines (ELGs) under the CWA?

> The EAB held that the notice was not effective because the Administrative Procedure Action (APA) only authorizes agency suspension of effective dates, not compliance dates. However, the EAB erred in failing to consider sources of authority other than the APA. Under the CWA, Respondent has broad power to enact necessary regulations to carry out the purposes of the CWA. This broad power encompasses suspension of compliance dates.
>
> Apposite authorities:
>
> - 33 U.S.C. § 1361(a)
>
> - 5 U.S.C. § 705

5. Could Respondent rely on Best Professional Judgment (BPJ) to impose a zero-discharge requirement for fly ash transport water and bottom ash transport water?

> The EAB held that Respondent could rely on BPJ. The April 2017 suspension of compliance deadlines for ELGs rendered the ELGs inapplicable. In the absence of ELGs, Respondent was required to rely on BPJ in order to issue an NPDES permit. Due to the toxic character of EnerProg's discharges, Respondent was further required to rely on best available technology, which is zero discharges for fly ash transport water and bottom ash transport water.

Apposite authorities:

- Postponement of Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005, 19,005 (Apr. 25, 2017)
- 40 C.F.R. § 125.3(c)
- 40 C.F.R. § 125.3(d)

FACTS

Petitioner EnerProg, L.L.C. ("EnerProg") operates the Moutard Electric Generating Station (MEGS) in the State of Progress. EAB 3.[1] MEGS is a coal-fired electric generating plant with a maximum dependable capacity of 745 megawatts. EAB 3. MEGS' coal-burning operations produce toxic ash wastes containing high levels of mercury, arsenic, and selenium. EAB 5. MEGS discharges these toxic wastes via fly ash transport waters and bottom ash transport waters (the "Transport Waters") into a coal ash pond (the "Ash Pond"). EAB 3-4. The Ash Pond is used by EnerProg as a holding basin for untreated toxic coal ash discharged from MEGS' cooling system. EAB 3. The toxic discharges are left to settle in the Ash Pond, allowing the sediment to sink to the bottom of the pond. EAB 3, 5. The water is then discharged into the Moutard Reservoir. EAB 3. The Ash Pond was created by damming a portion of Fossil Creek, a tributary to the Progress River. EAB 3. The Progress River is a navigable-in-fact interstate body of water. EAB 3.

Respondent Environmental Protection Agency ("Respondent") regulates toxic discharges into federal waters pursuant to the federal Clean Water Act (CWA), 33 U.S.C. § 1251 *et. seq.* Dischargers must obtain a permit to discharge toxic wastes under the federal National Pollutant Discharge Elimination System (NPDES). Respondent prescribes Effluent Limitations Guidelines (ELGs) governing pollutant levels in discharges. EAB 3. In January 2017, EnerProg obtained an NPDES permit (the "Permit") from EPA Region XII. EAB 2. The Permit authorized EnerProg to continue liquid

[1] "EAB" refers to the U.S. Environmental Protection Agency Environmental Appeals Board's Order Denying Review, NPDES Appeal No. 17-0123, Spring Term, 2017.

discharges at the MEGS plant. EAB 2. However, Respondent included two conditions to minimize hazards to environmental and human health. EAB 1, 7. These conditions are discussed below.

I. Closure of the Ash Pond

The Permit requires EnerProg to terminate MEGS' use of the coal ash settling pond by November 1, 2018, dewater the pond by September 1, 2019, and cover the remaining coal residuals in the pond with an impermeable cap by September 1, 2020. EAB 2. Respondent included this condition in the Permit to comply with requirements imposed by the State of Progress under the State's Coal Ash Cleanup Act (CACA). EAB 3. CACA's purposes are to prevent public hazards caused by failures of ash treatment pond containment systems, and from leaks into surrounding ground and surface waters. EAB 3-4.

II. Zero-Discharge Requirement

The Permit requires EnerProg to cease toxic discharges into federal waters altogether by November 1, 2018. EAB 5. EnerProg must adopt a dry-handling process for treating toxic discharges. EAB 5.

The Permit notes that dry handling is the Best Available Technology (BAT) for handling highly-toxic wastes. EAB 5. Dry handling would enable EnerProg to remove these toxic pollutants with zero liquid discharges, and instead dispose of them into a dry landfill. EAB 4-5. MEGS is sufficiently profitable for EnerProg to implement dry handling with an increase of only $0.12 in the average consumer's monthly electric bill. EAB 5. Many plants like MEGS have already utilized dry handling for several years. EAB 5.

The Permit notes that Respondent's most recent ELGs, issued in 2015, are the subject of ongoing federal litigation in the United States Court of Appeals for the Fifth Circuit. EAB 5. The Permit expressly relies on the permit writer's Best Professional Judgment as an alternative basis for imposing a zero-discharge requirement with a deadline of November 1, 2018. EAB 5.

III. Ensuing Dispute

On April 1, 2017, EnerProg and fellow Petitioner Fossil Creek Watchers, Inc. ("FCW"), a group which advocates for protection of environmental resources, sought review of several aspects of the Permit from Respondent's Environmental Appeals Board (EAB). EAB 2. EnerProg challenged Respondent's inclusion of the State of Progress' conditions for the closure and capping of the Ash Pond as inappropriate under Section 401(d) of the CWA, which requires conditions based on state laws to be related to water quality standards or effluent limitations. O. 2.[2] EnerProg also challenged the zero-discharge requirement as inappropriate in light of Respondent's suspension of compliance deadlines for the 2015 ELGs, and as improperly based on BPJ. O. 2. FCW challenged the closure and capping of the Ash Pond as illegal without an additional permit under Sections 301 and 404 of the CWA. O. 2. FCW also contended that the closure-and-capping requirement necessitated an additional permit under Section 402 of the CWA. O. 2 Finally, FCW argued that Respondent's suspension of the 2015 ELG compliance dates was ineffective, and that the 2015 ELGs are therefore binding on EnerProg. O. 3.

[2] "O." refers to the United States Court of Appeals for the Twelfth Circuit's Order dated September 1, 2017, in consolidated Docket Nos. 17-000123 and 17-000124.

IV. EAB Review and Order

The EAB denied review and upheld the Permit as written. EAB 9. First, the EAB noted that when a state imposes a condition to be incorporated into an NPDES permit, the CWA is construed broadly in favor of the state when a permittee challenges the appropriateness of condition. EAB 7. The EAB found that the that Ash Pond closure-and-capping requirements were "appropriate requirements of state law" related to water-quality standards. EAB 7. The EAB also noted that under Section 1341(d) of the CWA, it lacked discretion to reject state-law conditions imposed as part of an NPDES permit. EAB 7.

Second, the EAB found that BPJ was an appropriate basis for imposing a zero-discharge requirement. EAB 7. The EAB noted that when regulations under the CWA are inapplicable or ineffective, Respondent may regulate toxic pollutant discharges on a case-by-case basis. EAB 7. BPJ is the appropriate standard in case-by-case review. EAB 7.

Third, the EAB held that the suspension of compliance dates for the 2015 ELGs was ineffective because Respondent lacked authority to suspend compliance deadlines under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.* EAB 7-8.

Fourth, the EAB held that closure and capping of the Ash Pond did not require an additional permit under Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342. EAB 8. Sections 301 and 402 involve "waters of the United States." *See* 33 U.S.C. §§ 1311, 1342. The EAB noted that the Ash Pond is not a "water[] of the United States" as that term is defined in the CWA because it is a waste treatment pond designed to meet the requirements of the CWA. EAB 8. Such ponds were formerly included in the definition of "waters of the United States" if they were created by damming a body of water that

was already a "water[] of the United States." EAB 8. However, the provision including such ponds has been suspended since 1980. EAB. 8. The EAB recognized that the suspension did not comport with notice-and-comment requirements under the APA. EAB 8. Nonetheless, the suspension has been incorporated into two successive reconsiderations of the definitions section of the CWA. EAB. 8. The EAB deferred to Respondent's "longstanding policy judgment" that the suspension was effective to exclude ponds like the Ash Pond from the definition of "waters of the United States." EAB 8. Accordingly, the EAB held that the closure-and-capping requirement did not necessitate a Section 402 permit. EAB 9.

Finally, the EAB held that closure and capping of the Ash Pond did not require a permit to discharge "fill" material under Sections 402 of the CWA. EAB 8-9. The EAB noted that the Ash Pond would not revert to its original status as a "water[] of the United States" simply because EnerProg stopped using it for discharges. EAB 9. Accordingly, no permit was required to discharge fill material into the Ash Pond. EAB 9. This appeal followed.

ARGUMENT

I. Summary

The decision of the EAB should be upheld. Respondent is authorized to administer the NPDES program to safeguard the goals of the CWA. State-law conditions relating to water quality standards may be incorporated into an NPDES permit under Section 401(d) of the CWA, and Respondent has no power to reject a state-law condition that imposes stricter requirements on pollutant dischargers than the requirements imposed by the CWA. The State of Progress' requirement that EnerProg close and cap the Ash Pond was an appropriate state-law requirement under Section 401(d).

Permits are not required to discharge materials, including fill material, into the Ash Pond under Sections 301, 402, and 404 of the CWA. The Ash Pond is not a "water[] of the United States" as that term is defined for purposes of the CWA. Waste-treatment ponds like the Ash Pond have been excluded from the definition of "waters of the United States" since 1980. The Ash Pond does not become a "water[] of the United States" as soon as it ceases to serve as a waste-treatment system, since the CWA contains no recapture provision converting an abandoned waste-treatment system into a federal body of water.

Respondent had authority to suspend compliance dates for the 2015 ELGs pursuant to its broad authority under the CWA. While the APA restricts Respondent's authority to suspend effective dates, compliance dates are distinct from effective dates. Because the suspension of compliance dates, Respondent was required to rely on BPJ in issuing an NPDES permit to EnerProg. Likewise, Respondent was required to determine BAT in exercising BPJ. BAT for facilities like MEGS is zero discharges.

II. Standard of Review

> A reviewing court may set aside an agency action found to be, *inter alia,*
>
> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> ***
> (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]
> (d) without observance of procedure required by law.

5 U.S.C. § 706. Under subpart (a), review "is narrow, and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

FWC's challenge to inclusion of the closure-and-capping provision as an "[in]appropriate condition of state law" in the Permit should be reviewed under subsections (a) and (c) for abuse of discretion and overreach of statutory jurisdiction. FWC and EnerProg's challenges to the validity of the July 1980 suspension and the April 2017 postponement should be reviewed under subsection (d) for failure to observe proper procedures. The use of BPJ should be reviewed under subsection (d) failure to observe proper procedures. Requirement of additional permits for the Ash Pond should be reviewed under subsection (a) for abuse of discretion.

III. The closure-and-capping requirements for the Ash Pond were "appropriate conditions of state law" because they were related to achieving the State of Progress' water quality standards.

A. Respondent has jurisdiction to consider the permissibility of the conditions included by the State of Progress.

Under the CWA, 33 U.S.C. § 1251 *et seq.,* Respondent administers a national program to grant permits for discharge of toxic pollutants. This program is the NPDES

program. *See* 33 U.S.C. § 1342 *et seq.* As part of the permitting process, the CWA gives states an express role in setting conditions under which discharges may occur. Under Section 401 of the CWA,

> [a]ny applicant for a Federal license or permit to conduct any activity...which may result in any discharge...shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with [national and EPA-approved state water quality standards].

33 U.S.C. § 1341(a). The limitations that the state prescribes "shall become condition" on any federal permit, and no "permit shall be granted if certification has been denied." *Id*. Any condition imposed by a State under Section 401(d) becomes a part of the permit as a matter of law. *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 548 (C.A.D.C. 1992). Respondent has interpreted this provision broadly to preclude federal-agency review of state certification. *See Roosevelt Campobello Intern. Park Com'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("Limitations contained in a State certification must be included in a NPDES permit. EPA has no authority to ignore State certification or to determine whether limitations certified by the State are more stringent than required to meet the requirements of State law") (internal citations omitted).

Although Respondent cannot ignore state certifications, Respondent has jurisdiction to determine the permissibility of the conditions because the State of Progress has not been delegated the authority to issue permits for plants such as MEGS. Under Section 401 of the CWA, the State of Progress only has the authority to certify a permit upon the EPA's submission of the draft permit to the State. *See* 33 U.S.C. § 1341.

B. The conditions included by the State of Progress are appropriate conditions of state law because they are within the scope of the State's authority under Section 401.

EnerProg was required to obtain certification from the State of Progress pursuant to Section 401 of the CWA, 33 U.S.C § 1341, because the operation of MEGS results in pollutant discharges. Upon certification, the State of Progress required EnerProg to cease use of the Ash Pond, dewatering the Ash Pond, and cover the dewatered Ash Pond with an impermeable cap to comply with the Progress Coal Ash Cleanup Act (CACA). EAB 3-4. CACA is a state-enacted law that requires these conditions to prevent public hazards associated with the failures of ash treatment pond containment systems, as well as leaks from the treatment ponds into ground and surface waters. *Id.* Section 401(d) also allows the State of Progress to incorporate additional conditions into the Permit. Specifically, under Section 401(d), a state may include conditions such as "effluent limitation and other limitations, and monitoring requirements," to ensure compliance with various provisions of the CWA and with "any other appropriate requirements of State law." *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1915 (1994). Section 401(d) "is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied." *Id*. at 1909.

The State of Progress' additional conditions are related to specific pollutant discharges from the plant. MEGS currently discharges Transport Waters containing toxic pollutants to the Ash Pond and the Moutard Reservoir. EAB 3-4. The conditions imposed by the State of Progress to close and cap the Ash Pond are related to discharge. The State

of Progress' conditions are specifically intertwined with discharge because the Ash Pond undergoes treatment by sedimentation before it releases the water into the Reservoir.

Even if the conditions imposed by the State of Progress are not all directly related to discharge, Section 401(d) has been interpreted to cover activities, not merely discharges, and to require that these activities comply with state water quality standards. *See PUD,* 114 S. Ct. at 1909. Accordingly, the State of Progress has authority may impose conditions on the activity as a whole of the operation of MEGS. The State's authority is not unfettered. Instead, conditions must be placed to ensure compliance with "any applicable effluent limitations and other limitations....and appropriate requirements of State law." *Id*. The State of Progress' conditions are effluent limitations necessary to ensure compliance under CACA, an appropriate requirement of state law.

EnerProg asserts that the CACA provisions are not requirements based on achieving State water quality standards established under Section 303 of the CWA, 33 U.S.C. § 1311 that the CACA provisions are unrelated to achieving effluent limitations. EAB 6-7. EnerProg errs in both assertions. First, the conditions imposed by the State of Progress are related to achieving effluent limitations in compliance with the CACA because the purpose of the CACA legislation is to prevent leaks from treatment ponds into ground and surface waters. EAB 4. Effluent limitations are a vital mechanism to prevent leaks of toxic pollutants, since pollutants cannot leak if they are not ever discharged to begin with.

Second, although CACA was not expressly enacted pursuant to Section 303, *PUD* did not clearly define when a State's condition on an NPDES fails to constitute an "appropriate requirement of State law." In fact, the *PUD* court declined to "speculate on

what additional state laws...might be incorporated by this language." 114 S. Ct. at 1909. At the very least, CACA is consistent with state water quality standards adopted pursuant to Section 303. Under Section 303, state water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). In requiring closure and capping of the Ash Pond, the State of Progress likely determined that operation of the Ash Pond could create a public hazard if toxic pollutants leaked into ground and surface waters such as the Progress River. The Progress River is a navigable-in-fact interstate body of water whose tributaries include Fossil Creek, the river dammed to create the Ash Pond. EAB 2. The designated use of the Progress River as a navigable interstate body of water reflects the CWA's goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Further, the CWA defines pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). In requiring the closure and capping of the Ash Pond, the State of Progress like took into consideration the threats to federal waters used for "propagation of fish and wildlife" in the Progress River and surrounding land. These waters could be drastically damaged by any leak into ground and surface water. *See* 33 U.S.C. § 1313(c)(2)(A).

Further, there is no requirement that the State of Progress's conditions be specific and objective criteria. *See PUD*, 114 S. Ct at 1911. Respondent defines "criteria" as "elements of State water quality standards, expressed constituent concentrations, level, or narrative statements." 40 CFR § 131.3(b). Respondent's interpretation of its own regulation is entitled to deference. *See Ohio Valley Env. Coalition v. Aracoma Coal Co.,*

556 F.3d 177, 199 (4th Cir. 2009). Even criteria expressed in broad, narrative terms (e.g., "there shall be no discharge of toxic pollutants in toxic amounts") meet Respondent's definition. *See American Paper Institute, Inc. v. EPA*, 996 F.2d 346, 349 (C.A.D.C. 1993). The State of Progress's conditions requiring EnerProg to cap and close the Ash Pond meet the broad-narrative-terms standard. *Id.* At minimum, the conditions imposed by the State of Progress are consistent with Section 303 and are related to water quality because they are related to preserving the Progress River surrounding ground water. Accordingly, the State of Progress acted within its scope of authority.

However, even if the conditions imposed by the State of Progress are not "appropriate requirements of State law," Respondent lacks discretion to exclude state-law limitations from NPDES permits when those limitations are more stringent than the limitations in the CWA. 33 U.S.C. § 1311(b)(1)(C); *see U. S. Steel Corp. v. Train,* 556 F.2d 822, 837-39 (7th Cir. 1977). Accordingly, the requirements of CACA would be imposed either as "appropriate requirements of State law" during state certification or by the EPA because the requirements of CACA are more stringent limitations.

IV. The Ash Pond closure-and-capping plan does not require a separate permit because the dewatered pond is not a "water[] of the United States."

Disposal of pollutants into "waters of the United States" requires adherence to applicable ELGs. 33 U.S.C. §§ 1311, 1341. However, the Ash Pond is not a "water[] of the United States." The Ash Pond is a waste-treatment pond. Waste-treatment ponds are specifically exempted from the definition of "waters of the United States." While Respondent failed to follow all statutory notice-and-comment rulemaking procedures in exempting waste-treatment ponds like the Ash Pond from the definition of "waters of the

United States," Respondent has treated that exemption as effective for nearly 40 years. Vacating the exemption because of a procedural technicality would violate constitutional due process by restoring a pre-1980 regulatory scheme in spite of Respondents' administrative construction to the contrary.

A. Waste treatment ponds are excluded from the definition of "waters of the United States."

Under Sections 301(b) and 402 of the CWA, disposal of pollutants into "waters of the United States" requires adherence to applicable ELGs. 33 U.S.C. §§ 1311, 1341. Federal regulations define "waters of the United States" for purposes of CWA requirements. 40 C.F.R. § 122.2. Certain waters are exempt from the definition of "waters of the United States." *Id.* The exemptions include all "waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." *Id.*

FCW argues that the Ash Pond does not fall within this exemption because earlier versions of the statute limited the exemption. Specifically, versions of the statute enacted before the July 1980 suspension stated that the exemption only applied to manmade bodies of water which were not originally waters of the United States or impoundments thereof. *See, e.g.,* 40 C.F.R. § 122.3 (1980) . However, this sentence was indefinitely stayed by the EPA on July 21, 1980. *See* Consolidated Permit Regulations, 45 Fed. Reg. 48,620, 48,620 (Jul. 21, 1980). The stay was reaffirmed on June 29, 2015. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,504, 37,114, (Jun. 29, 2015).

The current definition of "waters of the United States" does not include the limitation upon which FCW relies. *See* 40 C.F.R. §122.2. Accordingly, as a waste-treatment pond, the Ash Pond is not a "water[] of the United States." Because the permits required by Sections 301 and 404 of the CWA apply only to "waters of the United States," discharges into the Ash Pond do not require a permit.

B. Invalidating a definition on which the public have relied since 1980 would violate constitutional due process by effecting a regulatory scheme of which the public have had no notice.

Under the APA, agency rulemaking must ordinarily provide for public notice of and comment on a proposed rule. 5 U.S.C. § 553(c). The July 1980 suspension indicated that a proposed rule was forthcoming and that a notice-and-comment period would follow. *See* Consolidated Permit Regulations, 45 Fed. Reg. at 48,620. However, no proposed rule was ever published. Respondent concedes that its failure to publish a proposed rule and provide for public notice and comment amounts to a technical failure under the APA. Nonetheless, the public has had notice of the suspended rule since 1980 through Respondents publications in the Federal Register.

The public have relied on the suspension since 1980. The public have had no notice that they are required to abide by the pre-1980 definition of "waters of the United States." Disturbing that reliance would violate constitutional due process by requiring the public to abide by a regulatory scheme of which the public has had no notice. *See* U.S. Const. amend. V; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994) ("[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted"). Reliance on an agency's "longstanding

administrative construction" of a federal statute has been sufficient to preclude criminal liability for violations under that statute. *U.S. v. Pennsylvania Indus. Chem. Corp.,* 411 U.S. 655, 673-75 (1973) ("to the extent that the regulations deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal…there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution"). A 1980 failure to follow procedural technicalities under the APA does not justify a due-process violation.

V. Because closure of the Ash Pond will not cause it to become a "water[] of the United States," the dewatered pond will not require a fill permit under Section 404 of the CWA.

FCW argues that even if the closure of the Ash Pond does not require a permit under Sections 301(b) and 402 of the CWA, once the Ash Pond is closed it no longer qualifies as a waste treatment system. EAB 9. FWC argues that the dewatered Ash Pond will thus become a "water[] of the United States." *Id.* FWC argues that EnerProg will must then obtain a fill permit under Section 404 of the CWA, 33 U.S.C. § 1344, to abandon the remaining coal ash solids in the Ash Pond and cover the Ash Pond with an impermeable cap. *Id.*

The Ash Pond will not become a "water[] of the United States" simply because EnerProg discontinues use of it. Notably, if any water remaining in the Ash Pond continues to undergo natural sedimentation treatment processes even after the Ash Pond is closed, the Ash Pond will still be operating as a waste-treatment pond. As a waste-treatment pond, the Ash Pond will continue to be exempt from the definition of "waters of the United States." *See* 40 C.F.R. 122.2. After the pond is dewatered, the remaining

cavity will no longer contain any water. At that point, the Ash Pond cannot be a "water[] of the United States." *See* 40 C.F.R. 122.2. As the EAB noted, federal regulations contain no provision converting an exempted waste-treatment pond into a water of the United States once it has been closed. EAB 9; *see also* 40 C.F.R. 122.2. Therefore, the closure and capping of the dewatered ash pond do not require a permit under Section 404.

VI. Although compliance dates for zero-discharge requirements for Transport Waters in the 2015 ELGs are currently suspended, Respondent appropriately relied on Best Professional Judgment to impose a zero-discharge requirement.

Respondent promulgated ELGs (the "2015 ELGs") for the NPDES program in November 2015. The 2015 ELGs became effective on January 4, 2016. The 2015 ELGs required that permittees achieve zero discharges of Transport Waters (the "zero-discharge requirement"). The compliance date for the zero-discharge requirement was November 1, 2018.

Several provisions of the 2015 ELGs have been challenged in litigation which is currently pending in the Fifth Circuit. In April 2017, Respondent postponed the compliance date for the zero-discharge requirement until resolution of the litigation. In the postponement notice, Respondent erroneously indicated that the postponement was based on its authority under the APA. Despite this error, the postponement was lawful based on Respondent's more general authority to carry out the purposes of the CWA..

Respondent also correctly relied on BPJ in including a zero-discharge requirement in the Permit. Because the April 2017 postponement of ELG compliance deadlines effectively rendered the ELGs inapplicable, Respondent was required to rely on BPJ in issuing the Permit. BPJ involves consideration of the best available technology (BAT) to achieve CWA goals. The permit writer determined that BAT for Transport Waters is zero discharges. EAB 4.

This Court should not hold that postponement of the ELGs creates a loophole for EnerProg to engage in unfettered toxic dumping. Such a result would violate Congress' clear intent to preserve the integrity of federal waters and prevent discharge of toxic pollutants.

A. The April 2017 postponement of the compliance deadline for the zero-discharge requirement was effective because Respondent has authority to postpone compliance deadlines under Section 1361 the CWA.

Respondent promulgated the "2015 ELGs" for the NPDES program in November 2015. *See* Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838, 67,838 (Nov. 3, 2015). The ELGs became effective on January 4, 2016. *Id.* The 2015 ELGs imposed a zero-discharge requirement for Transport Waters. 40 C.F.R. §§ 423.13(h)(1)(i), (k)(1)(i). The compliance date for the zero-discharge requirement was November 1, 2018.

Several provisions of the 2015 ELGs have been challenged in litigation which is currently pending in the Fifth Circuit. *See Sw. Elec. Power Co. v. EPA,* No. 15-60821. In April 2017, Respondent postponed the compliance date for the zero-discharge requirement until resolution of the litigation. *See* Postponement of Compliance Dates for Effluent Limitations Guidelines, 82 Fed. Reg. 19,005, 19,005 (Apr. 25, 2017). In the postponement notice, Respondent erroneously indicated that the postponement was based on its authority under the APA, 5 U.S.C. § 705.

Section 705 of the APA governs the procedure for an agency's suspension of the "effective date[s]" of its actions. 5 U.S.C. § 705. However, Section 705 does not discuss "compliance dates." "Effective dates" are distinct from "compliance dates." Section 705 should not be construed to govern compliance dates. Because Section 705 does not govern compliance dates, Respondent's authority to suspend compliance dates derives

from its general authority to enact "regulations" under the CWA. *See* 33 U.S.C. § 1361(a). The plain meaning of "regulations" includes suspending compliance dates.

1. Because the terms "effective date[s]" and "compliance dates" are distinct, Section 705 of the APA does not govern postponement of compliance dates.

Congress granted Respondent authority "to prescribe such regulations as are necessary to carry out [its] functions" under the CWA. 33 U.S.C. § 1361(a). The APA prescribes certain standards by which Respondent may exercise that authority. Those standards govern postponement of the "effective date[s]" of Respondent's actions. 5 U.S.C. § 705. However, the APA does not address postponement of "compliance dates."

As Petitioners argue persuasively, the term "effective date[s]" does not encompass "compliance dates." Multiple courts have upheld this distinction. *See, e.g., Silverman v. Eastrich Multiple Inv'r Fund,* 51 F.3d 28, 51 (3d. Cir. 1995); *Nat. Res. Def. Council, Inc. v. EPA,* 683 F.2D 752, 762 (3d. Cir. 1982); *Becerra v. U.S. Dep't of Interior,* 2017 WL 3891678, *9 (N.D.Cal. August 30, 2017) (sl. copy). Moreover, under the CWA, the terms are not interchangeable because they designate different calendar dates. *See* Effluent Limitations Guidelines, 80 Fed. Reg. at 67,838 (designating effective date as Jan. 4, 2016); 40 C.F.R. §§ 423.13(h)(1)(i), (k)(1)(i) (designating compliance date for zero-discharge requirement as November 1, 2018). Finally, under *Bates v. United States,* courts should "resist reading words or elements into a statute that do not appear on its face." 522 U.S. 23, 29 (1997).

Because the term "compliance date" does not appear in Section 705 of the APA, this Court should not construe Section 705 to include that term. *See id.* Accordingly, postponement of compliance dates is not governed by Section 705.

Respondent erroneously purported to rely on Section 705 in the April 2017 postponement notice. *See* Postponement of Compliance Dates, 82 Fed. Reg. at 19,005. Respondent concedes that Section 705 does not necessarily confer authority to suspend effective dates. The language in the postponement notice should not be interpreted as the exclusive basis for Respondent's exercise of authority delegated under Section 1341(a).

2. Respondent's broad authority under Section 1361 of the CWA includes postponing compliance dates.

Because Section 705 does not govern compliance dates, Respondent's ability to postpone compliance dates depends on its general authority to "to prescribe such regulations as are necessary to carry out [its] functions" under the CWA. 33 U.S.C. § 1361(a). The term "regulations" is undefined under the CWA and the APA. However, the plain meaning of "regulation" includes "authoritative rule[s] dealing with details or procedure." *Regulation,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). A compliance date is an authoritative rule, since regulated parties are required to abide by it or face statutory penalties. 33 U.S.C. § 1319. A compliance date involves a particular detail: the deadline for avoiding liability for failure to abide by the law.

3. This Court should not adopt a rule that postponing compliance dates amounts to substantive rulemaking because postponement is not a "rule" as defined by the CWA.

A few Circuits have opined that postponement of a rule's effective date amounts to repealing that rule. *See Nat. Res. Def. Council v. Abraham,* 355 F.3d 179, 194 (2d Cir. 2004); *Pub. Citizen v. Steed,* 733 F.2d 93, 98 (D.C.Cir. 1984). This Court need not adopt those holdings. Postponement of a compliance date is not a "rule" under the APA. Instead, the APA defines a "rule" as

> the whole or a part of an agency statement…designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.

5 U.S.C. § 551(4). A postponement does not "implement, interpret, or prescribe law or policy." Instead, it merely preserves the status quo. *See Sierra Club v. Jackson,* 833 F.Supp.2d 11, 28 (D.D.C. 2012). Nor does a postponement "describ[e] the organization, procedure, or practice requirements of an agency." Instead, a postponement of a compliance date prevents an agency rule from becoming enforceable on a specific day. Such prevention does not amount to repealing the rule. Postponement is temporary by definition and contemplates that the rule will become enforceable at a later date.

B. Respondent could rely on Best Professional Judgment to impose a zero-discharge requirement.

Due to the suspension of compliance dates for zero-discharge requirements for Transport Waters, the zero-discharge portions of the 2015 ELGs are currently ineffective. When specific effluent regulations are lacking, Respondent must nonetheless ensure that any new NPDES permit safeguards the goals of the CWA. Respondent must rely on BPJ to ensure that NPDES permits uphold CWA requirements. The MEGS permit writer considered the appropriate factors in drafting the Permit. This Court should not hold that suspension of ELGs authorizes EnerProg to circumvent Congress' goals by engaging in unregulated toxic dumping.

1. The April 2017 suspension of ELG compliance deadlines for Transport Waters means that these provisions of the ELGs are currently inapplicable.

Respondent's 2015 ELGs create a zero-discharge requirement for fly ash transport water and bottom ash transport water (collectively, "Transport Waters"). 40 C.F.R. §§ 423.13(h)(1)(i), (k)(1)(i). ELG limitations become binding on an entity that receives an

NPDES permit. *E.I. Pont de Nemours & Co. v. Train,* 430 U.S. 112, 119-20 (1977). As an NPDES permittee, EnerProg is bound by the ELGs. However, in April 2017, due to pending litigation, Respondent suspended compliance deadlines for the zero-discharge requirements for Transport Waters. *See* Postponement of Compliance Dates, 82 Fed. Reg. at 19,005. That litigation has not yet been resolved. *See generally Sw. Elec. Power Co. v. EPA,* No. 15-60821. Because compliance with the 2015 ELGs cannot be enforced for Transport Waters, the 2015 ELGs are effectively inapplicable to toxic wastes associated with Transport Waters.

2. When ELGs are inapplicable, NPDES permits must be based on Respondent's best professional judgment.

The inapplicability of ELGs does not relieve dischargers from complying with the CWA. Instead, dischargers must still seek an NPDES permit, 40 C.F.R. § 122.1(b)(1), and are subject to regulation on a case-by-case basis to achieve CWA compliance. 40 C.F.R. § 125.3(c)(2)-(3). Case-by-case regulation is known as best professional judgment (BPJ). *See, e.g.,,* 40 C.F.R. § 125.3(a)(2)(ii)(B).

BPJ-based permits regarding toxic pollutants must require utilization of the best available technology that is economically achievable (BAT). 40 C.F.R. § 125.3(a)(3). The permit writer must consider the appropriate technology for the type of discharger at issue and any unique factors about the discharger. 40 C.F.R. § 125.3(c)(2)(i)-(ii). To determine BAT, the permit writer must also consider the age of facilities and equipment involved, the costs of achieving effluent reduction, the process utilized and any changes, the engineering aspects of potential discharge-control techniques, and environmental impacts beyond water quality. 40 C.F.R. § 125.3(d)(3)(i)-(vi).

In this case, the permit writer determined that BAT for MEGS was zero discharges. O. 5. The permit writer noted that a process to achieve zero discharges was available and feasible, since plants like MEGS have long employed dry handling of toxic wastes associated with Transport Waters. *Id.* The permit writer found that MEGS was sufficiently profitable to modify or upgrade its facilities and equipment to implement dry handling. *Id.* In fact, the approximate cost would result in a mere $0.12 increase in the average consumer's monthly bill. *Id.* The permit writer also noted that MEGS was sufficiently profitable to make the necessary changes to its facilities to implement dry handling.

The record does not reflect whether the permit writer considered engineering aspects, broader environmental impacts, or other unique factors. *Id.* However, the EAB upheld the permit. The EAB correctly noted that if the suspension of the 2015 ELGs were effective, BPJ was an appropriate basis for the permit writer's decision. O. 7. The EAB noted that when ELGs do not cover all pollutants or all aspects of a discharger's operations, the remaining areas "'are subject to regulation on a case-by-case basis.'" *Id.* (quoting 40 C.F.R. 125.3(c)(3). Due to the suspension of the 2015 ELGs for Transport Waters, the 2015 ELGs are currently inapplicable to EnerProg's Transport Waters. Thus, the EAB correctly concluded that BPJ was an appropriate basis for imposing zero-discharge requirements for Transport Waters.

C. Suspension of compliance deadlines should not create a loophole for EnerProg to circumvent the Congressional goals underlying the CWA.

This Court should not hold that the 2017 postponement simply exempts EnerProg from compliance with the CWA. Exempting EnerProg from any regulation would effectively authorize EnerProg to discharge unlimited quantities of toxic materials into

protected waters. Such authorization would violate Congress' plainly-expressed intent to protect the integrity of the nation's waters by preventing discharges of toxic pollutants. 33 U.S.C. § 1251(a)(1), (3). Moreover, the plain text of the CWA clearly provides for the EPA to regulate pollutant discharges when specific regulations are unavailable. If a discharger seeks an NPDES permit while federal guidelines are still in progress, any permit issued by the EPA must impose "such conditions as the Administrator determines are necessary to carry out the provisions of [the CWA]." 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.4(a); *see also Nat. Res. Def. Council, Inc. v. Costle,* 568 F.2d 1369, 1375 (D.C. Cir. 1977) (holding that the EPA has no discretion to issue a more lenient permit). The zero-discharge requirement represents a condition that the EPA has determined to be "necessary to carry out the provisions of [the CWA]." This Court should not allow EnerProg to circumvent Congress' intent by avoiding CWA compliance during suspension of the ELGs.

D. Even if the suspension was ineffective, the zero-discharge requirement is still applicable because it is part of the 2015 ELGs.

If this Court finds that the April 2017 suspension of ELG compliance dates was ineffective, EnerProg must nonetheless comply with the zero-discharge requirement for Transport Waters. The zero-discharge requirement is part of the 2015 ELGs. *See* 40 C.F.R. §§ 423.13(h)(1)(i), (k)(1)(i). The compliance date for the zero-discharge requirement is also part of the 2015 ELGs. *Id.* The 2015 ELGs are binding on EnerProg pursuant to EnerProg's receipt of an NPDES permit. *See E.I. Pont de Nemours,* 430 U.S. at 119-20. Accordingly, if the compliance date is not suspended, it is binding on EnerProg.

The compliance date in the 2015 ELGs is November 1, 2018. 40 C.F.R. §§ 423.13(h)(1)(i), (k)(1)(i). This is the same compliance date listed in EnerProg's NPDES permit. O. 5. Thus, even if Respondent cannot rely on BPJ to impose the zero-discharge requirement, the requirement still binds EnerProg because it is part of the binding ELGs.

CONCLUSION

The State of Progress' requirement that EnerProg close and cap the Ash Pond was an appropriate state-law requirement under Section 401(d) of the CWA, and Respondent lacked discretion to reject the requirement. The Ash Pond is not a "water[] of the United States" as that term is defined for purposes of the CWA. Waste-treatment ponds like the Ash Pond have been excluded from the definition of "waters of the United States" since 1980, and the CWA does not provide for them to become "waters of the United States" upon disuse. Respondent had authority to suspend compliance dates for the 2015 ELGs pursuant to its broad authority under the CWA. Respondent was required to rely on BPJ in issuing an NPDES permit to EnerProg. Likewise, Respondent was required to determine BAT in exercising BPJ. BAT for facilities like MEGS is zero discharges. For these reasons, the decision of the EAB should be upheld.

We hereby certify that the brief for Mitchell Hamline School of Law is the product solely of the undersigned and that the undersigned have not received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

Dated: November 27, 2017

/s/ Morgan Voight
/s/ Mercedes Priebe
/s/ Alexandra Zabinski

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United States District Court,
N.D. California.

Xavier BECERRA, et al., Plaintiffs,
v.
UNITED STATES DEPARTMENT OF the INTERIOR, et al., Defendants.

Case No. 17–cv–02376–EDL
|
Signed 08/30/2017

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ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 13

ELIZABETH D. LAPORTE, United States Magistrate Judge

***1** In this case, Plaintiffs People of the State of California, ex rel. Xavier Becerra, Attorney General, and People of the State of New Mexico, ex rel. Hector Balderas, Attorney General, seek a declaration that that the action of Defendants United States Department of the Interior ("DOI"), Office of Natural Resources Revenue ("ONRR"), Secretary of the Interior Ryan Zinke, and Director of the ONRR Gregory Gould violated the Administrative Procedure Act ("APA") and an injunction requiring Defendants to vacate the postponement of and reinstate the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation rule at 81 Fed. Reg. 43,338 (July 1, 2016) (the "Rule"). On June 2, 2017, Plaintiffs moved for summary judgment. Dkt. No. 13. Defendants opposed on July 20, 2017, and Plaintiffs replied on August 4, 2017. Dkt. Nos. 26 & 27. On August 22, 2017, the Court heard argument on Plaintiffs' motion. For the reasons stated below, the Court GRANTS Plaintiffs' motion for summary judgment.

I. FACTUAL BACKGROUND

In 2007, ONRR's Subcommittee on Royalty Management issued a report with several recommendations regarding mineral revenue collection from Federal and Indian lands. Dkt. No. 15–9, Ex. 9, 90 Fed. Reg. 608. ONRR engaged in a rulemaking process and issued two advanced notices of proposed rulemaking in May 2011. Dkt. No. 15–7, 76 Fed. Reg. 30,878; Dkt. No. 15–8, 76 Fed. Reg. 30,881. One advanced notice requested comments and suggestions before proposing changes to the regulations governing the valuation of oil and gas produced from Federal leases for royalty calculation. Dkt. No. 15–7, 76 Fed. Reg. 30,878. The other requested comments and suggestions before proposing changes to the regulations governing the valuation of coal produced from Federal and Indian leases, also used to calculate royalties. Dkt. No. 15–8, 76 Fed. Reg. 30,881. After receiving responses to the call for comments and conducting six public workshops, ONRR issued a proposed rule entitled "Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform" (the "Proposed Rule") on January 6, 2015. Dkt. No. 15–9, Ex. 9, 90 Fed. Reg. 608. Approximately eighteen months later, on July 1, 2016, ONRR issued the final rule regarding the valuation of oil and gas production from Federal leases and coal production from Federal and Indian leases (the "Rule"). Dkt. No. 15–10, Ex. 10, 81 Fed. Reg. 43,338. ONRR set forth an effective date of January 1, 2017 for the Rule. Id. ONRR described the purpose of the Rule as follows:

> (1) to offer greater simplicity, certainty, clarity, and consistency in product valuation for mineral lessees and mineral revenue recipients; (2) to ensure that Indian mineral lessors receive the maximum revenues from coal resources on their land, consistent with the

> Secretary's trust responsibility and lease terms; (3) to decrease industry's cost of compliance and ONRR's cost to ensure industry compliance; and (4) to provide early certainty to industry and to ONRR that companies have paid every dollar due.

***2** Id. ONRR estimated that the Rule would increase royalty collections by between $71.9 million and $84.9 million. Id. at 43,359.

On December 29, 2016, various coal and oil industry groups challenged the Rule in three lawsuits filed in the United States District Court for the District of Wyoming, contending that the Rule was arbitrary and capricious. Dkt. No. 13–1, Mot. at 5. The Rule took effect on January 1, 2017, although first reports and royalty payments under the Rule were not due until February 28, 2017. Dkt. No. 26–1, Gould Decl. ¶ 4.

Between October 17, 2016 and December 15, 2016, ONRR conducted eleven training sessions on the Rule. Id. ¶ 4. According to Gould, the trainings revealed some confusion about the Rule. Id. During this training, ONRR received requests for guidance about how to comply with the Rule. Id. ¶ 5. ONRR responded that it could not provide guidance before the January 1, 2017 effective date and could not guarantee guidance by the end of February. Id.

On February 17, 2017, the plaintiffs in the District of Wyoming suits sent a letter to ONRR which "ask[ed] ONRR to postpone the implementation of the Rule under 30 U.S.C. § 705 of the Administrative Procedure Act." Id. ¶ 6. On February 22, 2017, Deputy Director of ONRR James D. Steward issued a letter stating that "[i]n light of the pending litigation, ONRR has decided to postpone the effective date of the 2017 Valuation Rule until the litigation is resolved pursuant to Section 705 of the Administrative Procedure Act." Dkt. No. 15–2, Ex. 2 at 1. The letter stated that the effective date of the Rule was January 1, 2017, with the first reports due on February 28, 2017. Id. According to the letter, those affected by the Rule "should continue to value, report, and pay royalties under the rules that were in effect prior to January 1, 2017," i.e., under the old regulation that the Rule replaced. Id. ONRR also published an announcement on its website stating, "Attention: The 2017 Valuation Rule has been stayed!" Dkt. No. 26–1, Gould Decl., Ex. 4.

On February 27, 2017, ONRR issued a notice in the Federal Register which postponed the Rule. Dkt. No. 15–12, Ex. 12, 82 Fed. Reg. 11,823. Referring to three separate petitions challenging the Rule in the District of Wyoming, ONRR wrote that "[i]n light of the existence and potential consequences of the pending litigation, ONRR has concluded that justice requires it to postpone the effectiveness of the 2017 Valuation Rule pursuant to 5 U.S.C. § 705 of the Administrative Procedure Act, pending judicial review." Id.

On March 23, 2017, ONRR moved to stay the three cases in the District of Wyoming because they were developing a notice of proposed rulemaking to repeal the Rule. Dkt. No. 15–3, Ex. 3. On April 4, 2017, ONRR issued an advance notice of proposed rulemaking. Dkt. No. 15–14, Ex. 14, 82 Fed. Reg. 16,325. In it, ONRR sought comments and suggestions about whether revisions to the Rule were necessary and, if so, what revisions. Id. On the same day, ONRR proposed to repeal the Rule. Dkt. No. 15–13, Ex. 13, 82 Fed. Reg. 16,323. On April 27, 2017, the district court granted the requested stays. Dkt. No. 15–5, Ex. 5. On August 7, 2017, ONRR published a final rule repealing the Rule, with an effective date of September 6, 2017 ("Repeal Rule"). Dkt. No. 35.

II. PROCEDURAL HISTORY

***3** On April 26, 2017, Plaintiffs filed a complaint seeking declaratory and injunctive relief. Dkt. No. 1. Plaintiffs alleged that Defendants' actions violated 5 U.S.C. sections 553, 705, and 706, and sought a declaratory judgment that Defendants acted arbitrarily, capriciously, contrary to law, abused their discretion, and failed to follow the required procedure in their delay of the Rule. Id. ¶¶ 36–45; p. 9. Plaintiffs also requested that the Court vacate Defendants' postponement of the Rule, enjoin Defendants to reinstate the Rule, award Plaintiffs their costs, expenses, and reasonable attorneys' fees, and award such other relief as the Court deems just and proper. Id. at 9–10.

On June 2, 2017, Plaintiffs moved for summary judgment. Dkt. No. 13. Plaintiffs argued that ONRR's postponement of the Rule violated the APA in two respects. First, Plaintiffs argued that ONRR incorrectly invoked Section 705 of the APA to postpone the effectiveness of the Rule after it had already gone into effect, contrary to the plain language of the statute. Second, Plaintiffs contended that ONRR effectively repealed the Rule without soliciting input from the public as required by the APA's provision for notice and comment. Id.

Oral argument was scheduled on July 11, 2017, pursuant to the normal briefing and hearing schedule under the local rules. L.R. 7–2(a). However, Defendants requested a thirty-day extension of Defendants' time to file their opposition, and postponement of oral argument until August 22, 2017 due to "personal and professional commitments" of their counsel. Plaintiffs agreed to the request, apparently as a professional courtesy. Guidelines for Professional Conduct, Northern District of California, Section 3.

On July 20, 2017, Defendants opposed the motion. Dkt. No. 26. They responded that ONRR's postponement was authorized under Section 705. Defendants also contended that the motion is premature because the Court has not yet issued a case management schedule and Defendants have not had sufficient time to produce the administrative record. Id. Defendants argued that the motion should be denied or dismissed as premature, or that consideration of it be stayed. Id.

On August 4, 2017, Plaintiffs replied. Dkt. No. 27. Plaintiffs argued that the meaning of effective date in section 705 is clear and does not authorize an agency to postpone a rule that is already in effect. Id., Reply at 1. Further, Plaintiffs contended that Defendants have not pointed to any need for examination of the administrative record to decide the purely legal question presented. Id.

On June 14, 2017, the States of Washington, Oregon, Maryland, and New York moved to file an *amicus curiae* brief in support of Plaintiffs. Dkt. No. 20. The Court granted their motion on June 16, 2017. Dkt. No. 21. *Amici* States argued that section 705 of the APA does not allow the retroactive suspension of a rule that has already gone into effect. Dkt. No. 20, Br. at 3. Furthermore, *amici* States contended that the suspension under section 705 was invalid because the suspension was pending ultimate repeal of the Rule rather than pending judicial review of the Rule. Id. at 4. In addition, *amici* States argued that ONRR's actions undermine the APA's goal of fostering the stability and predictability of federal regulation. Id. at 5.

On August 16, 2017, only six days before the hearing on the motion for summary judgment and nine days after the issuance of the Repeal Rule (also more than four months after ONRR formally proposed repeal of the Rule), Defendants filed an administrative motion to postpone oral argument to October 3, 2017. In that motion, Defendants informed the Court that they intended to file a motion to dismiss based on Article III mootness due to the repeal. Defendants' motion violated the requirement of Local Rule 6–1(b) requiring that a request to extend a court hearing date be filed at least fourteen days in advance, so as not to disrupt the Court's and the parties' schedule, especially once briefing was complete (also fourteen days before the hearing), and the Court began preparing for the hearing.

***4** Plaintiffs opposed the motion to postpone the hearing as violating the local rules and prejudicing them by prolonging the length of what they viewed as an illegal and harmful postponement of the Rule. On August 17, 2017, the Court denied the requested continuance as contrary to the Local Rule and inefficient because the Court had already fully prepared for the long-scheduled hearing on summary judgment.

On August 18, 2017, Defendants filed their motion to dismiss based solely on Article III mootness, noticed to be heard on October 3, 2017. Defendants did not move to shorten time for the hearing as permitted under Local Rule 6–1. Their notice of motion stated that this case is moot in the present tense. Dkt. No. 39 at 2.

At the hearing on summary judgment, however, after the Court asked about the impact of the September 6, 2017 effective date of the Repeal Rule, Defendants stated that because the postponement of the Rule remained operative until the Repeal Rule took effect on September 6, 2017, prudential mootness rather than Article III mootness

applied until September 6, 2017, when the case would become moot under Article III.

III. LEGAL STANDARD

Summary judgment shall be granted if "the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). Material facts are those which may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. Id. If the moving party meets its initial burden, the opposing party "may not rely merely on allegations or denials in its own pleading;" rather, it must set forth "specific facts showing a genuine issue for trial." See Fed. R. Civ. P. 56(e)(2); Anderson, 477 U.S. at 250, 106 S.Ct. 2505. If the nonmoving party fails to show that there is a genuine issue for trial, "the moving party is entitled to judgment as a matter of law." Celotex, 477 U.S. at 323, 106 S.Ct. 2548.

IV. DISCUSSION

A. Prudential Mootness

ONRR published a final rule repealing the Rule, effective as of September 6, 2017. Defendants moved to dismiss this case for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(h)(3). Subject matter jurisdiction presents a "threshold question[ ] which must be decided before [the Court] address[es] the merits." Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' ") (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884)). An action is moot when the issues presented are no longer live, and the mootness inquiry asks whether there is anything left for the court to do. Western Oil & Gas Ass'n v. Sonoma Cnty., 905 F.2d 1287, 1290 (9th Cir. 1990).

***5** Here, the repeal of the Rule is not effective until September 6, 2017. At the hearing, Defendants acknowledged that the postponement under section 705 of the APA is operative in their view until September 6, 2017, so the case is (at most) prudentially moot now, and not moot under Article III until September 6, 2017.

The Ninth Circuit has not adopted the doctrine of prudential mootness outside of the bankruptcy context. Maldonado v. Lynch, 786 F.3d 1155, 1161 n.5 (9th Cir. 2015) (en banc). Cf. Hunt v. Imperial Merch. Servs., Inc., 560 F.3d 1137, 1142 (9th Cir. 2009) (declining to dismiss an appeal as "anticipatorily moot" because it presented an issue that often arises in district courts but evades appellate review). Therefore, this Court declines to apply it.

Even if the doctrine of prudential mootness were to apply, however, the motion is not prudentially moot. Prudential mootness is an equitable doctrine, under which the Court should exercise its discretion, Fletcher v. United States, 116 F.3d 1315, 1321 (10th Cir. 1997), and generally depends on whether the court can grant

"meaningful relief." Hunt, 560 F.3d at 1142 (quoting S. Utah Wilderness All. v. Smith, 110 F.3d 724, 727 (10th Cir. 1997)). See also Marcavage v. Nat'l Park Serv., 666 F.3d 856, 862 n.1 (3d Cir. 2012) (explaining that the "key inquiry in a prudential mootness analysis is 'whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief' ") (quoting Int'l Broth. of Boilermakers v. Kelly, 815 F.2d 912, 915 (3d Cir. 1987)); Penthouse Int'l, Ltd. v. Meese, 939 F.2d 1011, 1019 (D.C. Cir. 1991) ("This concept is concerned, not with the court's power under Article III to provide relief, but with the court's discretion in exercising that power."). As an equitable doctrine, the analysis of whether the motion is prudentially moot is guided by a "sense of basic fairness." United States v. Paradise, 480 U.S. 149, 192, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987). In other circuits that recognize the prudential mootness doctrine, a principle concern when determining if the court can provide meaningful relief is whether it is likely that the challenged conduct will be repeated. See Fletcher, 116 F.3d at 1321.

As remedies, Plaintiffs seek a declaration that Defendants violated the APA by postponing the effective date of the Rule and vacatur of the postponement. With respect to declaratory relief, Plaintiffs' argument is well taken that leaving the postponement in place casts a "continuing and brooding presence" over the parties and any subsequent challenge that might be made to the repeal of the Rule. Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 122, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974). Declaratory relief provides the necessary clarity and certainty that Defendants acted in violation of the APA when they issued the postponement if repeal of the Rule is overturned at some point in the future and the former rule is reinstated.

Declaratory relief is an appropriate and meaningful remedy for the additional reason that Defendants' approach to repealing the Rule is sufficiently likely to be repeated without being subject to judicial review to cut against application of prudential mootness.[1] The likelihood that one or more Defendants will use the same strategy to effectively repeal regulations that California has a stake in maintaining in effect without statutory authority after their effective date is not remote. An agency within the Department of the Interior—the Bureau of Land Management—is a defendant in another case that is currently before this Court in which the plaintiffs are challenging the Bureau of Land Management's delay of the Waste Prevention, Production Subject to Royalties and Resources Conservation rule (81 Fed. Reg. 83,008) under Section 705 of the APA. See State of California et al. v. United States Bureau of Land Management et al., 17–cv–3804–EDL. The possibility that Defendants will repeat their conduct is an appropriate factor for the Court to consider when assessing prudential mootness. See Fletcher, 116 F.3d at 1321.

***6** Defendants have shown through the circumstances of this case that they can move quickly to engage in notice and comment rulemaking to repeal an unwanted regulation after postponing its implementation after the effective date, thereby frustrating those aggrieved by the interim repeal from obtaining a judicial ruling on the misuse of Section 705. See Greenpeace Action v. Franklin, 14 F.3d 1324, 1329–30 (9th Cir. 1992) ("The regulation challenged was in effect for less than one year, making it difficult to obtain effective judicial review."); Humane Soc'y of the United States v. Envt'l Protection Agency, 790 F.2d 106, 113 (D.C. Cir. 1986) ("The one-year life span of the permits simply did not allow completion of the process prior to their demise."). The significance of the possibility of repeated conduct is highlighted by Defendants' "conspicuous failure ... to foreswear future deferrals without notice or comment." Envt'l Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 811 (D.C. Cir. 1983). See also American Rivers, Inc. v. NOAA Fisheries, 2004 WL 2075032, at *3 (D. Or. Sept. 14, 2004) (concluding that the defendants had not shown an intention to abandoned the challenged conduct "to the extent that a repeat of the challenged actions is highly unlikely").

An inherent aspect of the application of an equitable doctrine is whether declaratory relief is necessary to achieve basic fairness. See Paradise, 480 U.S. at 192, 107 S.Ct. 1053. As indicated in the procedural history recited above, Defendants have repeatedly used procedures to delay the decision on Plaintiffs' summary judgment motion, including delaying the hearing on this motion for five weeks and then violating the local rules by filing a last minute administrative motion to postpone argument

for six more weeks until October 3, 2017. If their belated request had been granted, the resulting delay would have had the effect of putting off the hearing and decision on the motion until after the Repeal Rule went into effect on September 6, 2017, and the case became moot under Article III. Indeed, in the brief in support of their motion to dismiss, filed on August 18, 2017 and noticed for a hearing on October 3, 2017, Defendants argued for dismissal solely on the basis of Article III mootness, yet at the August 22, 2017 hearing on the motion for summary judgment, Defendants acknowledged that only prudential mootness (a doctrine not adopted by the Ninth Circuit) was currently at issue. When asked why the motion to dismiss had not addressed prudential mootness, Defendants pointed to the hearing date. The omission of prudential mootness in the motion to dismiss was apparently based on the self-fulfilling prophecy that delay in ruling on the merits until after the effective date of the Repeal Rule would render the issue of prudential mootness itself moot and divest this Court of jurisdiction.

Finally, as the Ninth Circuit has repeatedly held, "there is a continuing public interest in determining the appropriate legal principles" by which Defendants promulgate rules and regulations affecting the value of revenue generated from coal produced from Federal and Indian leases. See Joint Bd. of Control of Flathead, Mission & Jocko Irrigation Dists. v. United States, 832 F.2d 1127, 1130 (9th Cir. 1987) (continuing public interest in resolving the Bureau of Indian Affairs' water distribution strategy). See also United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) (there is a "public interest in having the legality of practices settled" where the challenged conduct violated the antitrust laws and is capable of being repeated).

Accordingly, a meaningful remedy is available in the form of declaratory relief and the motion would not be prudentially moot even if that were a viable doctrine in the Ninth Circuit outside of the bankruptcy context. As set forth in the later discussion on remedies, the Court declines to also issue vacatur under these circumstances.

B. Standard of Review

***7** Defendants argue that the APA may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law," 5 U.S.C. § 706, focusing on the standard of review under the first clause regarding arbitrary action and abuse of discretion on matters within the agency's discretion. Defendants contend that review under this standard "is narrow, and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). They argue that an agency's decision can be set aside "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Earth Island Inst. v. U.S. Forest Serv., 697 F.3d 1010, 1013 (9th Cir. 2012) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)).

That standard, however, is not applicable to actions short of statutory right or taken in violation of legally required procedures. To the contrary, section 706 provides that, "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The "arbitrary and capricious" standard forms a separate basis to set aside agency action, 5 U.S.C. § 706(2)(A), and it is that standard which Motor Vehicle Manufacturers Association characterized as narrow. 463 U.S. at 42–43, 103 S.Ct. 2856. Similarly, Defendants rely on a portion of Earth Island Institute in which the court cites Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) for exposition of the arbitrary and capricious standard. See also Price v. Stevedoring Servs. of Am., Inc., 697 F.3d at 825–26 (holding that litigating position of Director of Office of Workers' Compensation Programs in interpreting Longshore Act was not entitled to Chevron deference where Director did not adopt his litigating positions through any relatively formal administrative procedure, but through internal decision-making not open to public comment or determination, and there was no other indication that Congress intended Director's litigating positions to carry force of law).

As Plaintiffs persuasively argue, the ONRR's decision to postpone the Rule is not entitled to deference. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) held that "the court must first give effect to the unambiguously expressed intent of Congress" when reviewing an agency's interpretation of a statute. Under United States v. Mead Corp., 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) and Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 826 (9th Cir. 2012), Chevron deference is warranted only when an agency is exercising authority delegated to it by Congress to administer a particular statute, and that Congress has not delegated ONRR authority to administer the APA. By contrast, Motor Vehicle Manufacturers Association addressed agency action delegated to that agency by the Motor Vehicle Safety Act. 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443. Similarly, in Earth Island Institute, the Ninth Circuit held that the Forest Service is entitled to deference as to its interpretation of its own forest plans unless that interpretation is plainly inconsistent with the plan. 697 F.3d at 1013.

The underlying dispute here, however, centers upon ONRR's application of section 705 of the APA. Under Mead Corp., "administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226–27, 121 S.Ct. 2164. Defendants have not pointed to any authority delegating ONRR authority to interpret section 705 of the APA. Thus, Defendants have failed to show that ONRR's interpretation of section 705 of the APA is entitled to deference.

C. ONRR's Application of Section 705

***8** Section 705 of the APA provides:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

Plaintiffs argue that postponing the effectiveness of the Rule after it had gone into effect contradicts the plain language of the statute. Plaintiffs point to the only decision on this issue, Safety–Kleen Corp. v. EPA, 1996 U.S. App. LEXIS, *2 (D.C. Cir. Jan. 19, 1996), which held that section 705 does not permit an agency to suspend a promulgated rule without notice and comment.

Defendants contend instead that the deadline for invoking agency postponement authority under the first sentence of section 705 is not the effective date, but what they term the "compliance date" of February 28, 2017 at which time the first reports and royalty payments were due. Defendants argue that Plaintiffs' interpretation of effective date makes little practical sense and would frustrate Congressional intent. They contend that in many instances, an agency will not have time to exercise its § 705 authority after a lawsuit is filed and before the challenged rule's stated effective date. Defendants do not cite a part of the Rule in which the "compliance date" is designated, but instead rely on ONRR Director Gould's recent declaration to characterize February 28, 2017 as the compliance deadline. Dkt. No. 26, Gould Decl. ¶ 4.

Defendants also argue that "compliance dates" are the "dates with teeth," and section 705 is meant to allow an agency to maintain the status quo pending judicial review. At the hearing, however, Defendants acknowledged that the Rule began to require compliance when it went into effect on the effective date "in a buildup" to the compliance date of February 28, 2017. Thus, rather than being toothless as of the effective date and only suddenly acquiring a set of teeth as of the February compliance

date, in actuality the Rule imposed compliance obligations starting on its effective date of January 1 that increased over time but did not abruptly commence at the end of February.

Plaintiffs respond that Defendants' attempt to read additional language into the statute to permit them to delay a rule after its effective date, but before the passing of compliance deadlines, fails. As the Supreme Court cautioned in Bates v. United States, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997), courts "ordinarily resist reading words or elements into a statute that do not appear on its face." See also Stanton Rd. Assocs. v. Lohrey Enters., 984 F.2d 1015, 1020 (9th Cir. 1993) (stating that the court did not have the power to read into the statute words not explicitly inserted by Congress). Plaintiffs also argue that Defendants' broad reading of "effective date" runs counter to the overall scheme of the APA, which provides an orderly process of notice and comment rulemaking, including the date a final rule takes effect, and limits the agency's authority to postpone that date once it has passed so as not to allow the agency to bypass the notice and comment requirements for repeal.

***9** As the Court of Appeals for the District of Columbia explained:

> Upon consideration of the motion of intervenors to vacate administrative stay, the responses thereto and the reply, it is ORDERED that the motion be granted. Respondent improperly justified the stay based on 5 U.S.C. § 705 (1994). That statute permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It does not permit the agency to suspend without notice and comment a promulgated rule, as respondent has attempted to do here. If the agency determines the rule is invalid, it may be able to take advantage of the good cause exception, 5 U.S.C. § 553(b).

Safety–Kleen Corp. v. EPA, 1996 U.S. App. LEXIS, *2–3 (Jan. 19, 1996). The Court finds that reasoning persuasive. The plain language of the statute authorizes postponement of the "effective date," not "compliance dates." 5 U.S.C. § 705. Effective and compliance dates have distinct meanings. See Silverman v. Eastrich Multiple Inv'r Fund, L.P., 51 F.3d 28, 31 (3d Cir. 1995) ("The mandatory compliance date should not be misconstrued as the effective date of the revisions."); Nat. Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 683 F.2d 752, 762 (3d Cir. 1982) (stating an effective date is "an essential part of any rule: without an effective date, the agency statement could have no future effect, and could not serve to implement, interpret, or prescribe law or policy") (internal quotation marks omitted).

Furthermore, *amici* States persuasively argue that because ONRR sought and secured stays in the cases challenging the Rule in the District of Wyoming, ONRR improperly invoked section 705 to suspend the effective date of the Rule pending its ultimate repeal rather than pending judicial review as required by section 705. The announced purpose of the postponement was that "[i]n light of the pending litigation, ONRR has decided to postpone the effective date of the 2017 Valuation Rule until the litigation is resolved pursuant to section 705 of the APA." Dkt. No. 15–2, Ex. 2 at 1 (emphasis added). Thus, ONRR acknowledged the other limit of its section 705 authority to postpone in addition to "effective date," i.e., "pending judicial review," yet ONRR blocked judicial review by obtaining a stay in the Wyoming litigation to pursue the Repeal Rule instead.

Even if the Court could ignore the plain language of the statute, Defendants' policy argument that the Court should construe section 705 to include "compliance dates" because section 705 is meant to allow an agency to maintain the status quo pending judicial review is unpersuasive. Defendants' position undercuts regulatory predictability and consistency. See Price, 697 F.3d at 830 (formal rulemaking exists in order to provide "notice and predictability to regulate parties"). After nearly five years of carrying out the requisite rulemaking milestones, as well as public workshops, and trainings leading up to the effective date, ONRR's suspension of the Rule did not merely "maintain the status quo," but instead prematurely

restored a prior regulatory regime. In addition, while the "effective date" is clearly set forth in the formal announcement of the final Rule, the same is not true of dates that ONRR subsequently labels "compliance dates" after the Rule takes effect and then equates to effective dates. Defendants' interpretation would allow the agency broad latitude to delay implementation long after a rule was formally noticed to the public as taking effect by characterizing other later dates as compliance dates and thereby retroactively abrogating the published effective date. Not only is there no support in the language of the statute for this interpretation, but ONRR cites no precedent or legislative history to support a Congressional delegation of such broad authority to bypass the APA repeal process for a duly promulgated regulation.

***10** Similarly, Defendants' argument that recent questions and complaints raised new issues justifying the postponement does not justify acting outside of statutory authority. Moreover, entities which would be subject to the Rule had copious opportunities to raise objections and concerns about implementation during the lengthy notice and comment period. Indeed, as Defendants acknowledged at oral argument, many, if not all, of the same objections raised by the plaintiffs challenging the Rule in the District of Wyoming were advanced during the five-year long rulemaking process. Presumably, they did so in light of the requirement to exhaust their administrative remedies. Lands Council v. McNair, 629 F.3d 1070, 1076 (9th Cir. 2010) ("A party forfeits arguments that are not raised during the administrative process.").

Finally, Defendants' argument that construing the effective date literally and not also as the "compliance date" can in some circumstances unduly shorten the agency's opportunity to postpone a rule's impact when faced with litigation is unpersuasive in light of the additional provision of section 705, which allows the agency to seek broad relief from the reviewing court. See 5 U.S.C. § 705 ("On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.") (emphasis added). Thus, ONRR could have asked the court to stay the implementation of the regulation, instead of unilaterally issuing its own "stay," as it characterized the postponement on its website.

1. Relationship between Section 705 and Section 553(d) of the APA

At the hearing, Defendants argued that section 705 does not incorporate or cross reference effective date under section 553(d) of the APA, as section 705 applies to all agency action rather than just rulemaking. See 5 U.S.C. § 705 (allowing an agency to postpone "action taken by it"); 5 U.S.C. § 551(13) (defining agency action to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). Defendants make the leap that the definition of effective date in section 705 must therefore be more capacious than the definition of effective date in section 553(d).

Their argument is not persuasive. While section 705 allows the postponement of the effective date of a broader range of agency actions than a complete rule, such as a part of a rule or a license, that does not alter the plain meaning of "effective date."

D. Compliance with Notice-and-Comment Requirements

Plaintiffs and *amici* States argue that ONRR also violated the APA's notice-and-comment requirements by effectively repealing the Rule without allowing the public an opportunity for meaningful comment. Sections 553(b) and (c) of the APA set forth the notice-and-comment requirements for agency "rule making." 5 U.S.C. § 553. "Rule making means agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Citing Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 814 (D.C. Cir. 1983), Plaintiffs contend that ONRR's action "amounted in substance to a suspension of a regulation," which should have thus included notice and comment.

In Environmental Defense Fund, Inc., the court considered a challenge to the Environmental Protection Agency's Administrator's decision to defer processing of operating permits for hazardous waste incinerators and storage impoundments. 713 F.2d 802. The court held that the Environmental Protection Agency's deferral of the permit process constituted a suspension of a regulation without notice or comment in violation of the APA. Id. at 818.

***11** Defendants respond that section 705 does not refer to notice-and-comment requirements. Citing Hoctor v. U.S. Department of Agriculture, 82 F.3d 165, 167 (7th Cir. 1996), they also argue that notice and comment is time-consuming, which would make effective use of section 705 difficult in some situations. Defendants rely on Sierra Club v. Jackson, 833 F.Supp.2d 11, 28 (D.D.C. 2012), which held that the section 705 delay notice did not constitute substantive rulemaking. However, in Sierra Club, unlike here, the agency properly invoked section 705 before the rule's effective date. Therefore, the postponement of the rule there was not effectively a repeal, as here. The APA does not permit an agency to "guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date. The APA specifically provides that the repeal of a rule is rulemaking subject to rulemaking procedures." Nat. Res. Def. Council, Inc., 683 F.2d at 762.

Furthermore, the policy underlying the statutory requirement of notice-and-comment is equally applicable to repeal of regulations as to their adoption. As Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n, 673 F.2d 425, 446 (D.C. Cir. 1982) observed: "The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." By acting outside its statutory authority to in effect repeal the Rule in February of 2017 without allowing the public to comment, ONRR improperly put the cart before the horse. While Defendants argue that its subsequent rulemaking included notice and comment to adopt the Repeal Rule months later, that does not cure the failure to give the public an opportunity to weigh in with comments beforehand as required by the APA.

V. REMEDY

Having found that Defendants violated the APA, the Court must fashion the appropriate remedy under the circumstances of this case. Plaintiffs have requested declaratory relief and vacatur. For the reasons discussed in Section IV.A, declaratory relief is the proper remedy for Defendants' violation of the APA. The Court grants a declaration that Defendants' postponement of the effective date of the Rule was contrary to law.

Plaintiffs also contend that the Court should order vacatur of the postponement of the Rule because it is required under the APA, see 5 U.S.C. § 706(2), and is the "standard remedy" when a court concludes that an agency's conduct was illegal under the APA. See Stewardship Council v. Envt'l Protection Agency, 806 F.3d 520, 532 (9th Cir. 2015); Klamath–Siskiyou Wildlands Ctr. v. Nat'l Oceanic and Atmospheric Admin., 109 F.Supp.3d 1238, 1241 (N.D. Cal. 2015). To determine if vacatur is appropriate under the circumstances of any given case, courts in the Ninth Circuit weigh two factors: "(1) the seriousness of the agency's errors and (2) the disruptive consequences that would result from vacatur." Klamath–Siskiyou, 109 F.Supp.3d at 1242 (citing Cal. Communities Against Toxics v. Envt'l Protection Agency, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam)). Defendants' errors here are serious. See Nat. Res. Def. Council v. Envt'l Protection Agency, 489 F.3d 1364, 1374 (D.C. Cir. 2007) ("The agency's errors could not be more serious insofar as it acted unlawfully, which is more than sufficient reason to vacate the rules.").

The more difficult question is the disruptive consequences that would result from vacatur. On the one hand, Plaintiffs argue that vacatur with reinstatement of the Rule will provide the required legal and regulatory clarity by ensuring that the illegal action has no further legal effect, especially given the potential that the repeal of the Rule will be appealed and possibly vacated at some point after September 6, 2017, and the postponement of the Rule could perhaps be argued to remain in place (albeit declared unlawful).

***12** On the other hand, if the Court granted vacatur, the Rule would only be in place for a few days before the

Repeal Rule takes effect. Therefore, although Plaintiffs are correct that vacatur is the usual remedy for illegal rulemaking under the APA, vacatur would be unduly disruptive because it would require the industry to comply with the Rule for only a short time before switching gears to comply with its predecessor. See Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (holding that the court may remand without vacatur "when equity demands"). If there comes a time in the future when the Repeal Rule itself is vacated, the issue of vacatur of the postponement could be addressed then.

VI. CONCLUSION

Accordingly, the Court GRANTS Plaintiffs' motion for summary judgment on its claim for declaratory relief that Defendants violated the APA when they postponed the Rule under Section 705.

IT IS SO ORDERED.

All Citations

Slip Copy, 2017 WL 3891678

Footnotes

1 The Court need not decide whether that threshold would be crossed if Article III mootness applied.