

complaint.”). Under these circumstances, it would serve no legitimate purpose to retain the challenged rule in effect and thereby subject Defendants to further litigation concerning the merits of the SBZ Rule. Rather, it is well within the Court’s inherent power to vacate the SBZ Rule, as proposed by Defendants.

ARGUMENT

I. It Is Unnecessary for the Court to Make a Determination on the Merits of the SBZ Rule.

Judicial review of the SBZ rule is unnecessary, because the United States has already confessed legal error. As noted in Defendants’ opening memorandum, DE # 10, the Office of Surface Mining Reclamation and Enforcement (“OSM”) failed to initiate consultation with the U.S. Fish and Wildlife Service (“FWS”) under the Endangered Species Act (“ESA”) to evaluate possible effects of the SBZ Rule on threatened and endangered species. DE # 10 at 2. This was one of the legal deficiencies specifically alleged by Plaintiffs in their Amended Complaint. DE # 6 at ¶¶ 56-60. The requested vacatur and remand is consistent with the Court’s inherent powers to remand cases to administrative agencies for further proceedings. E.g. Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939). NMA fails to cite any authority for the proposition that Congress intended to proscribe this inherent power in cases involving regulations promulgated pursuant to the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553. To the contrary, “we do not lightly assume that Congress has intended to depart from established principles’ such as the scope of a court’s inherent power.” Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)).

Although the reported cases on vacatur most commonly address judicial remedies that

were fashioned after substantive briefing had occurred, NMA fails to cite any authority for the proposition that the Court may not exercise its inherent powers to vacate a challenged rule where, as here, an agency confesses legal error prior to undertaking substantive briefing. Indeed, it is hardly remarkable that an agency would seek to conserve litigation resources by requesting the Court to dispose of a case before the parties incur significant legal fees, which may be charged against the public fisc. NMA's demand for the United States to continue to litigate the merits of the SBZ Rule after confessing legal error would inappropriately turn these proceedings "into a game in which an agency is 'punished' for procedural omissions by being forced to defend them well after the agency has decided to reconsider." Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta, 375 F.3d 412, 416 (6th Cir. 2004).

II. The Federal Defendants Have Proffered a Legally Sufficient Explanation Concerning the Deficiency of the SBZ Rule.

NMA incorrectly suggests, DE # 13 at 11 - 13, that the Court should undertake a substantive review of the ESA claims in this case, notwithstanding Federal Defendants' confession of error as to OSM's failure to undertake ESA consultation in conjunction with its decision to promulgate the SBZ Rule. While the Court might properly deny a motion to remand in some instances, it should not do so in a case like this, where the Defendants' motion is predicated on a confession of error. Cf. Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying "novel, last second motion to remand," noting that the remand request was not based on a confession of error and was instead based on a prospective policy statement which would not bind the Defendants); Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1125-26 (D.C. Cir. 1983) (A court may enter a consent decree without inquiry into the precise rights of the parties, the merits of the claims, or a determination that a statutory

violation has occurred).

NMA suggests that Defendants' confession of error concerning the lack of ESA consultation should be disregarded because: 1) FWS previously, in 1996, rendered a biological opinion concerning procedures then in effect; and 2) FWS did not specifically conclude that further consultation was necessary in its 2008 comments on the SBZ Rule. DE # 13 at 13. It would be inappropriate for Defendants to address NMA's arguments in detail at this time, as such responses may inappropriately predetermine the course of Defendants' review of the SBZ rule on remand or may otherwise prejudice Defendants in defending the SBZ Rule if it is re-promulgated after remand. It would be similarly inappropriate for Federal Defendants to respond to Plaintiff NPCA's various arguments concerning the merits of the 1996 biological opinion, see DE # 15 at 3-4, as Plaintiff NPCA has consented to the dismissal of its Amended Complaint. Nevertheless, it should suffice to note that the Federal Defendants do not dispute Plaintiff's allegation that no formal ESA consultation occurred specifically with respect to the promulgation of the SBZ rule. See Amended Complaint, DE # 6 at ¶ 59. By confessing that OSM's failure to initiate consultation with FWS on the rule constituted an omission, Defendants have proffered a legally sufficient explanation concerning the deficiency of the SBZ Rule in relation to specific claims in Plaintiffs' Amended Complaint, notwithstanding NMA's argument to the contrary. See, e.g., Citizens Against Pellissippi, 375 F.3d at 416 ("In the absence of any such reason [to continue injunctive relief against the agency], it is an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action.").

III. Vacating the SBZ Rule Is Consistent With the Court’s Exercise of its Inherent Powers.

NMA correctly notes that—*outside* the litigation context—withdrawal of a regulation that has been promulgated through notice-and-comment procedures would typically entail further notice-and-comment rulemaking. DE # 13 at 13 - 15. Here, however, the Secretary has confessed legal error *within* a litigation context. The Court has the inherent power to vacate the rule, without requiring OSM to engage in the normal notice-and-comment procedure. Cf., National Ass’n of Home Builders v. Evans, No. 1:00CV02799(CKK), 2002 WL 1205743 (D.D. C. Apr. 30, 2002) (“Thus, the Court does not find that the typical notice and comment requirements of 5 U.S.C. § 553 apply in this context, where the Court is approving a consent decree that vacates a rule.”). Indeed, NMA has cited no authority, and we are not aware of any such authority, suggesting that, when a court invalidates a rule, the agency must engage in notice-and-comment rulemaking to effectuate the court’s judgment. Moreover, leaving the challenged rule in effect, as proposed by NMA, would potentially require Defendants to continue to litigate and defend the merits of a rule¹ that Defendants have determined to be legally defective on ESA grounds.

Contrary to NMA’s inference, the fact that Congress specifically authorized the Department of the Interior to withdraw another one of its regulations without notice and

¹ This is because remand without vacatur likely would not moot Plaintiff’s claims, e.g., DE # 6 at p. 31 (request for vacatur of SBZ Rule in Amended Complaint). See Cement Kiln Recycling Coal. v. E.P.A., 255 F.3d 855, 872 (D.C. Cir. 2001) (rejecting remand without vacatur because court elected not to reach the bulk of the petitioners’ claims in the case “and leaving the regulations in place during remand would ignore petitioners’ potentially meritorious challenges.”); Natural Res. Def. Council v. E.P.A., 489 F.3d 1250, 1262 (D.C. Cir. 2007) (rejecting remand without vacatur because court elected “not to address potentially meritorious challenges....”).

comment, see DE # 13 at n. 14 (citing 2009 Omnibus Appropriations Act, § 429(a), Act of Mar. 11, 2009, Pub. L. 111-8, 123 Stat. 524, 749 (2009)), does not mean that Congress has abrogated the Court's inherent power to fashion a similar remedy with respect to the regulation challenged in this case. Moreover, the 2009 Omnibus Appropriations Act cited by NMA did not hinge on or require any finding of legal error but rather allowed agency withdrawal for any reason—legal, policy, or otherwise. Without this legislation, APA notice and comment requirements would likely have applied to these types of withdrawals. This stands in sharp contrast with the circumstances in this case, where Defendants have identified a specific legal defect with respect to the SBZ rule, and where the Court has the inherent power to remedy that defect by granting the requested vacatur without requiring OSM to engage in notice-and-comment procedures.

IV. Effect of Vacatur

NMA's argument that the Defendants mischaracterize the effect of vacatur, DE # 13 at 17-18, is simply wrong. First, NMA misstates the test. The question is not, as NMA poses, whether there will be disruptive consequences from maintaining the challenged rule in place, but whether vacating the rule will cause disruptive consequences. E.g., Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Here, there will be no such disruptive consequences from vacatur of the rule and NMA does not seriously contend otherwise. This is with good reason.

If the Court grants Defendants' motion to vacate the SBZ Rule, the rule as it was in effect on December 11, 2008, i.e., 30 C.F.R. § 816.57, 817.57 (2008), would once again be effective. Georgetown University Hosp. v. Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987) ("This circuit has previously held that the effect of invalidating an agency rule is to reinstate the rules previously in

force.”) (citation omitted); Action on Smoking & Health v. Civil Aeronautics Board, 713 F.2d 795,797 (D.C. Cir. 1983) (same); Oceana Inc. v. Evans, 384 F. Supp. 2d 4, 6-7 (D.D.C. 2005) (same); but see Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 545 (D.C. Cir. 1983) (“In at least some cases, we have no power to reinstate the prior rule and must remand to the agency to determine the appropriate replacement.”). Because the Secretary has not required the state regulatory agencies to take any action to replace their counterparts to the 1983 SBZ Rule with provisions consistent with the recent 2008 SBZ Rule, reinstatement of the 1983 rule would result in no change to the delegated state programs and would restore the predecessor rule in states where the regulatory program is federally administered (primarily Tennessee). NMA has not put forth any serious argument why reverting to the legally valid predecessor rule that has been in place in various iterations since 1983 will cause disruptive consequences.

In relation to its argument pertaining to the effect of vacatur, NMA asserts that “vacating the SBZ Rule would not return the law to a simple ‘status quo,’ but would in fact revive uncertainty in the legal landscape that the SBZ Rule was designed to stabilize.” DE # 13 at 18. However, vacatur of the 2008 SBZ Rule and reinstatement of the duly promulgated, legally valid 1983 SBZ rule would in fact preserve the longstanding status quo. For example, NMA correctly notes that no state regulatory authority has amended its program to formally reflect the 2008 SBZ Rule. DE # 13 at 18. Given the accuracy of that statement, vacating the 2008 SBZ Rule would not disrupt the status quo with respect to delegated state programs and surely would not cause disruptive consequences. In any event, NMA’s assertion that there is no harm in allowing the SBZ Rule to remain in effect while OSM reconsiders the rule, DE # 13 at 18, is incorrect. While it is generally true that the state regulatory programs cannot be amended to conform to the

SBZ Rule without Secretarial approval, NMA does not address the fact that the SBZ Rule has immediate effect in the federal program in Tennessee, which is administered by OSM. See DE # 10 at 3. Thus, only through vacatur can the status quo be restored in federal program states.

CONCLUSION

As Plaintiff NPCA has consented to the remand and vacatur of the SBZ rule, see DE # 15 at 5, NMA is the only remaining party in this case that continues to urge the Court to consider the merits of this case. For the foregoing reasons, and for the reasons set forth in Defendants' motion, DE # 10, NMA's objections to the proposed dismissal lack merit. Federal Defendants respectfully request the Court to grant the requested remand with vacatur of the SBZ rule, notwithstanding the objections of NMA.

Respectfully submitted,

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