No. 22-1056

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITIZENS FOR CONSTITUTIONAL INTEGRITY, and

SOUTHWEST ADVOCATES, INC.,

Plaintiffs-Appellants,

v.

THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
No. 21-cv-923-RM-STV
The Honorable Judge Raymond P. Moore

PLAINTIFFS-APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706
BLM	Bureau of Land Management
Citizens	Citizens for Constitutional Integrity and Southwest Advocates, Inc.
EA	Environmental Assessment
ESA	Endangered Species Act, 16 U.S.C. §§ 1531-1544
The Expansion	The King II Mine's Dunn Ranch coal-mine expansion, I-App-14[1]
GCC	GCC Energy, Inc.
The Mine	The King II Mine
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4370m-12
The Order	February 16, 2022, order, II-App-245
OSMRE	The Office of Surface Mining Reclamation and Enforcement, the Department of the Interior, Secretary of the Interior Deb Haaland, Acting OSMRE Director Glenda Owens, and Acting Assistant Secretary for Land and Minerals Management Laura Daniel-Davis
SMCRA	Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328)

[1] This brief cites X-App-YY to refer to Appendix Volume X, page YY.

INTRODUCTION

Congress passed Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328), for cases just like this. GCC Energy, Inc., told OSMRE (the Office of Surface Mining Reclamation and Enforcement, the Department of the Interior, Deb Haaland, Glenda Owens, and Laura Daniel-Davis) it was using 14.07 acre-feet of water for mining, and it told La Plata County it was using 30 acre-feet. Both cannot be true.

OSMRE picked one fact over another without explaining why, and that decision meets the very definition of arbitrary and capricious. In addition, OSMRE points to no record citation where it determined how much irrigation water would have replenished groundwater aquifers if GCC had not diverted it to the King II Mine Dunn Ranch Expansion (the Expansion). This Court's precedent holds that agencies act arbitrarily and capriciously when they misapprehend groundwater impacts.

To argue that SMCRA's citizen-suit provision does not allow Citizens for Constitutional Integrity and Southwest Advocates, Inc.'s (Citizens) claims, OSMRE abandons its twenty-year-old litigation position and

reads *Bennett v. Spear*, 520 U.S. 154 (1997), backward. Its arguments fall to SMCRA's text. SMCRA's plain text gives Citizens a cause of action. SMCRA's plain text identifies one administrative remedy for Citizens to exhaust, which they did. SMCRA's plain text compels issuing temporary relief as long as stopping the Expansion will not harm public health, public safety, or the environment. "This calls to mind what Judge Friendly described as Felix Frankfurter's 'threefold imperative to law students' in his landmark statutory interpretation course: '(1) Read the statute; (2) read the statute; (3) read the statute!'" *In re England*, 375 F.3d 1169, 1181-1182 (D.C. Cir. 2004) (Roberts, J.).

OSMRE failed its SMCRA duties, and Citizens will likely prevail on the merits of their citizen-suit. SMCRA requires temporary relief stopping the Expansion during the litigation. *See* 30 U.S.C. § 1276(c).

ARGUMENT

I. SMCRA gives Citizens a citizen-suit cause of action to allege OSMRE failed its SMCRA duties in approving the Expansion.

A. The Supreme Court approved an analogous citizen-suit claim.

OSMRE argues this Court lacks jurisdiction over Section 1270(a) citizen-suits to ensure regulatory authorities comply with SMCRA when issuing permits. Resp. Br. 14-15. This surprising position contradicts

twenty years of the United States taking the opposite position. It also depends on reading *Bennett* for the opposite of its holding. Moreover, Section 1270 only creates citizen-suit causes of action—not jurisdiction. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 299-300 (4th Cir. 2001).

With SMCRA's citizen-suit provision, Congress intended to expand access to judicial review. It sought "public participation in the . . . *enforcement* of . . . programs established by the Secretary . . . ." 30 U.S.C. § 1202(i) (emphasis added). It included a citizen-suit cause of action because "citizen suits can play an important role in assuring that regulatory agencies and surface operators comply with [SMCRA] . . . ." S. Rep. No. 95-128, at 88 (1977). The dissenters on the House committee lamented the "extremely loose criteria established for the basis of such suits." H.R. Rep. No. 95-218, at 193 (1977). But the Senate committee majority expected "[t]he possibility of a citizen suit [to] help to keep program administrators 'on their toes.'" S. Rep. No. 95-128, at 88. SMCRA's citizen-suit text attained these objectives.

OSMRE argues that Citizens' claims do not fall under Subsection 1270(a)(2) because Citizens "are not challenging an asserted failure to act," but OSMRE's completed approval of the Expansion. Resp. Br. 15.

To the contrary, the plain text of Subsection 1270(a)(2) accommodates citizen-suits against completed actions for failures to complete nondiscretionary duties. *See Bennett*, 520 U.S. at 172 (allowing a citizen-suit against a completed biological opinion).

Among other nondiscretionary duties, SMCRA assigned OSMRE to ensure permits comply with SMCRA, and Citizens allege it breached that duty. Subsection 1270(a)(2) applies not only to failures to *act*, but also to any "failure . . . to perform any . . . *duty* under [SMCRA] which is not discretionary . . . ." (Emphasis added.) Subsection 1260(b)(1) assigns a broad duty to OSMRE to ensure permits comply with SMCRA: "No permit or revision application *shall* be approved unless . . . the regulatory authority finds . . . that . . . all the requirements of [SMCRA] . . . have been complied with . . . ." (Emphasis added.) By using the word "shall," it imposed "a nondiscretionary duty." *See SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018); *Bennett*, 520 U.S. at 172. Thus, Section 1260(b)(1) assigns OSMRE a duty to ensure permits comply with SMCRA. Subsection 1270(a)(2) allows Citizens to bring citizen-suits alleging OSMRE failed to perform that duty.

OSMRE relies on *Bennett* for the opposite of its holding. Resp. Br. 15. The Parties agree *Bennett* controls. But it confirms SMCRA's citizen-suit applies to Citizens' claims under Subsection 1270(a)(2). In *Bennett*, the Supreme Court rejected the argument OSMRE makes here, and it recognized a claim analogous to Citizens' claims.

ESA			SMCRA
16 U.S.C. § 1540(g)(1)(A)	the United States and any other governmental instrumentality or agency . . ., who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; [*Bennett*: no citizen-suit]	the United States or any other governmental instrumentality or agency . . . which is alleged to be in violation of the provisions of this chapter or of any rule, regulation, order or permit issued pursuant thereto	30 U.S.C. § 1270(a)(1)
16 U.S.C. § 1540(g)(1)(C)	against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary. [*Bennett*: citizen-suit for 16 U.S.C. § 1533 claims]	against the Secretary . . . where there is alleged a failure of the Secretary . . . to perform any act or duty under this chapter which is not discretionary with the Secretary . . . . [Citizens' SMCRA claims]	30 U.S.C. § 1270(a)(2)

Understanding *Bennett* requires a brief comparison between the citizen-suit provisions in SMCRA and in the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. Under the ESA, 16 U.S.C. § 1540(g)(1)(A) (ESA Section A) analogizes to Subsection 1270(a)(1)

because both allow citizen-suits against "the United States or any other governmental instrumentality or agency . . . alleged to be in violation" of the respective statute.

Separately, 16 U.S.C. § 1540(g)(1)(C) (ESA Section C) analogizes to Subsection 1270(a)(2). Both allow citizen-suits for "a failure" of the Secretary of the Interior "to perform any act or duty under [16 U.S.C. § 1533/SMCRA] which is not discretionary . . . ." ESA Section C narrowly allows these citizen-suits alleging only failures to comply with 16 U.S.C. § 1533, which requires the Fish and Wildlife Service to list threatened and endangered species and to identify critical habitat. *Bennett*, 520 U.S. at 157-58. Subsection 1270(a)(2), however, more broadly allows citizen-suits alleging failures to perform "any act or duty under [SMCRA]."

In *Bennett*, two irrigation districts filed citizen-suits under both ESA Sections A and C. They brought an ESA Section A citizen-suit against the Fish and Wildlife Service alleging violations of 16 U.S.C. § 1536 by informing the Bureau of Reclamation that if it did not leave minimal amounts of water in two reservoirs to protect two species of endangered fish, it would violate the Endangered Species Act. *Bennett*, 520 U.S. at

157-160. The Supreme Court denied their citizen-suit. It held that ESA Section A allows private parties to bring citizen-suits against regulated parties and government agencies as actors for violating the ESA, but not against the regulators for breaching regulatory duties. *Id.* at 173. The Supreme Court prohibited citizen-suits under ESA Section A for "maladministration" of the ESA. *Id.* at 174 (quoted by Resp. Br. 15); *see also Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1543 n.1 (D.C. Cir. 1992) (similarly rejecting claims against regulators under Section 1270(a)(1)) (cited by Resp. Br. 15). That holding is irrelevant because Citizens are not bringing their claims under Subsection 1270(a)(1).

Citizens are bringing their citizen-suit under Subsection 1270(a)(2), which allows "suits against regulators." *Lujan*, 963 F.2d at 1548, 1550-51. In *Bennett*, the Supreme Court *approved* of analogous citizen-suit claims under ESA Section C. 520 U.S. at 172 ("This claim does come within subsection (C)."). The irrigation districts claimed the Fish and Wildlife Service "implicit[ly]" designated critical habitat for the endangered fish species in violation of 16 U.S.C. § 1533(b)(2). *Id.* at 154. They alleged the agency completed an action (issued a biological

opinion) without complying with procedures (considering economic and other impacts) mandated by Section 1533 (identified in the citizen-suit provision). *Id.* at 172. The Supreme Court recognized that citizen-suit challenging a failure of a nondiscretionary duty identified in ESA Section C. "Since it is the omission of these required procedures that petitioners complain of, their § 1533 claim is reviewable under [ESA Section C]." *Id.*

So too here. Citizens allege that OSMRE completed an action (approved the Expansion) without complying with the procedures (reasonably analyzing surface water and groundwater quantity) mandated by SMCRA (identified in the citizen-suit provision). *See* 30 U.S.C. § 1257(b)(11), 1260(b)(1), (b)(3), 1265(b)(10). Because Citizens allege OSMRE failed to complete procedures under SMCRA, their SMCRA claim "is reviewable" under Subsection 1270(a)(2). *See Bennett*, 520 U.S. at 172.

B. The United States recognized plaintiffs may challenge permitting approvals under SMCRA's citizen-suit provision.

Courts recognize citizen-suit claims against OSMRE to compel compliance with SMCRA in issuing permits. *Haydo v. Amerikohl Min., Inc.*, 830 F.2d 494, 496 (3d Cir. 1987) ("Section [1270] of the SMCRA

confers jurisdiction on the federal district courts to hear citizen suits to *compel compliance with the SMCRA* and for damages." (emphasis added)); *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 519 (D.C. Cir. 1981) ("[OSMRE's] oversight function is shared in part by the public, which is given the right to sue in federal court, to compel compliance with the state program *and its permits*. [Section 1270]." (emphasis added)).

Allowing Citizens' citizen-suit also accords with OSMRE's regulations and OSMRE's position for twenty years before now. OSMRE's regulations recognize that federal law "allow[s] citizens . . . access to . . . Federal court in areas such as citizen suits, . . . permit applications, etc." Surface Coal Mining and Reclamation Operations, 44 Fed. Reg. 14,902, 14,964 (Mar. 13, 1979). In court, OSMRE stated that "Section [1270](a)(2) authorizes actions against regulatory authorities alleging violations of nondiscretionary duties arising under SMCRA itself," which includes "issuing permits that do not comply" with SMCRA. Br. for the Fed. Defs.' as Amicus Curiae in Supp. of Appellant at 17-18, *Penn. Fed'n of Sportsmen Clubs, Inc. v. Hess*, 297 F.3d 310 (3d Cir. 2002), Ex. A. Similarly, the U.S. Department of Justice's Solicitor

General's Office stated that SMCRA allows citizen-suits against state regulators under the same section for "alleged failure[s] to comply with an approved state SMCRA program," which includes "permitting requirements . . . ." Br. for Fed. Resp't in Opp. 16, *Bragg*, No. 01-619 (Dec. 2001), Ex. B. OSMRE's contrary interpretation here has no weight. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015) ("courts will not defer to an agency's litigating position where it contradicts the agency's prior regulations, rulings, or administrative practice" (quotations omitted)).

SMCRA's citizen-suit provision allows claims against OSMRE when, like here, OSMRE fails to comply with SMCRA in issuing a permit (the Expansion approval). *See* 30 U.S.C. § 1270(a)(2).

C. In any event, 28 U.S.C. § 1331 and the APA provide jurisdiction.

Even if SMCRA does not give Citizens a citizen-suit cause of action, OSMRE's SMCRA failures present a federal question under 28 U.S.C. § 1331, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, gives Citizens a cause of action. 5 U.S.C. § 702. The APA applies only if SMCRA does not. *See* 5 U.S.C. § 704 (allowing APA claims if "there is no other adequate remedy in a court"). The Supreme Court recognizes

"a strong presumption favoring judicial review of administrative action" because "legal lapses and violations occur, and especially so when they have no consequence." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quotations omitted).

OSMRE argues Citizens did not assert jurisdiction over is APA Claims. Resp. Br. 15. It nitpicks a statement in the Amended Complaint, paragraph 23, in which Citizens assert an APA claim if SMCRA provides no jurisdiction. *Id.* (citing I-App-31). In its apparent haste, OSMRE missed paragraph 20: "United States Code Title 28, sections 1331 and 1361, assign this Court jurisdiction over this case both because the case presents a federal question and because it names the United States as a defendant." I-App-30. "[I]t is common ground that if review is proper under the APA, the District Court had jurisdiction under 28 U.S.C. § 1331." *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988). Citizens asserted jurisdiction to bring an APA claim as well as a SMCRA claim.

Just as Citizens' claims fall well within SMCRA's citizen-suit provision, so do they fall well within the APA. The APA, "embodies a basic presumption of judicial review . . . ." *Dep't of Commerce v. New*

York, 139 S. Ct. 2551, 2567 (2019) (quotations omitted); 5 U.S.C. § 702. As its "central purpose," the APA "provid[es] a broad spectrum of judicial review of agency action." *Bowen*, 487 U.S. at 903. It contains "generous" and "comprehensive provisions" for judicial review. *Webster v. Doe*, 486 U.S. 592, 599 (1988) (quoting 5 U.S.C. § 704).

OSMRE argues that Section 1276 provides the adequate judicial remedy, and it thereby precludes an APA claim. Resp. Br. 15-16. It skips a step. It leaps to Subsection 1276(a) requirements to exhaust administrative remedies, but it never shows where Subsection 1276(a) allows Citizens to claim OSMRE failed its SMCRA duties by approving the Expansion. Citizens cannot bring their claims under Subsection 1276(a) because the Expansion-approval action does not fit within any category listed there.

Subsection 1276(a) allows challenges only to the following actions:

- "to approve or disapprove a State program,"
- "to prepare or promulgate a Federal program,"
- "promulgating national rules or regulations,"
- "constituting rulemaking,"
- "[a]ny order or decision issued by the Secretary in a civil penalty proceeding,"

- "any other proceeding required to be conducted pursuant to section 554 of title 5 [APA adjudications]," or
- "an order or decision issued by the Secretary under the penalty section of this chapter . . . ."

None of these categories includes this permit approval. OSMRE seeks to require Citizens to comply with inapplicable statutory requirements. SMCRA does not preclude Citizens' claims, and the APA's generous review provisions accommodate them if SMCRA does not. *See Sackett v. EPA*, 566 U.S. 120, 129 (2012) (recognizing an APA action to comply with some Clean Water Act requirements).

D. Citizens exhausted their administrative remedies by sending a letter as Subsection 1270(b) requires.

Continuing its pattern of creating obligations where none exist, OSMRE argues Subsection 1276(a) required Citizens to exhaust their SMCRA administrative remedies under 30 U.S.C. §§ 1263(b) and 1264(c). Resp. Br. 16. Subsection 1276(a)'s plain text precludes applying it to citizen-suits. "[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020).

Congress specified in Subsection 1276(a) that it does not apply to Section 1270 citizen-suits: "availability of review established in this *subsection* [Subsection 1276(a)] shall not be construed to limit the operations of rights established in Section [1270]." (Emphasis added.) Contrary to OSMRE's argument, courts "will not alter the text in order to satisfy the policy preferences of the [agency]." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). OSMRE cites cases that require parties to pursue administrative remedies under SMCRA before seeking judicial relief under Subsection 1276(a). Resp. Br. 16-19. But none of those cases matter because none accounts for the text in Subsection 1276(a) that exempts citizen-suits from its requirements, and none analyzes a citizen-suit. *See Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466, 1471 (8th Cir. 1995) (rejecting SMCRA exhaustion requirements because SMCRA did not specifically require compliance).

Instead, SMCRA's citizen-suit provision defines the only administrative exhaustion Congress required. Section 1270(b)(1)(A) requires plaintiffs to send a letter to OSMRE and to wait sixty days before filing a citizen-suit. Citizens did exactly that. I-App-6, -17. By completing that procedure, Citizens gave OSMRE "the first chance to

exercise . . . discretion or to apply that expertise," and did not cause the "premature interruption of the administrative process." *McKart v. United States*, 395 U.S. 185, 193 (1969). *Id.* at 194. Exhaustion requires nothing more.

Even if Citizens' claims do not qualify as a SMCRA citizen-suit, which they do, the APA precludes requiring further exhaustion. It allows courts to require post-finality exhaustion only as "expressly required by statute." 5 U.S.C. § 704. The APA prohibits courts from "impos[ing] an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' . . . ." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993).

Here, SMCRA does not require exhaustion beyond the citizen-suit provision, as OSMRE advocates, because OSMRE's interpretation would eliminate most citizen-suits. The Supreme Court prohibits interpreting statutes with those results. *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007) (rejecting "the Government's interpretation [that] would reduce the number of potential plaintiffs to almost zero, rendering [the statute] a dead letter.").

OSMRE faults Citizens for failing to exhaust under 30 U.S.C. §§ 1263 or 1264, which process focuses on "ownership, precise location, and boundaries of the land to be affected." Resp. Br. 16-18; 30 U.S.C. § 1263(a). But the objection deadline ran before Citizens could even have known to object to OSMRE's water analysis. GCC posted its Section 1263 notice in February 2019. I-App-81 to -82. The thirty-day objection deadline ran in March 2019. *Id.*; *see* 30 U.S.C. § 1263(b). OSMRE did not issue even the Preliminary Environmental Assessment until five months later in August 2019. I-App-83. Citizens could not have known during that limited opportunity that they had any objection. OSMRE's argument makes no sense.

Moreover, the Supreme Court does not require exhaustion when the statute limits review to an administrative record, and when the administrative record does not allow the plaintiff to create a record sufficient for "meaningful judicial review." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493-97 (1991). Citizens could not have created an administrative record for review under Sections 1263 and 1264 because they objected to OSMRE's analysis of water impacts—not the Expansion's location, ownership, or boundaries.

For lack of notice and a meaningful opportunity to respond, SMCRA also did not require Citizens to exhaust those remedies. *See McCarthy v. Madigan*, 503 U.S. 140, 147 (1992) (rejecting requirements to exhaust procedures with "unreasonable or indefinite timeframe[s]."). This Court has layers of jurisdiction and causes of action over this case—and none require exhaustion of additional administrative remedies.

II. The plain text of Subsection 1276(c) compels temporary relief.

In Citizens' opening brief, they explained that the plain text of Subsection 1276(c) displaces the traditional equitable balancing test for issuing temporary relief. Opening Br. 19-25. Subsection 1276(c) applies to "*any* order or decision issued by the Secretary *under this Act* . . . ." SMCRA, Pub. L. No. 95-87 § 526(c) (emphases added); *see also SAS Inst.*, 138 S. Ct. at 1354 ("the word any' naturally carries an expansive meaning" (quotations omitted)).

OSMRE never rebuts the plain text of Subsection 1276(c), except to argue (1) that Citizens "cannot selectively pick the part of Section [1276] that appear to suit them and ignore those that do not" and (2) that Congress did not hide an elephant in Subsection 1276(c). Resp. Br. 20-21. OSMRE misreads Section 1276. It ignores the plain text

clarifying that subsections (b) and (c) apply to citizen-suits. Congress acted deliberately.

SMCRA's "Judicial Review" section has five subsections. Three exclude application to citizen-suits:

- 1276(a) states it does not apply to citizen-suits,
- 1276(e) states it does not apply to citizen-suits, and
- 1276(d) applies only to "commencement of a proceeding under [Section 1276]," and only subsection 1276(a) allows commencement of any proceeding—again, that subsection states it does not apply to citizen-suits.

By specifying the subsections that do not apply to citizen suits, Congress left subsections (b) and (c) to apply to citizen-suits. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80-81 (2002) (defining the *expressio unius est exclusion alterius canon* as "one item of [an] associated group or series excludes another left unmentioned."). Subsection (b) requires judicial review on the administrative record, which makes sense for a citizen-suit, and (c) defines the principles for temporary relief for reviewing "any order or decision issued by" OSMRE. The text is clear.

OSMRE argues that Subsection 1276(c) includes no "command" confirming Congress's intent to displace the traditional injunctive relief

test. It asks this Court to disregard the plain text because Citizens "cite no authority showing that Congress intended to do away with the 'irreparable harm' part of the four-part test so readily, or for Section [1276](c) to apply so broadly." Resp. Br. 21. That plain text contains Congress's command. Opening Br. 19-24. And "when the meaning of the statute's terms is plain, [a court's] job is at an end." *Bostock*, 140 S. Ct. at 1749.

To the extent OSMRE wants some evidence beyond the text, the Supreme Court rejects that requirement. "Where the statutory language is clear and unambiguous, [courts] need neither accept nor reject a particular 'plausible' explanation for why Congress would have written a statute [in a particular way.]" *Barnhart*, 534 U.S. at 460; *SAS Inst.*, 138 S. Ct. at 1357 ("[Courts] need not and will not invent an atextual explanation for Congress's drafting choices when the statute's own terms supply an answer."); *Bostock*, 140 S. Ct. at 1749 ("the fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command" (quotations and alterations omitted)).

Nevertheless, extratextual evidence exists. The Supreme Court recognized SMCRA's remedial provisions allow the "deprivation of property to protect the public health and safety [as] one of the oldest examples of permissible summary action." *Hodel v. Va. Surface Mining Recl. Ass'n*, 452 U.S. 264, 298-303 (1981) (quotations and alteration omitted). Congress intended to apply summary action to citizen-suits, as well, as SMCRA's plain text shows. *See* H.R. Rep. No. 95-218 (allowing Section 1276 "[j]urisdiction over review of . . . Secretarial actions to . . . implement a Federal program . . . .").

Without text or legislative history as its allies, OSMRE resorts to three citizen-suit cases that applied the traditional preliminary injunction test. Resp. Br. 20. But no plaintiff in those cases sought temporary relief under Subsection 1276(c). Because those courts did not face that question, they are irrelevant. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); *United States v. Taylor*, 514 F.3d 1092, 1099 (10th Cir. 2008); *see Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system

is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). Under its plain text, Subsection 1276(c) applies to Citizen's request for temporary relief.

III. OMSRE violated SMCRA by admitting it failed to analyze surface water and groundwater quantity.

On the merits, Citizens demonstrated OSMRE arbitrarily and capriciously approved the Expansion by failing to determine the Expansion's consequences on surface water and groundwater quantity. Opening Br. 7, 18-19, 25-40.

In particular, Citizens explained that SMCRA requires OSMRE to collect "sufficient data" to assess hydrologic impacts. Opening Br. 18, 25, 34, 37, 40 (citing Section 1257(b)(11)). OMSRE denies that requirement. Resp. Br. 26. It apparently believes it can satisfy its SMCRA duties with insufficient data. That makes no sense. Courts "set aside agency action . . . because of failure to adduce empirical data that can readily be obtained." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009). SMCRA specifically requires a permit applicant to provide "sufficient data" in Section 1257(b)(11), and it assigns OSMRE to ensure the permit applicant completed that duty. 30 U.S.C. §

1260(b)(1), (b)(3). SMCRA thus assigns OSMRE a duty to obtain sufficient information, or to ask the mining company for that information. OSMRE failed to comply.

A. OSMRE ignored conflicting facts on the volume of surface water the Expansion would use.

Citizens argued that OSMRE arbitrarily and capriciously never accounted for GCC's statements to La Plata County that it was not using 14.07 acre-feet of water, as the Environmental Assessment (EA) states, but 30 or 40 acre-feet of water, and that GCC sought more water. Opening Br. 26-30. GCC told different government agencies different things, and OSMRE was asleep at the switch:

- GCC to La Plata County: "GCC reports that *it used* 30 acre-feet (AF) of water in 2014 and may have a need for up to 40 AF." II-App-261 (emphasis added) (cited by I-App-91).
- GCC to OSMRE: "Approximately 14.07 acre-ft of water *is used* by GCC . . . ." I-App-91 (emphasis added).

Both facts cannot be true. GCC cannot be using 30 acre-feet and 14.07 acre-feet.

But OSMRE never explained why it chose one fact over another. Now, it denies any "inconsistencies," "stands by its analysis," and insists it chose the correct fact. Resp. Br. 22-25. OSMRE's "just trust us" argument applies the wrong standard of review. In reviewing agency

decisions, courts do not decide which facts are correct; they require agencies to explain why they chose the facts they chose. "The agency's obligation is to articulate a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 59 (1983) (quotations omitted). OSMRE failed to explain why it chose 14.07 among the three options. Courts overturn decisions like this that leave "unexplained inconsistenc[ies]"—here among 14.07, 30, and 40 acre-feet of water-use. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016) (alteration omitted); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 58-59 (D.C. Cir. 2015).

When an agency picks one fact over another without explaining why, it makes a textbook arbitrary and capricious decision. Here, OSMRE made no "rational" decision "based upon conscious choice." *See Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962). Sixty years ago, the Supreme Court overturned an agency that "made no findings specifically directed to the choice between two vastly different remedies" and did not "articulate any rational connection between the facts found and the choice made." *Id.* at 168. OSMRE did the same

thing. "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion." *Id.* at 167. The Supreme Court set aside that decision. *Burlington Truck Lines* compels the same result here.

OSMRE argues that if GCC in the future uses more water, OSMRE can enforce SMCRA then. Resp. Br. 25. That argument does not cure OSMRE's SMCRA failure: it never resolved the inconsistency between 14.07, 30, and 40 acre-feet. *See Encino Motorcars*, 136 S. Ct. at 2126-27. OSMRE's argument again assumes GCC was only using 14.07 acre-feet of water, but this Court cannot rely on that arbitrary and capricious finding. If an "agency has not considered all relevant factors, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. *Fla. Power Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

OSMRE also contends that OSMRE had no reason to question GCC's statements on water rights because GCC "told OSMRE that its water use is not expected to materially change." Resp. Br. 24.[2] That statement

[2] GCC and OSMRE made inconsistent statements in this Court, too. In GCC's March brief, it told this Court "remaining coal reserves from the current mining area . . . are fully exhausted." [GCC's] Resp. 13. In

highlights another unexplained inconsistency. Contrary to OSMRE's statement that the Expansion's "water consumption rate should not change," Gov. App. 34, the EA stated the Expansion's water use *would* change: "GCC filed (2015CW3029) for supplemental water supply . . . ." I-App-91.

OSMRE did not heed the red flags La Plata County raised. *See* I-App-91. The district court concluded that OSMRE reasonably approved of GCC seeking more water rights to satisfy local land-use requirements. II-App-249. In their opening brief, Citizens explained that, to the contrary, the EA's statement underscores OSMRE's arbitrary decision. The EA reflects GCC obtaining more water rights because La Plata County realized GCC was consuming so much water. Opening Br. 32-33. In response, OSMRE argues that GCC could not have been seeking more water rights in 2015 to satisfy La Plata County's 2016 report, and Citizens "do no more than speculate" why GCC sought more water rights. Resp. Br. 24. OSMRE read La Plata

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contrast, OSMRE stated, those "[e]xisting operations . . . are expected to end this year." Defs.-Appellees' Opp. to Mot. for Inj. Pending Appeal 4. Again, both cannot be true.

County's report, I-App-91, but neither OSMRE's counsel nor the district court read it.

In 2010, La Plata County started bringing GCC into compliance with its land-use policies. II-App-258. It held several hearings before releasing the 2016 report. *Id.* Initially, GCC was hauling water "to address required water needs of the [Mine]." *Id.* La Plata County wanted that to stop. *See id.* In 2015, GCC began seeking more water rights to satisfy La Plata County. In the EA, OSMRE states it read the report. I-App-91. Contrary to OSMRE's repeated assertions, Resp. Br. 24, 25, the Expansion changed its water sources from hauling water to diverting more water from the Huntington farm. II-App-258. OSMRE never recognized or analyzed these changed water sources.

OSMRE complains that, if Citizens believed GCC was misleading OSMRE, Citizens never told OSMRE. Resp. Br. 24 n.9. Citizens spent two pages of its sixty-day notice letter telling OSMRE of its numerous flaws in analyzing the volume of water the Mine was using. I-App-20 to -22. But OSMRE never responded to Citizens' letter. It had no interest in Citizens' concerns.

OSMRE has no escape from this arbitrary and capricious decision. This Court's precedent compels the conclusion OSMRE arbitrarily and capriciously calculated surface water-use. *See Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 856-59 (10th Cir. 2019) (setting aside a decision that may have miscalculated water use by up to 82 %); Opening Br. 28-30. OSMRE never references that *Diné Citizens* opinion and never tries to distinguish it. But this Court "take[s] [its] duty to follow precedent very seriously . . . ." *Taylor*, 514 F.3d at 1099.

It makes no difference that this Court decided *Diné Citizens* under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 to 4370m-12. Resp. Br. 18. Both NEPA and SMCRA use the arbitrary and capricious standard of review. *See* 5 U.S.C. § 706(2); *United States v. Bean*, 537 U.S. 71 (2002). If a NEPA analysis is arbitrary and capricious for miscalculating water-use, so is a SMCRA analysis. As on-point precedent, *Diné Citizens* compels the conclusion that OSMRE acted arbitrarily and capriciously. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) ("We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior

panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.").

B. OSMRE never analyzed the Expansion's groundwater impacts.

In their opening brief, Citizens explained that OSMRE never analyzed the impacts of diverting, to the Expansion, irrigation water that would have replenished groundwater aquifers. Opening Br. 34-40. OSMRE effectively admits it did not know the quantity of irrigation water had been infiltrating through the Huntington farm to replenish groundwater. Although it lodged its administrative record in December 2021, I-App-12, it identifies no statement analyzing that impact. It failed to comply with SMCRA by failing to determine the impact of losing that quantity of groundwater for twenty-two years. *See* I-App-108; 30 U.S.C. §§ 1260(b)(3), 1265(b)(10).

To cover for its failure to calculate groundwater quantity impacts, OSMRE denies any "obligation to calculate the 'volume' of water" the Expansion would use. Resp. Br. 29-30. It fails to read SMCRA's text. SMCRA requires OSMRE to ensure the permit applicant "determin[es] . . . the probable hydrologic consequences . . . [on] quantity . . . of water in surface and ground water systems . . . ." 30 U.S.C. §§ 1257(b)(11),

1260(b)(3). OSMRE's regulations confirm that "interrupt[ing] . . . an underground . . . source of water" and "intercept[ing] aquifers" qualify as "hydrologic consequences." 30 C.F.R. § 780.20(a)(3), (4). SMCRA also prohibits OSMRE from approving mine permits unless the mine "minimize the disturbances . . . to the . . . quantity of water in surface and ground water systems . . . ." 30 U.S.C. § 1265(b)(10). OSMRE cannot comply with that duty without knowing the quantity of groundwater that irrigation water was replenishing, but now would be intercepted for the Expansion.

OSMRE approved the Expansion, but argues the water court had complete authority over water rights, and nothing requires OSMRE to determine water rights under state law. Resp. Br. 28-29. These arguments miss the point. Regardless of water rights, SMCRA's plain text assigned OSMRE a duty to determine groundwater quantity consequences. It failed at that duty. *See San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1254 n.12 (D. N.M. 2018) ("Where an agency action may implicate water quantity, NEPA requires the analysis of the environmental impacts of the action, regardless of

whether water rights are established and controlled by a state." (collecting cases)).

SMCRA gave OSMRE power to approve the permit, to deny it, or to require modification. *See* 30 U.S.C. § 1260(a) ("regulatory authority shall grant, require modification of, or deny the application for a permit"). It assigned OSMRE, the "regulatory authority," the duty to assess the "probable cumulative impact of all anticipated mining in the area on the hydrologic balance . . . ." *Id.* § 1260(3). Nothing allows OSMRE to assign its duties to the water court. "[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).

Moreover, the water court never could have completed OSMRE's SMCRA analysis. Colorado prohibits water courts from analyzing groundwater recharge. It requires water courts to approve changes to surface water-right uses that do not injure other surface water rights holders. Colo. Rev. Stat. § 37-92-305(3)(a) ("A change of water right . . .

shall be approved if such change . . . will not injuriously affect the owner of or persons entitled to use water under a vested water right . . . ."); *see Frees v. Tidd*, 349 P.3d 259, 264 (Colo. 2015) ("An important aspect of a water court's task is to assure the maximum beneficial use of water while adequately protecting against injury to vested water rights.").

The water courts consequently did not analyze impacts on the groundwater aquifer. *See* II-App-10 ("The Court finds that the change of water rights . . . will maintain historical conditions on the La Plata River and Hay Gulch . . . ."); II-App-84 (same). Because Colorado water courts have no authority to analyze groundwater impacts of water-rights changes, OSMRE arbitrarily and capriciously relied on that analysis for a conclusion its authors never intended to reach. *See Humana of Aurora, Inc. v. Heckler*, 753 F.2d 1579, 1583 (10th Cir. 1985) (holding an agency arbitrarily and capriciously relied on a report that, "in its most basic sense was never designed or intended by its makers to answer the questions or support the propositions the Secretary wished.").

OSMRE contends that it was just approving continued operation of the King II Mine, so it knew the Expansion's consequences. Resp. Br. 29. That argument misapprehends the definition of "consequence." *See* 30 U.S.C. §§ 1257(b)(11), 1260(b)(3). Without knowing the baseline, no one can know the consequences of approving a permit. In *N.C. Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 602-03 (4th Cir. 2012), for example, the court overturned an agency when it "calculat[ed] the 'no-build' baseline" (not building a road) based on "data that assumed" it would build the road. The plaintiffs argued the flawed baseline "ma[de] it impossible to accurately isolate and assess the environmental impacts" of building the road. *Id.* The court agreed and overturned the agency because "the baseline assume[d] the existence of a proposed project." *Id.*

OSMRE made the same mistake. It argues that it compared "mining" to "mining" and found no difference, and that satisfied SMCRA. I-App-112; Resp. Br. 31. But without comparing (a) conditions if it grants the permit to (b) conditions if it denies the permit, OSMRE can never know the permit's consequences. The EA sought to avoid those tautologies by defining the no-action, baseline alternative as "no mining plan . . .

approval." I-App-93. But OSMRE never followed through by completing that comparison. It only compared "mining" to "mining." It failed its SMCRA duties by failing to determine the groundwater quantity consequences of granting the permit. *See* 30 U.S.C. §§ 1257(b)(11), 1260(b)(3).

In one of this Court's landmark APA cases, it five times reiterated that "the reviewing court must determine whether the agency considered all relevant factors." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574, 1581, 1582, 1583, 1584 (10th Cir. 1994). OSMRE did not consider the relevant factor of the Expansion diverting irrigation water that otherwise would have replenished groundwater aquifers. *See* 30 U.S.C. §§ 1257(b)(11), 1265(b)(10); 30 C.F.R. § 780.20(a)(3), (4). It failed its SMCRA duties by "entirely fail[ing] to consider an important aspect of the problem . . . ." *State Farm*, 463 U.S. at 43.

CONCLUSION

Citizens will likely prevail on the merits of their claim. They gave notice, and stopping the Expansion will not harm public health,

public safety, or the environment. Therefore, Subsection 1276(c) compels temporary relief stopping the Expansion during the rest of the case.

Respectfully submitted, June 17, 2022,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the length limit in 32(a)(7)(B)(ii) because it contains 6,467 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 10th Circuit Rule 32(B). I used Microsoft Word to count the words.

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)(A) and 32(a)(6), and 10th Circuit Rule 32(A). This brief used 14-point Century Schoolbook in Microsoft Word.

This brief complies with 10th Circuit Rule 25.5 and the Tenth Circuit's CM/ECF User's Manual § II.J because I made all privacy redactions and scanned the filing for viruses with the most recent version of Norton 360, which discovered no viruses.

Dated: June 17, 2022, *s/ Jared S. Pettinato*
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16 U.S.C. § 1540

Section 1540 - Penalties and enforcement

(a) Civil penalties

(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 1538 of this title, may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this chapter may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation. Any person who otherwise violates any provision of this chapter, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (1) of this subsection shall be conducted in accordance with section 554 of title 5. The Secretary may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this chapter, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of

his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) Criminal violations

(1) Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this chapter or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this chapter or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this chapter, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

(c) District court jurisdiction

The several district courts of the United States, including the courts enumerated in section 460 of title 28, shall have jurisdiction over any actions arising under this chapter. For the purpose of this chapter, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(d) Rewards and certain incidental expenses

The Secretary or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violation of this chapter or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this chapter with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of

the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 3375(d) of this title, as penalties or fines, or from forfeitures of property, exceed $500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 1535(i) of this title.

(e) Enforcement

(1) The provisions of this chapter and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this chapter.

(2) The judges of the district courts of the United States and the United States magistrate judges may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this chapter and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this chapter may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such person may make arrests without a warrant for any violation of this chapter if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this chapter. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this chapter, as the Secretary shall by regulation prescribe.

(4)

(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported

contrary to the provisions of this chapter, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this chapter, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to subsection (b)(1) of this section.

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this chapter; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this chapter, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof.

(f) Regulations

The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this chapter, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this chapter including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this chapter. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf-

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B)

of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)

(A) No action may be commenced under subparagraph (1)(A) of this section-

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section-

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)

(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert

witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

(h) Coordination with other laws

The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this chapter with the administration of the animal quarantine laws (as defined in section 136a(f) of title 21) and section 306 [1] of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this chapter or any amendment made by this chapter shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this chapter shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this chapter shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

[1] See References in Text note below.

16 U.S.C. § 1540

Pub. L. 93-205, §11, Dec. 28, 1973, 87 Stat. 897; Pub. L. 94-359, §4, July 12, 1976, 90 Stat. 913; Pub. L. 95-632, §§6-8, Nov. 10, 1978, 92 Stat. 3761, 3762; Pub. L. 97-79, §9(e), Nov. 16, 1981, 95 Stat. 1079; Pub. L. 97-304, §§7, 9(c), Oct. 13, 1982, 96 Stat. 1425, 1427; Pub. L. 98-327, §4, June 25, 1984, 98 Stat. 271; Pub. L. 100-478, title I, §1007, Oct. 7, 1988, 102 Stat. 2309; Pub. L. 101-650, title III, §321, Dec. 1, 1990, 104 Stat. 5117; Pub. L. 107-171, title X, §10418(b)(3), May 13, 2002, 116 Stat. 508.

EDITORIAL NOTES

REFERENCES IN TEXT*This chapter, referred to in subsecs. (a)(1), (3), (b)-(f), (g)(1)(A), and (h), was in the original "this Act", meaning Pub. L. 93-205 Dec. 28, 1973, 81 Stat. 884, known as the Endangered Species Act of 1973, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.The amendments made by this chapter, referred to in subsec. (h), refer to the amendments made by Pub. L. 93-205, which amended section 460k-1, former section 460l-9, and sections 668dd, 715i, 715s, 1362, 1371, 1372, and 1402 of this title and section 136 of Title 7, Agriculture, and repealed sections 668aa to 668cc-6 of this title.The Tariff Act of 1930, referred to in subsec. (h), is act June 17, 1930, ch. 497, 46 Stat. 590, which is classified generally to chapter 4 (§1202 et seq.) of Title 19, Customs Duties. Section 306 of the Act was repealed by Pub. L. 107-171, title X, §10418(a)(5), May 13, 2002, 116 Stat. 507. For complete classification of this Act to the Code, see section 1654 of Title 19 and Tables.*

AMENDMENTS2002*-Subsec. (h). Pub. L. 107-171 substituted "animal quarantine laws (as defined in section 136a(f) of title 21)" for "animal quarantine laws (21 U.S.C. 101-105, 111-135b, and 612-614)".**1988****-Subsec. (a)(1). Pub. L. 100-478, §1007(a), substituted "$25,000" for "$10,000" and "$12,000" for "$5,000".Subsec. (b)(1). Pub. L. 100-478, §1007(b), substituted "$50,000" for "$20,000" and "$25,000" for "$10,000". Subsec. (d). Pub. L. 100-478, §1007(c), inserted at end "Whenever the balance of sums received under this section and section 3375(d) of this title, as penalties or fines, or from forfeitures of property, exceed $500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 1535(i) of this title." **1984****-Subsec. (d). Pub. L. 98-327 in first sentence, substituted a comma for "a reward" after "shall pay", inserted "(1) a reward" before "to any person", and added cl. (2). **1982****-Subsecs. (a)(1), (b)(1). Pub. L. 97-304, §9(c), substituted "(a)(2)(A), (B), (C), or (D)" for "(a)(2)(A), (B), or (C)".Subsec. (e)(6). Pub. L. 97-304, §7(1), added par. (6).Subsec. (g)(1)(B). Pub. L. 97-304, §7(2)(A)(i), substituted "any State; or" for "any State.".Subsec. (g)(1)(C). Pub. L. 97-304, §7(2)(A)(ii), added subpar. (C). Subsec. (g)(1). Pub. L. 97-304, §7(2)(A)(iii), inserted "or to order the Secretary to perform such act or duty," after "any such provision or regulation," in provisions following subpar. (C).Subsec. (g)(2)(C). Pub. L. 97-304, §7(2)(B), added subpar. (C). **1981****-Subsec. (d). Pub. L. 97-79 substituted "The Secretary or the Secretary of the Treasury shall pay a reward from sums received as penalties, fines, or forfeitures of property for any violation of this chapter or any regulation issued hereunder to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder" for "Upon the recommendation of the Secretary, the Secretary of the Treasury is authorized to pay an amount equal to one-half of the civil penalty or fine paid, but not to exceed $2,500, to any person who furnishes information which leads to a finding of civil violation or a conviction of a criminal violation of any provision of this chapter or any regulation or permit issued thereunder" and inserted provision that the amount of the reward, if any, be designated by the Secretary or the Secretary of the Treasury, as appropriate.**1978****-Subsec. (a)(1). Pub. L. 95-632, §6(1), (2), substituted "and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates" for "or who knowingly commits an act in the course of a commercial activity which violates" in two places and "$500" for "$1,000". Subsec. (a)(3). Pub. L. 95-632, §7, added par. (3). Subsec. (b)(1). Pub. L. 95-632, §6(3), substituted "knowingly" for "willfully commits an act which" in two places.Subsec. (b)(2). Pub. L. 95-632, §6(4), inserted "a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing" after "authorizing".Subsec. (b)(3). Pub. L. 95-632, §8, added par. (3). **1976****-Subsec. (e)(3). Pub. L. 94-359 inserted "make arrests without a warrant for any violation of this chapter if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may" after "Such person may" and ", but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this chapter, as the Secretary shall by regulation prescribe," after "other surety satisfactory to the Secretary".*

STATUTORY NOTES AND RELATED SUBSIDIARIES

CHANGE OF NAME*"United States magistrate judges" substituted for "United States magistrates" in subsec. (e)(2) pursuant to section 321 of Pub. L. 101-650 set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.*

EFFECTIVE DATE OF 1981 AMENDMENT*Pub. L. 97-79, §9(f), Nov. 16, 1981, 95 Stat. 1080, provided that: "The amendment specified in subsection 9(e) of this Act [amending this section] shall take effect beginning in fiscal year 1983."*

TRANSFER OF FUNCTIONS*For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d),and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.For transfer of functions of the Secretary of Agriculture relating to agricultural import and entry inspection activities under this section to the Secretary of Homeland Security, and for treatment of related references, see sections 231, 551(d), 552(d),and 557 of Title 6, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.*

30 U.S.C. § 1260

Section 1260 - Permit approval or denial

(a) Basis for decision; notification of applicant and local government officials; burden of proof

Upon the basis of a complete mining application and reclamation plan or a revision or renewal thereof, as required by this chapter and pursuant to an approved State program or Federal program under the provisions of this chapter, including public notification and an opportunity for a public hearing as required by section 1263 of this title, the regulatory authority shall grant, require modification of, or deny the application for a permit in a reasonable time set by the regulatory authority and notify the applicant in writing. The applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program. Within ten days after the granting of a permit, the regulatory authority shall notify the local governmental officials in the local political subdivision in which the area of land to be affected is located that a permit has been issued and shall describe the location of the land.

(b) Requirements for approval

No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that-

(1) the permit application is accurate and complete and that all the requirements of this chapter and the State or Federal program have been complied with;

(2) the applicant has demonstrated that reclamation as required by this chapter and the State or Federal program can be accomplished under the reclamation plan contained in the permit application;

(3) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance specified in section 1257(b) of this title has been made by the regulatory authority and the proposed operation thereof has been designed to prevent material damage to hydrologic balance outside permit area;

(4) the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 1272 of this title or is not within an area under study for such designation in an administrative proceeding commenced pursuant to section 1272(a)(4)(D) or section 1272(c) of this title (unless in such an area as to which an administrative proceeding has commenced pursuant to section 1272(a)(4)(D) of this title, the operator making the permit application demonstrates that, prior to January 1, 1977, he has made substantial legal and financial commitments in relation to the operation for which he is applying for a permit);

(5) the proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would-

(A) not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated, but, excluding undeveloped range lands which are not significant to farming on said alluvial valley floors and those lands as to which the regulatory authority finds that if the farming that will be interrupted, discontinued, or precluded is of such small acreage as to be of negligible impact on the farm's agricultural production, or

(B) not materially damage the quantity or quality of water in surface or underground water systems that supply these valley floors in (A) of subsection (b)(5):
Provided, That this paragraph (5) shall not affect those surface coal mining operations which in the year preceding August 3, 1977, (I) produced coal in commercial quantities, and were located within or adjacent to alluvial valley floors or (II) had obtained specific permit approval by the State regulatory authority to conduct surface coal mining operations within said alluvial valley floors.

With respect to such surface mining operations which would have been within the purview of the foregoing proviso but for the fact that no coal was so produced in commercial quantities and no such specific permit approval was so received, the Secretary, if he determines that substantial financial and legal commitments were made by an operator prior to January 1, 1977, in connection with any such operation, is authorized, in accordance with such regulations as the Secretary may prescribe, to enter into an agreement with that operator pursuant to which the Secretary may, notwithstanding any other provision of law, lease other Federal coal deposits to such operator in exchange for the relinquishment by such operator of his Federal lease covering coal deposits involving such mining operations, or pursuant to section 1716 of title 43, convey to the fee holder of any such coal deposits involving such mining operations the fee title to other available Federal coal deposits in exchange for the fee title to such deposits so involving such mining operations. It is the policy of the Congress that the Secretary shall develop and carry out a coal exchange program to acquire private fee coal precluded from being mined by the restrictions of this paragraph (5) in exchange for Federal coal which is not so precluded. Such exchanges shall be made under section 1716 of title 43;

(6) in cases where the private mineral estate has been severed from the private surface estate, the applicant has submitted to the regulatory authority-

(A) the written consent of the surface owner to the extraction of coal by surface mining methods; or

(B) a conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

(C) if the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship shall be determined in accordance with State law: *Provided*, That nothing in this chapter shall be construed to authorize the regulatory authority to adjudicate property rights disputes.

(c) Schedule of violations

The applicant shall file with his permit application a schedule listing any and all notices of violations of this chapter and any law, rule, or regulation of the United States, or of any department or agency in the United States pertaining to air or water environmental protection incurred by the applicant in connection with any surface coal mining operation during the three-year period prior to the date of application. The schedule shall also indicate the final resolution of any such notice of violation. Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or such other laws referred to [1] this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this chapter of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this chapter.

(d) Prime farmland mining permit

(1) In addition to finding the application in compliance with subsection (b) of this section, if the area proposed to be mined contains prime farmland pursuant to section 1257(b)(16) of this title, the regulatory authority shall, after consultation with the Secretary of Agriculture, and pursuant to regulations issued hereunder by the Secretary of [2] Interior with the concurrence of the Secretary of Agriculture, grant a permit to mine on prime farmland if the regulatory authority finds in writing that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in section 1265(b)(7) of this title. Except for compliance with subsection (b), the requirements of this paragraph (1) shall apply to all permits issued after August 3, 1977.

(2) Nothing in this subsection shall apply to any permit issued prior to August 3, 1977, or to any revisions or renewals thereof, or to any existing surface mining operations for which a permit was issued prior to August 3, 1977.

(e) Modification of prohibition

After October 24, 1992, the prohibition of subsection (c) shall not apply to a permit application due to any violation resulting from an unanticipated event or condition at a surface coal mining operation on lands eligible for remining under a permit held by the person making such application. As used in this subsection, the term "violation" has the same meaning as such term has under subsection (c).

[1] So in original. Probably should be followed by "in".

[2] So in original. Probably should be "of the".

Pub. L. 95-87, title V, §510, Aug. 3, 1977, 91 Stat. 480; Pub. L. 102-486, title XXV, §2503(a), Oct. 24, 1992, 106 Stat. 3102; Pub. L. 109-432, div. C, title II, §208, Dec. 20, 2006, 120 Stat. 3019.

EDITORIAL NOTES

AMENDMENTS2006*-Subsec. (e). Pub. L. 109-432 struck out at end "The authority of this subsection and section 1265(b)(20)(B) of this title shall terminate on September 30, 2004."****1992****-Subsec. (e). Pub. L. 102-486 added subsec. (e).*

30 U.S.C. § 1270

Section 1270 - Citizens suits

(a) Civil action to compel compliance with this chapter

Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter-

(1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this chapter or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter; or

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

(b) Limitation on bringing of action

No action may be commenced-

(1) under subsection (a)(1) of this section-

(A) prior to sixty days after the plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator; or

(B) if the Secretary or the State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the provisions of this chapter, or any rule, regulation, order, or permit issued pursuant to this chapter, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, in such manner as the Secretary shall by regulation prescribe, or to the appropriate State regulatory authority, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(c) Venue; intervention

(1) Any action respecting a violation of this chapter or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located.

(2) In such action under this section, the Secretary, or the State regulatory authority, if not a party, may intervene as a matter of right.

(d) Costs; filing of bonds

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Effect on other enforcement methods

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any of the provisions of this chapter and the regulations thereunder, or to seek any other relief (including relief against the Secretary or the appropriate State regulatory authority).

(f) Action for damages

Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district in which the surface coal mining operation complained of is located. Nothing in this subsection shall affect the rights established by or limits imposed under State Workmen's Compensation laws.

30 U.S.C. § 1270

Pub. L. 95-87, title V, §520, Aug. 3, 1977, 91 Stat. 503.

EDITORIAL NOTES

REFERENCES IN TEXT*The Federal Rules of Civil Procedure, referred to in subsec. (d), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.*