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## California v. United States Bureau of Land Management

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***California v. U.S. Bureau of Land Mgmt.*, \_\_\_ F. Supp. 3d \_\_\_, 2017  
WL 4416409 (N.D. Cal. Oct. 4, 2017)**

**Molly M. Kelly**

After President Trump’s Executive Order No. 13783 encouraging relaxing regulatory burdens on energy production, the Bureau of Land Management reevaluated its 2016 “Waste Prevention Rule” which addressed waste of natural gas from venting, flaring, or other leaks resulting from oil and natural gas production activities. The BLM sought to postpone the Rule’s compliance date to give the agency time to promulgate a new rule—effectively overruling the 2016 Rule. Plaintiffs challenged the agency’s compliance under the Administrative Procedures Act, and the court found the BLM did not properly follow APA requirements.

## I. INTRODUCTION

In *California v. Bureau of Land Management*, California and New Mexico (“Plaintiffs”) challenged the Bureau of Land Management’s (“BLM”) postponement of the compliance dates for a rule addressing venting and flaring of methane in natural gas production.<sup>1</sup> Plaintiffs alleged that the BLM violated the Administrative Procedure Act’s (“APA”) because there was not proper notice-and-comment before postponing the Rule and the BLM acted arbitrarily and capriciously while postponing the Rule.<sup>2</sup> The United States District Court for the Northern District of California held that the BLM violated the APA by issuing the Postponement Notice without following the proper APA procedures.<sup>3</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

In 2014, the BLM began developing the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule (“Rule”).<sup>4</sup> The Rule aimed to “reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities . . . .”<sup>5</sup> The BLM received input from various stakeholders and held forums in affected states.<sup>6</sup> The BLM met with state representatives, companies, and non-governmental organizations, and received about 330,000 public

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1. *California v. U.S. Bureau of Land Mgmt.*, \_\_\_ F.Supp.3d \_\_\_, 2017 WL 4416409, at \*1 (N.D. Cal. Oct. 4, 2017).

2. *Id.* at \*3.

3. *Id.* at \*13.

4. *Id.* at \*1.

5. *Id.* (citing Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016)).

6. *Id.*

comments on the Proposed Rule during the notice-and-comment period.<sup>7</sup> The Rule was finalized on November 18, 2016, and went into effect on January 17, 2017.<sup>8</sup>

On June 15, 2017, at the direction of Executive Order No. 13783<sup>9</sup> and Department of the Interior Secretarial Order No. 3349,<sup>10</sup> the BLM issued a notice that it was postponing the compliance dates for certain sections of the Rule (“Postponement Notice”).<sup>11</sup> The sections affected by the Postponement Notice had a compliance date of January 17, 2018.<sup>12</sup> Invoking § 705 of the APA, the BLM concluded that justice required the Bureau to postpone the future compliance dates for certain sections of the Rule in “light of “the substantial cost that complying with these requirements poses to operators . . . and the uncertain future these requirements face in light of the pending litigation and administrative review of the Rule.”<sup>13</sup> To justify postponing the compliance date, the BLM interpreted the 2018 compliance date to be “within the meaning of the term ‘effective date’ as that term is used in Section 705 of the APA.”<sup>14</sup>

Plaintiffs alleged that the BLM’s decision to postpone compliance dates of the Rule violated the APA, and filed suit on July 5, 2017.<sup>15</sup> The case was related to another case before the court, *Sierra Club v. Zinke*, which was filed by conservation and tribal organizations opposed to postponing the Rule.<sup>16</sup> The court denied a motion to transfer the case to the District of Wyoming, where litigation regarding the rule was pending. The Plaintiffs moved for summary judgment on July 26, 2017.<sup>17</sup>

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7. *Id.* (citing Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. at 83,021).

8. *Id.* at \*1.

9. *Id.* at \*2 (citing Promoting Energy Independence and Economic Growth, Exec. Order No. 13783, 82 Fed. Reg. 16093 (March 28, 2017) (directing agencies to review rules that potentially burden energy production and rescind the undue burdensome rules)).

10. *Id.* (citing American Energy Independence, Order No. 3349, Sec. 1, (DOI March 29, 2017) (enacting Executive Order No. 13783)).

11. *California*, 2017 WL 4416409, at \*2 (citing Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430).

12. *Id.* at \*3 (citing Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,431).

13. *Id.* (citing Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,431).

14. *Id.*

15. *Id.*

16. *Id.*; *Sierra Club v. Zinke*, Case No. 17-cv-03885-EDL (N.D. Cal. July 10, 2017).

17. *California*, 2017 WL 4416409, at \*3.

### III. ANALYSIS

The court considered the standard of review required for claims under the APA. Following the reasoning in *Beccera v. U.S. Department of Interior*, which raised similar issues, the court found the BLM’s reliance on the arbitrary-and-capricious standard of review, in order to warrant deferential treatment from the court, misguided.<sup>18</sup> The BLM argued that under the APA, a court can only set aside agency action if it is: “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, . . . in excess of statutory jurisdiction . . . [or] without observance of procedure required by law.”<sup>19</sup> The court distinguished the arbitrary-and-capricious standard, which allows *Chevron* deference to agency interpretation of the statute at issue,<sup>20</sup> from the specific APA rulemaking procedures which are not entitled to agency interpretation.<sup>21</sup> The court found that the BLM only considered the first clause “regarding arbitrary action and abuse of discretion,” and that the standard was *not* applicable to agency actions made in violation of APA mandated procedures.<sup>22</sup> The court therefore reasoned the agency action was plainly not interpreting a statute; the action was merely following the procedures required for rulemaking under the APA.<sup>23</sup>

#### A. BLM’s Application of APA § 705

The BLM invoked § 705 of the APA for its Postponement Notice when it postponed the effective date of the Rule.<sup>24</sup> The court analyzed the BLM’s application of § 705, which allows a court to postpone the effective date of a rule if the agency finds that “justice so requires . . . pending judicial review . . . to prevent irreparable injury.”<sup>25</sup> Since the agency is not afforded deference to its interpretation of § 705, the court analyzed the agency’s interpretation *de novo*.

##### 1. An Agency Cannot Suspend a Promulgated Rule Without Notice-and-Comment

The BLM interpreted the term “effective date” under § 705 to encompass effective dates *and* compliance dates, and thus postponed the

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18. *Id.* at \*6 (citing *Becerra v. U.S. Dep’t of Interior*, Case No. 17-cv-02376-EDL, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017)).

19. *Id.* (citing Administrative Procedures Act, 5 U.S.C. § 706 (2012)).

20. *Id.* (citing *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that if Congress did not unambiguously declare its intent in the statute at issue, and the agency interpreted the statute reasonably, the court will give deference to the agency’s interpretation)).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at \*7.

25. *Id.* (citing Administrative Procedures Act, 5 U.S.C. § 705 (2012)).

compliance dates in the Postponement Notice.<sup>26</sup> However, the court found that the plain language of the statute authorizes postponement only of the effective date, not the compliance dates.<sup>27</sup> Finding that effective dates and compliance dates have distinct meanings,<sup>28</sup> the court found that failing to utilize a notice-and-comment process for the suspension of the Rule was contrary to the plain language of the statute.<sup>29</sup> The court found that the compliance date was “intended to give operators in the oil and gas industry the time they needed to adjust their operations to come into compliance,” which is not the same as the date the Rule became effective.<sup>30</sup> Finally, the court noted a “clear statutory distinction between the two periods before and after a rule takes effect,” and that § 705 expressly permits the agency to invoke its § 705 authority during the time between publication and its effective date.<sup>31</sup>

The BLM argued that it was in the interest of public policy to include “compliance dates” in the definition of “effective dates” because it allowed the agency to maintain the status quo pending judicial review.<sup>32</sup> The court found this policy argument unpersuasive, because in fact, “formal rulemaking exists in order to provide ‘notice and predictability to regulate[d] parties.’”<sup>33</sup> Regulated parties needed to make detailed preparations after the Rule’s effective date, but before they were required to be in compliance.<sup>34</sup>

The BLM also asserted that APA § 705 did not require notice-and-comment because it would impede the agency’s ability to “act swiftly to maintain the status quo, as Congress envisioned when it crafted the Section 705 authority.”<sup>35</sup> The court disagreed, holding that the Postponement Notice was invoked after the Rule’s effective date, voiding the problem Congress envisioned during the gap between the final rule and the effective date.<sup>36</sup> The APA “specifically provides that the repeal of a rule is rulemaking subject to rulemaking procedures” and cannot be indefinitely postponed under § 705 authority.<sup>37</sup> Consequently, the Postponement Notice, without formal notice-and-comment, exceeded the statutory authority under APA § 705.<sup>38</sup>

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26. *Id.*

27. *Id.* (citing Administrative Procedures Act, 5 U.S.C. § 706 (2012)).

28. *Id.* (citing *Silverman v. Eastrich Multiple Inv’r Fund*, 51 F.3d 28, 31 (3d Cir. 1995) (held, mandatory compliance date should not be misconstrued as the effective date of the revisions)).

29. *Id.*

30. *Id.* at \*8.

31. *Id.*

32. *Id.* at \*9.

33. *Id.* (citing *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012)).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at \*9-10 (citing *Nat. Resources Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 761 (3d Cir. 1982)).

38. *Id.*

## 2. BLM's Postponement Notice was Arbitrary and Capricious

The court additionally found that the BLM's interpretation of APA § 705 and their actions regarding the Postponement Notice were arbitrary and capricious because they did not meet the additional § 705 statutory standards of "pending litigation" or "justice so requires" to lawfully postpone an already enacted rule.<sup>39</sup>

The court found the BLM merely paid "lip service" to the pending litigation in the District of Wyoming, because the Postponement Notice reiterated that the BLM believed the Rule had been properly promulgated.<sup>40</sup> The BLM specifically cited Postponement Notice litigation in the District of Wyoming for an extension there. In the absence of specific concerns regarding the adequacy of the rulemaking process for the Rule, the court found the BLM did not meet the statutory requirement that pending litigation in the District of Wyoming justified the Postponement Notice.<sup>41</sup>

The court further found that the BLM's Postponement Notice was arbitrary because it completely neglected to explain the rejection of its earlier Rule promulgation and factual findings.<sup>42</sup> The court explained that "if the words 'justice so requires' are to mean anything, they must satisfy the fundamental understanding of justice . . ." and consider both sides of the issue.<sup>43</sup> According to the court, the BLM needed to consider both the costs, as well as benefits of the Rule, such as resource conservation, environmental protection, and enhanced public revenues.<sup>44</sup> An agency cannot ignore "an important aspect of the problem," and the Rule, when promulgated in 2016, showed that the benefits substantially outweighed the costs.<sup>45</sup> By using the same Regulatory Impact Analysis to justify the postponement as used to justify the Rule initially, the BLM failed to give "a reasoned explanation . . . needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."<sup>46</sup>

### B. Remedy

Concluding that the BLM violated the APA, the court discussed the remedies of declaratory relief and vacatur of the Postponement

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39. *Id.* at \*10-11.

40. *Id.* at \*10.

41. *Id.*

42. *Id.* at \*11.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at \*11 (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

Notice.<sup>47</sup> Finding that the BLM seriously erred by “illegally invoking” Section 705 and attempting to circumvent the notice-and-comment requirements, the court found vacating the Postponement Notice appropriate.<sup>48</sup> Noting that exceptions to vacatur involve “irreparable and severe disruptive consequences that [go] beyond the potential disruptive consequences” that the BLM raised, the court found that vacating the Postponement Notice would “merely put the regulated parties back in the position of working toward compliance.”<sup>49</sup>

Furthermore, according to the agency’s own analysis when promulgating the Rule, vacating the Postponement Notice is “predicted to result in a net positive financial and environmental benefit.”<sup>50</sup> The court further discussed that if it denied the standard remedy of vacatur based on less severe disruptive consequences to the parties, it would be making a “mockery” of the APA and allow agencies to ignore their legal obligations to the APA procedural requirements.<sup>51</sup> Since the BLM had not yet promulgated a replacement for the Rule, it had no certainty that the Postponement Notice would be effective given the uncertainty that “either proposed rulemaking will survive potential legal challenge, given the litigation history of the Rule.”<sup>52</sup>

#### IV. CONCLUSION

The court affirmed that the APA rulemaking procedures apply to creating a rule, as well as postponing a rule prior to revoking it. Under this standard, the agency is responsible for formal notice-and-comment procedures not only when creating a rule, but also when rescinding a rule. This decision places a greater responsibility on the agency to diligently follow the—sometimes slow—APA requirements when adjusting to a new executive administration.

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47. *Id.*

48. *Id.* at \*13.

49. *Id.* at \*14.

50. *Id.*

51. *Id.*

52. *Id.*