

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:20-cv-03668-MSK

CITIZENS FOR CONSTITUTIONAL INTEGRITY,
and
SOUTHWEST ADVOCATES, INC.,

Plaintiff(s),

v.

THE UNITED STATES OF AMERICA,
THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,
SCOTT DE LA VEGA, Department of the Interior Secretary, in his official capacity,
GLENDA OWENS, Acting Director of the Office of Surface Mining Reclamation and
Enforcement, in her official capacity, and
LAURA DANIEL-DAVIS, Acting Assistant Secretary for Land and Minerals Management, in
her official capacity,

Defendant(s),

GCC Energy, LLC,

Interested Party.

**DEFENDANT-INTERVENOR GCC ENERGY, LLC'S
PROPOSED MOTION TO DISMISS**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (“FRCP”), Defendant-In-Intervention GCC Energy, LLC (“GCC”) hereby files this Proposed Motion to Dismiss Plaintiffs’ Complaint. If granted intervention in this action, as requested in GCC’s Motion to Intervene, GCC asks this Court to dismiss all three counts of Plaintiffs’ Complaint because, as set forth below, Plaintiffs have failed to state a claim upon which relief can be granted.

GCC certifies that, pursuant to D.C. Colo. L. Civ. R. 7.1(a), counsel discussed the grounds for this motion and the relief requested with counsel for the Plaintiffs on February 19, 2021. Plaintiff's counsel opposes the relief requested herein.

INTRODUCTION

Plaintiffs' complaint lacks clarity in many respects, but the three counts for relief all turn on the same flawed argument. Namely, Plaintiffs allege that the Federal Defendants (1) had a duty to determine, of their own volition, that the Congressional Review Act is unconstitutional; (2) further determine that Congress's application of the Congressional Review Act to overrule the Stream Protection Rule was invalid; (3) apply the repealed Stream Protection Rule to the 2017 Mine Modification in defiance of Congress's action; and (4) their failure to do so violates the Surface Mining Control and Reclamation Act and the federal Administrative Procedures Act. While there are multiple grounds on which this Court can find, as other courts have found previously, that the Congressional Review Act is constitutional, this Court need not reach the constitutional question to dismiss all three counts of Plaintiffs' Complaint.

In fact, Plaintiffs' challenge to the actions of the Federal Defendants must be dismissed irrespective of whether the Review Act itself is constitutional. The Stream Protection Rule was overruled by Congress, pursuant to the Review Act, on February 16, 2017, rendering it void *ab initio*, and as such, the federal decisionmakers had no authority to apply the Rule to the 2017 Mine Modification. Neither the mining laws at issue nor the federal Administrative Procedures Act give agencies the authority to apply a rule that is no longer valid. In fact, it would be contrary to law for the agencies to have done so here. And certainly, these statutes do not allow the agencies to defy Congress as Plaintiffs suggest simply by making their own independent determination that Congress's action was unconstitutional.

In essence, Plaintiffs are arguing that the agencies should have acted as judge and jury as to the constitutionality of the Stream Protection Rule, which is ironic given their separation of powers argument in this case. Any such quasi-judicial determination by the federal agencies would surely violate separation of powers and subject the agencies to a valid legal challenge by GCC had they applied the SPR to GCC's modification request. For Plaintiffs to suggest otherwise is absurd and cuts against their own argument that the Act itself violates separation of powers by allowing Congress, with approval from the President, to overturn agency rulemaking.

The bottom line is that the federal defendants had no authority to override Congress's repeal of the Stream Protection Rule and apply the invalidated Rule to the 2017 Mine Modification. As such, all three counts of Plaintiffs' Complaint fail to state a claim on which relief may be granted.

PERTINENT FACTUAL BACKGROUND¹

A. Relevant Mine Permit History

GCC operates the King II Mine, an underground coal mine located in La Plata County in southwestern Colorado approximately 6 miles southwest of Hesperus, Colorado and approximately 14 miles west of Durango, Colorado. The subsurface operations at the Mine are subject to a federal coal lease COC-62920 (the "King II Mine Lease") and Federal Permit CO-0106C (the "King II Mine Permit"). These programs are administered by the Office of Surface Mining, Reclamation and Enforcement ("OSMRE") and the Bureau of Land Management ("BLM") under the statutory authority of Surface Mining Control and Reclamation Act

¹ GCC sets forth on the key facts in the Complaint pertinent to this Motion. For a more fulsome recitation of the facts, including the background and history of the Mine, see GCC's Motion to Intervene filed simultaneously herewith.

(“SMCRA”), 30 U.S.C. §§ 1201, *et. seq.*, and the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.*

At issue in this litigation are two federal approvals under SMCRA and its implementing regulations allowing the expansion of operations at the King II Mine. GCC submitted an application to BLM on January 1, 2011, requesting a modification of the King II Mine Lease to add approximately 950 acres to the Lease. GCC simultaneously requested a modification to the King II Mine Permit from OSMRE. The purpose of the lease and permit modification requests were to authorize additional extraction of underground coal reserves in tracts immediately adjacent to the existing King II Mine and extend the life of the King II Mine. The requested modification of the King II Mine Lease and King II Mine Permit was approved by the federal Defendants on December 15, 2017 (the “2017 Mine Modification”).²

B. Summary of Plaintiffs’ Claims

Plaintiffs have three counts for relief – (1) the Congressional Review Act, 5 U.S.C. §§ 801, *et. seq.* (the “Act”), violates the right to equal protection under the Fifth Amendment of the U.S. Constitution, Congress’s use of the Act to invalidate OSMRE’s Stream Protection Rule was therefore ineffective, and OSMRE’s failure to apply the Rule to the 2017 Mine Modification violates the Surface Mine Reclamation Act, 30 U.S.C. §§ 1201, *et. seq.* (“SMCRA”) and the federal Administrative Procedures Act, 5 U.S.C. §§ 500, *et. seq.* (“APA”); (2) the Act violates

² Although not directly relevant to Plaintiffs’ allegations in this current action, in 2018, GCC submitted a second request to modify the King II Mine Lease and King II Mine Permit to further expand the acreage GCC is permitted to mine at King II (the “Second Mine Modification Request”). The Second Mine Modification Request was also subject to a fulsome environmental impact review under NEPA, with the same finding of no significant impact as the NEPA review conducted for the 2017 Mine Modification. Plaintiffs Southwest Advocates and its members also participated in this NEPA review process. Plaintiffs have indicated that they intend to file a second complaint challenging the Second Mine Modification Request on the same grounds asserted in this action. GCC intends to also intervene in that action, if filed, and seek dismissal of Plaintiffs’ second complaint for the same reasons detailed herein.

the right to due process under the Fifth Amendment of the U.S. Constitution, Congress’s use of the Act to invalidate OSMRE’s Stream Protection Rule was therefore ineffective, and OSMRE’s failure to apply the Rule to the 2017 Mine Modification violates SMRCA and the APA; and (3) the Act violates separation of powers requirements, Congress’s use of the Act to invalidate OSMRE’s Stream Protection Rule was therefore ineffective, and OSMRE’s failure to apply the Rule to the 2017 Mine Modification violates SMRCA and the APA. Complaint, ¶¶ 100, 105, 111. On those three bases, Plaintiffs seek to “vacate and set aside” the 2017 Mine Modification approval. Complaint, ¶ 112.

In support of each of these three counts, the Plaintiffs allege that the Federal Defendants, namely OSMRE, should have known that the Act, and Congress’s application of the Act to the Stream Protection Rule, ran afoul of these constitutional requirements and, thus, applied the Rule to the 2017 Mine Modification review anyway. Plaintiffs further allege that “because OSMRE applied the wrong law, SMCRA and the APA require the Court to hold Mine Modification unlawful.” Complaint, ¶¶ 100, 105, 111. In essence, the Plaintiffs are asking this Court to hold OSRME accountable for not applying a regulation that was repealed by Congress.

C. Pertinent Statutory and Regulatory History

To fully appreciate the fatal flaws in Plaintiffs’ claims, it is necessary to understand the history of the Congressional Review Act and its application in this matter. The Congressional Review Act was passed by Congress in 1996. *See* 5 U.S.C. § 801, *et. seq.* The Act empowers Congress to review new federal regulations issued by government agencies and, by joint resolution, overrule a regulation. 5 U.S.C. § 801. Once the rule is repealed, the Act also prohibits the agency from reissuing the rule or issuing a new rule that is substantially the same unless the new rule is specifically authorized by a law acted after the date of the joint resolution

disapproving the original rule. *Id.* at § 801(b)(2). The timeframe for Congress to overrule a regulation is short – only 60 legislative days after it has been notified of the regulation at issue.

The Act has been used by Congress on only 15 occasions since 1996. Relevant to this lawsuit, is Congress’s application of the Act to an OSMRE rule known as the “Stream Protection Rule.” The final Stream Protection Rule was published by OSMRE in the Federal Register in December 2016. 81 Fed. Reg. 93066-93455 (December 16, 2016). In February 2017, Congress approved Joint Resolution 38, overruling the Stream Protection Rule. *See* Pub. L. No. 115-5, 131 Stat. 10 (Feb. 16, 2017). This action by Congress, which the President signed on February 16, 2020, rendered the Stream Protection Rule void *ab initio*, and the regulations governing OSMRE’s decision-making no longer contained the SPR’s requirements. *See* 5 U.S.C. 801(f) (“[a]ny rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.”); *see also* *Kan. Natural Res. Coalition v. United States DOI*, 971 F.3d 1222, 1226 (10th Cir. 2020) (“If Congress passes and the President signs such a resolution, the rule shall not take effect (or continue.)” (internal quotations omitted); *ACA Connects - America's Communs. Ass'n v. Frey*, 2020 U.S. Dist. LEXIS 118293, *9 (D. ME 2020) (“An expression of congressional disapproval under the CRA simply makes it “as though such rule had never taken effect,” 5 U.S.C. § 801, returning to the status quo ante.”) (internal quotations omitted). As such, OSMRE and BLM did not apply the SPR to the 2017 Mine Modification decision, as it was nullified by Congress.

ARGUMENT

I. Standard of Review

In reviewing a motion to dismiss pursuant to FRCP 12(b)(6), the Court must accept all well-pleaded allegations in the Plaintiffs’ Complaint as true and view those allegations in the light most favorable to the nonmoving party. *Stidham v. Peace Officer Standards & Training*,

265 F.3d 1144, 1149 (10th Cir. 2001). A claim is subject to dismissal if it fails to state a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). To make such an assessment, the Court first discards those averments in the Complaint that are merely legal conclusions or "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 678-79. The Court takes the remaining, well-pleaded factual contentions, treats them as true, and ascertains whether those facts (coupled, of course, with the law establishing the requisite elements of the claim) support a claim that is "plausible" or whether the claim being asserted is merely "conceivable" or "possible" under the facts alleged. *Id.*

Here, the salient facts are not in dispute. The basis of Plaintiffs' claims for relief, and the key factual allegation upon which those claims rest, is that the Federal Defendants failed to apply the Stream Protection rule to the 2017 Mine Modification. Based on this fact alone, the Plaintiffs claim that the agencies approval of the 2017 Mine Modification violates SMCRA and the APA. This fact is not in dispute. OSMRE did not apply the specific requirements of the Stream Protection Rule in evaluating and approving the 2017 Mine Modification. OSMRE had no duty to do so because the Rule had been repealed by Congress 11 months before OSMRE issued its final decision on the 2017 Mine Modification. As such, Plaintiffs have not, nor can they, state a claim upon which relief can be granted.

Although the Plaintiffs have also asserted a constitutional challenge to the Congressional Review Act, for the reasons discussed below, the Court can and should dismiss this case without reaching the question of whether the Constitutional Review Act is constitutional. In fact, if other grounds for disposing of the matter exists, the U.S. Supreme Court has held that courts do not need to address the constitutional question. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S.

288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

II. The Federal Defendants Did Not Violate SMCRA or the APA, as OSMRE Had No Duty to Apply the Stream Protection Rule to the 2017 Mine Modification.

A. Burden of Proof

All three of Plaintiffs’ counts for relief allege a violation of SMCRA and the APA because OSMRE failed to consider the Stream Protection Rule to the 2017 Mine Modification approval. The Plaintiffs have the burden of proof to establish a violation of SMCRA and the APA by the Federal Defendants. *See Citizens Committee against Citizens Committee against Interstate Route 675 v. Lewis*, 542 F. Supp. 496, 521 (S.D. Ohio 1982) (*citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-420, 91 S. Ct. 814, 822-25, 28 L. Ed. 2d 136 (1971) (Final agency decision carries with it presumption of regularity, and to overturn such decision, plaintiffs must show that agency decision is clear error of judgment.)).

Typically, an "agency's action is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary or capricious." *Sorenson Communs. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009). Deference to the agency "is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006). If the agency's exercise of discretion is truly informed, then the Court defers to it. *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002). Here, Plaintiffs have not and cannot meet this burden of proof.

B. Elements

SMCRA: Section 520 of SMCRA authorizes any person having an interest which is or may be adversely affected to commence a civil action to compel compliance with the SMCRA or any rule, regulation, order or permit thereunder. 30 U.S.C.S. § 1270(a). The citizen suit provision describes two categories of civil actions that can be brought against the federal government: (1) complaints against the United States or other governmental instrumentality for violation of SMCRA or any rule, regulation, order or permit issued pursuant thereto, 30 U.S.C.S. § 1270(a)(1); and (2) complaints against the Secretary of the Interior for failure to perform any act or duty under the SMCRA which is not discretionary with the regulator. 30 U.S.C.S. § 1270(a)(2). Plaintiffs do not specify which citizen suit provision they are utilizing to bring this action, but as discussed below, they have not stated, nor can they state, a claim under either provision, because the OSMRE Stream Protection Rule was repealed by Congress long before OSMRE made its decision on the 2017 Mine Modification.

APA: The APA is a judicial statute, which allows a person adversely affected or aggrieved by agency action within the meaning of a relevant statute to seek judicial review of that action. 5 U.S.C. § 702. Under the APA, to successfully overturn the 2017 Mine Modification approval by OSMRE, the Plaintiffs must establish that action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The scope of review is narrow. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. 3d. 2d 443 (1983). The agency's decision is presumed to be valid, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at 415, and the court must not "substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. A court must be satisfied, though, that the agency has

examined the relevant data and articulated a satisfactory explanation for its action, "including a rational connection between the facts found and the choice made." *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6, 373 U.S. App. D.C. 65 (D.C. Cir. 2006) (citations omitted) (internal quotation marks omitted).

Again, Plaintiffs have not stated, nor can they state, a claim upon which relief can be granted under the APA as the 2017 Mine Modification decision as they have not alleged any violation of *existing law* by OSMRE in approving the Mine Modification.

C. Elements Not Supported by Complaint

Plaintiffs would have this court believe that OSMRE had an obligation under SMCRA and the APA to apply the Stream Protection Rule after it was repealed because the repeal of that Rule, according only to Plaintiffs, was unconstitutional. This position not only lacks a basis in statutory or common law, but also defies logic. Moreover, taken to its logical conclusion, Plaintiffs' position would require an agency to not only consider currently valid statutes and rules, but also undertake a historical review of all statutes and laws that may have once been applicable but have subsequently been repealed, withdrawn, or otherwise revised and determine whether the withdrawal of those historic requirements was constitutional.

In the case of the Stream Protection Rule, they are asking OSMRE to second guess both Congress and the President, because it takes not only a joint resolution of Congress, but also signature by the President, to repeal an agency rule. *See* 5 U.S.C. § 801. In support of their argument, Plaintiffs cite only the general APA provision that requires courts to overturn agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity." Complaint, ¶ 47 (citing 5 U.S.C. §§ 706(A), (B)). While federal agencies must ensure that decision-making

complies with all applicable legal requirements, there is no duty to apply statutes or rules that are no longer in effect. *See e.g., Sierra Club v. Wagner*, 581 F. Supp. 2d 246, 260-61 (D.N.H 2008) (rejecting plaintiff's argument that the U.S. Forest Service decision was contrary to law because the Forest Service did not apply an older version of its regulations to its site-specific decision to implement an existing forest management plan; while the original forest plan was adopted under the 1982 regulations, those regulations had since been rescinded and a newer version instead governed the implementation of the plan).

Like in *Wagner*, Plaintiffs in this case are asking this court to force OSMRE to apply a law that had been repealed at the time of the agency's decision. Nowhere does the APA require an agency to go beyond the statutory and regulatory requirements that are valid at the time the agency makes its decision. Because no such duty exists, Plaintiffs have failed to state a claim upon which this Court can grant relief. GCC therefore respectfully requests that the Court grant its Motion to Dismiss the Complaint in its entirety.

II. Alternatively, the Plaintiffs Complaint Fails to State a Claim Upon Which Relief Can Be Granted Because the Congressional Review Act is Constitutional, and Congress's Application of the Act to the Stream Protection Rule was a Valid Legislative Action.

For the reasons discussed above, the Court can and should dismiss this case without reaching the question of whether the Constitutional Review Act is constitutional. However, as Federal Defendants have stated in the parties Joint Case Management Plan [ECF No. 18], and as they will presumably argue in their initial responsive pleading and dispositive motion, the constitutional question does provide another basis upon which this Court can dismiss Plaintiffs' Complaint. All three of Plaintiffs' claims hinge on a finding by this Court that the Congressional Review Act is unconstitutional and Congress's application of the Act to the Stream Protection Rule was invalid. Accordingly, if the Court chooses to reach the constitutional question, GCC joins in and incorporates by reference the arguments of the Federal Defendants on this issue. In

fact, the 9th Circuit Court of Appeals has upheld the Act as constitutional. *See Center for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561-62 (9th Cir. 2019); *Center for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976, 999 (D. Alaska 2018). Plaintiffs' arguments to the contrary lack any legal basis and further support dismissal of Plaintiffs' Complaint. In any case, regardless of how the Court rules on the constitutional questions presented by Plaintiffs, for the reasons discussed above, the Plaintiffs' challenge to the 2017 Mine Modification approval under SMCRA and the APA can and should be dismissed.

CONCLUSION

For the reasons stated above, GCC respectfully requests that the Court grant this Motion to Dismiss Plaintiffs' Complaint in its entirety.

Dated this 10th day of March, 2021.

Respectfully submitted,

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By: /s/Adam T. DeVoe

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2021, I served the foregoing

DEFENDANT-INTERVENOR GCC ENERGY, LLC'S PROPOSED MOTION TO

DISMISS to the following addressed as follows:

| | |
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