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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CITIZENS FOR CONSTITUTIONAL INTEGRITY; SOUTHWEST ADVOCATES, INC.,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT; DEBRA HAALAND, in her official capacity as Secretary of the Department of the Interior; GLENDA OWENS, in her official capacity as Acting Director of the Office of Surface Mining Reclamation and Enforcement; KATE MACGREGOR, in her official capacity as Acting Assistant Secretary for Land and Minerals Management,

Defendants - Appellees.

GCC ENERGY, LLC,

Intervenor-Appellee.

No. 22-1056

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:21-cv-00923-RM-STV)

Jared S. Pettinato, The Pettinato Firm, Washington, D.C., for Plaintiffs - Appellants.

Sommer H. Engels, Attorney, Environment and Natural Resources Division, U.S. Department of Justice (Todd Kim, Assistant Attorney General, Bridget K. McNeil, Attorney, Environment and Natural Resources Division, with her on the brief), Washington, D.C., for Defendants - Appellees.

Before **HARTZ**, **TYMKOVICH**, and **MATHESON**, Circuit Judges.

HARTZ, Circuit Judge.

Citizens for Constitutional Integrity and Southwest Advocates, Inc. (Plaintiffs) appeal the denial of their motion for temporary relief by the United States District Court for the District of Colorado. The Department of the Interior's Office of Surface Mining Reclamation and Enforcement (the Office) granted a coal-mining permit for an expansion of the King II Mine (the Mine) in the Dunn Ranch Area of La Plata County, Colorado. Plaintiffs seek to enjoin mining under the expansion and ultimately vacate the permit. They allege that the Office conducted flawed assessments of the probable hydrologic impacts of the expansion, contrary to the requirements of the Surface Mining Control and Reclamation Act (the SMCRA or the Act), 30 U.S.C. § 1201 et seq. As authority for their motion, they invoke the Act's citizen-suit provision, 30 U.S.C. § 1270, or, alternatively, the Administrative Procedure Act (the APA), 5 U.S.C. § 551 et seq.

Exercising jurisdiction under 28 U.S.C. § 1292(a)(1),[1] we hold that Plaintiffs are not entitled to temporary relief because their claims under the SMCRA and the APA are not likely to succeed on the merits. Plaintiffs cannot use § 1270 to challenge discretionary action by the Office (which probably encompasses issuance of the permit); and it is unlikely that issuance of the permit can be challenged under the APA because there appears to be an adequate remedy under the SMCRA, though Plaintiffs did not pursue that remedy. We therefore affirm the district court's denial of Plaintiffs' motion for temporary relief.

I. BACKGROUND

The SMCRA "is a comprehensive statute that regulates all surface coal mining operations" in the United States. *United States v. Navajo Nation*, 556 U.S. 287, 300 (2009). It "establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981). "The Secretary

[1] To assure ourselves of our jurisdiction, we solicited supplemental briefs from the parties on Plaintiffs' standing and our appellate jurisdiction. In the interim, however, *Citizens for Constitutional Integrity v. United States*, 57 F.4th 750, 759–61 (10th Cir. 2023), has addressed the standing of the same Plaintiffs in raising a different challenge to the grant of a coal-mining permit for an adjacent tract of the King II Mine and asserting standing based on the same affidavits submitted in this case. For the reasons stated in that opinion, we hold that Southwest Advocates has standing in this case and that we need not address the standing of Citizens for Constitutional Integrity. As for appellate jurisdiction, Plaintiffs appeal the denial of injunctive relief, so § 1292(a)(1) applies.

[of the Interior], acting through the Office," administers and enforces the Act and its implementing regulations. 30 U.S.C. § 1211(c)(1).[2]

Any entity that wishes to engage in coal-mining operations on lands within the Office's jurisdiction needs a permit issued by the Office. *See id.* § 1256(a). Although GCC Energy, LLC, the operator of the Mine, had an existing permit for the Mine, the Dunn Ranch Area expansion would increase the size of the Mine by 2,462 acres, so GCC Energy needed to apply for another permit. *See id.* § 1261(a)(3). GCC Energy submitted its application for a revised and expanded permit on September 25, 2019. The Office approved the new permit on December 8, 2020. In doing so, the Office made several written findings "[b]ased on its review of the permit revision

[2] Since 1980 Colorado has had primary authority to regulate "surface coal mining and reclamation operations . . . on non-Federal and non-Indian lands" within its borders. 30 C.F.R. § 906.10. And, through a state-federal cooperative agreement in effect since 1982, Colorado has authority to regulate "surface coal mining operations on Federal lands" in Colorado. *Id.* § 906.30; *see Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 767 (D.C. Cir. 1988) (under 30 U.S.C. § 1273(c), "states may enter into cooperative agreements and take over the permit approval process for federal lands"). But that agreement does not cover Indian lands, and the Office retains jurisdiction over those lands. *See* 30 U.S.C. § 1291(9) (defining *Indian lands*); *id.* § 1291(4) (excluding Indian lands from definition of *Federal lands*); 30 C.F.R. § 750.6(a)(1) ("OSM shall . . . [b]e the regulatory authority on Indian lands"); *id.* § 700.5 ("OSM and OSMRE mean the Office of Surface Mining Reclamation and Enforcement established under title II of the Act."). The Dunn Ranch Area "consists of federal coal beneath surface estate predominantly owned by the Ute Mountain Ute (UMU) Tribe, along with a smaller amount of other private surface owners and [Bureau of Land Management]-administered surface estate." Aplts. App., Vol. I at 76 (the 2019 environmental assessment of the Dunn Ranch Area expansion, conducted by the Office and the Bureau of Land Management). Because of the UMU Tribe's ownership of most of the surface estate, the Office is "the primary regulator of coal mining operations" conducted in the Dunn Ranch Area. Aplees. App. at 172 (the Office's "Finding of No Significant Impact" for the Dunn Ranch Area expansion).

application." Aplees. App. at 78. Among these findings were that "[t]he revision application is accurate and complete, and the applicant has complied with all requirements of SMCRA and the Indian Lands Program for the permit revision." *Id.* The Office also found that the cumulative-hydrologic-impact assessment released earlier in 2020 (but analyzing the hydrologic effects of a March 2017 permit-revision application) did not need to be updated to assess the hydrologic impacts of the Dunn Ranch Area expansion. And it determined that two environmental assessments, conducted in 2011 and 2019, "adequately address[ed] the impacts of the mine operation." *Id.*

Plaintiffs filed this suit on March 31, 2021. On November 10, 2021, they filed a motion seeking preliminary injunctive relief under one of the SMCRA's temporary-relief provisions, 30 U.S.C. § 1276(c). The district court denied the motion. *See Citizens for Const. Integrity v. United States*, No. 21-cv-00923-RM-STV, 2022 WL 474697, at *2–3 (D. Colo. Feb. 16, 2022). Plaintiffs timely appealed.

II. DISCUSSION

A. Standard of Review and Requirements for Relief

A grant of temporary relief under the SMCRA—like a grant of a preliminary injunction—stays action "pending final determination of the proceedings." 30 U.S.C. § 1276(c); *cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). When reviewing a district court's grant or denial of a preliminary injunction, "we scrutinize abstract legal matters de novo, findings of fact

for clear error, and judgment calls with considerable deference to the trier. We will disturb the ruling below only if the court abused its discretion." *Corp. Techs., Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013) (citation and internal quotation marks omitted). We apply the same standard of review to a grant or denial of relief under § 1276(c).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). But 30 U.S.C. § 1276(c) provides that "[i]n the case of a proceeding to review any order or decision issued by the [Office] under [the SMCRA]," a "court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings" if three conditions are met: (1) "all parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief"; (2) "the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding"; and (3) "such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources."

The parties disagree about which test applies here; Plaintiffs argue for the application of § 1276(c)'s modified three-factor test (so that, presumably, they need not show irreparable harm and the court need not balance the equities), while the Office argues for the traditional four-factor test (based on its contention that § 1276(c) is not

available to Plaintiffs). The district court did not decide this issue, *see Citizens*, 2022 WL 474697, at *2, and neither do we. Both standards require Plaintiffs to demonstrate that they are likely to succeed on the merits of their claims. Plaintiffs have failed to satisfy this condition.

B. Likelihood of Success on the Merits

Plaintiffs allege that the Office's approval of the Dunn Ranch Area expansion violated four provisions of the SMCRA—30 U.S.C. §§ 1257(b)(11), 1260(b)(1), 1260(b)(3), and 1265(b)(10)—and was arbitrary and capricious in approving the expansion without investigating why GCC Energy would need to acquire six times the quantity of water rights that it was using, *see* Aplts. Br. at 26, and in "fail[ing] to analyze the volume of diverted irrigation water that would otherwise replenish underground aquifers," *id.* at 34. Plaintiffs contend that they may use 30 U.S.C. § 1270(a)(2), one of the SMCRA's citizen-suit provisions, to advance all these arguments.[3] They argue in the alternative that if they cannot obtain review under the SMCRA, they may proceed under the cause of action provided by the APA in 5 U.S.C. § 702. In response, the Office argues that § 1270(a)(2) does not cover Plaintiffs' claims of arbitrary and capricious action; that a different provision of the Act, 30 U.S.C. § 1276(a)(2),[4] covers Plaintiffs' arbitrary-and-capricious claims (although Plaintiffs

[3] Plaintiffs disclaim any intent to rely on 30 U.S.C. § 1270(a)(1), the other SMCRA citizen-suit provision.

[4] 30 U.S.C. § 1276(a)(2) states:

> Any order or decision issued by the Secretary in a civil penalty proceeding or any other proceeding required to be conducted pursuant to

have not invoked it—probably because they have failed to comply with the prerequisites to filing suit under that provision); and that the availability of the cause of action under § 1276(a)(2) precludes Plaintiffs from availing themselves of the APA cause of action. Because the Office appears to be correct on these points and because the Office did not violate the four specific provisions relied on by Plaintiffs, we hold that the district court did not abuse its discretion in denying Plaintiffs' motion for temporary relief.[5]

1. 30 U.S.C. § 1270(a)(2)

As we shall explain in the following discussion, a plaintiff can proceed under § 1270(a)(2) to compel the Office to perform a nondiscretionary duty. But a plaintiff cannot use that provision to advance an argument that the Office acted arbitrarily or

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> section 554 of Title 5 shall be subject to judicial review on or before 30 days from the date of such order or decision in accordance with subsection (b) of this section in the United States District Court for the district in which the surface coal mining operation is located. In the case of a proceeding to review an order or decision issued by the Secretary under the penalty section of this chapter, the court shall have jurisdiction to enter an order requiring payment of any civil penalty assessment enforced by its judgment. This availability of review established in this subsection shall not be construed to limit the operations of rights established in section 1270 of this title.

[5] The district court did not resolve this case based on Plaintiffs' failure to invoke a proper cause of action; instead, it denied Plaintiffs' motion on the merits of Plaintiffs' substantive attacks on the Office's environmental analyses. *See Citizens*, 2022 WL 474697, at *2–3. "Nevertheless, we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court." *Wells Fargo Bank, N.A. v. Mesh Suture, Inc.*, 31 F.4th 1300, 1307 n.4 (10th Cir. 2022) (internal quotation marks omitted). Plaintiffs had a fair opportunity to address the cause-of-action issue. Indeed, after Defendants raised the issue in their answer brief, Plaintiffs responded in their reply brief and during oral argument without arguing that the issue had been forfeited by Defendants.

capriciously in performing a discretionary action. The latter sort of claim must proceed, if at all, under some other statute. And because, as we shall see, the Office has performed all the nondiscretionary duties identified by Plaintiffs, Plaintiffs are not likely to succeed in their claims under § 1270(a)(2).

a. The Scope of § 1270(a)(2)

Section 1270(a)(2) provides that "where there is alleged a failure of the [Office] . . . to perform any act or duty under [the SMCRA] which is *not discretionary*," "any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance" (emphasis added).[6] This provision is for "suits against regulators." *Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541, 1549–50 (D.C. Cir. 1992) (R.B. Ginsburg, J.). Although the Office is the

[6] 30 U.S.C. § 1270(a) states:

> 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.

relevant regulator, it argues that § 1270(a)(2) is inapplicable here. In its view: "Plaintiffs are not challenging an asserted failure to act; instead, they challenge an action that [the Office] *did* take: approving GCC Energy's request for a permit revision. And any assertion that [the Office] failed to appropriately carry out its obligations under SMCRA in so acting does not fall under [§ 1270(a)(2)]." Aplees. Br. at 15. Plaintiffs counter that § 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." Aplts. Reply Br. at 4 (brackets, ellipses, and internal quotation marks omitted). Plaintiffs charge that the Office has not fulfilled its "broad duty . . . to ensure permits comply with SMCRA." *Id.* (citing 30 U.S.C. § 1260(b)(1)).[7] And they argue that they may use § 1270(a)(2) to challenge the approval of the permit for the expanded Mine as arbitrary and capricious.

The Office's reading is the better one. The scope of 30 U.S.C. § 1270(a)(2) is limited to ensuring that the Office performs required tasks. It does not ensure that the task is performed well, even though the agency is expected to make good decisions. In particular, it does not provide an avenue for challenging agency action as arbitrary or

[7] Plaintiffs contend that the Office in the past has adopted Plaintiffs' view of the scope of challenges permitted under § 1270(a)(2). But a prior inconsistent litigation position would be relevant here only to the extent that it would weigh against deferring to the agency's present interpretation. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417–18 (2019) (discussing deference of courts to agency interpretations of regulations); *cf. Heckler v. Cmty. Health Servs. of Crawford Cnty.*, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant."). The Office neither requests nor receives deference from this court, so Plaintiffs' contention is irrelevant.

capricious. If the agency is given a choice, then it has discretion, and an agency's exercise of its discretion is beyond the purview of § 1270(a)(2).

This construction of the statutory language reflects the consensus of the courts of appeals in interpreting identical language in a variety of similar statutes. The language at issue—allowing for a citizen suit to challenge an asserted "failure" by an agency "to perform any act or duty under this chapter which is not discretionary"—is not unique to the SMCRA. It appears in the citizen-suit provisions of a number of environmental statutes enacted by Congress, beginning with the 1970 amendments to the Clean Air Act of 1963. *See* Clean Air Amendments of 1970, Pub. L. No. 91-604, sec. 12(a), § 304(a)(2), 84 Stat. 1676, 1706 (codified as amended at 42 U.S.C. § 7604(a)(2)). "Once firmly ensconced in the Clean Air Act, the citizen suit was included in all new federal environmental statutes or major statutory amendments to existing federal environmental statutes in the 1970s [and, we would add, the 1980s], except for the Federal Insecticide, Fungicide, and Rodenticide Act." Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: Part I*, 13 Env't L. Rep. 10309, 10311 (1983). Congress repeatedly lifted the language used in the Clean Air Act and "transpose[d] it with only the most cursory conforming changes into other environmental statutes." *Id.*; *see, e.g.*, Federal Water Pollution Control Act Amendments (Clean Water Act) of 1972, Pub. L. No. 92-500, sec. 2, § 505(a)(2), 86 Stat. 816, 888 (codified as amended at 33 U.S.C. § 1365(a)(2)); Energy Policy and Conservation Act (EPCA) of 1975, Pub. L. No. 94-163, § 335(a)(2), 89 Stat. 871, 930 (codified as amended at 42 U.S.C. § 6305(a)(2)); Resource Conservation and Recovery

Act (RCRA) of 1976, Pub. L. No. 94-580, sec. 2, § 7002(a)(2), 90 Stat. 2795, 2825 (codified as amended at 42 U.S.C. § 6972(a)(2)); Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, § 520(a)(2), 91 Stat. 445, 503 (codified at 30 U.S.C. § 1270(a)(2)); Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, sec. 7(2), § 11(g)(1)(c), 96 Stat. 1411, 1425 (codified as amended at 16 U.S.C. § 1540(g)(1)(c)); Superfund (Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, sec. 206, § 310(a)(2), 100 Stat. 1613, 1704 (codified at 42 U.S.C. § 9659(a)(2)).

Before discussing the relevant decisions by this and other circuits, it will be helpful to put the issue in perspective. For many years, even before the enactment of the APA in 1946, the general paradigm has been to require exhaustion of administrative remedies before seeking federal-court review (which is quite deferential to the agency on factual matters) of an agency's final decision. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938) ("[It is] the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."); *id.* at 51 n.9 (collecting cases). The exhaustion requirement has been justified "as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S.

749, 765 (1975). The requirement is pragmatic. A party that exhausts administrative remedies "may be successful in vindicating [its] rights in the administrative process," in which case a court "may never have to intervene." *McKart v. United States*, 395 U.S. 185, 195 (1969). And even if a party is disappointed by the outcome and seeks federal-court review, the administrative process "may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute on other grounds as recognized by Booth v. Churner*, 532 U.S. 731, 740 (2001).

For its part, deferential review of agency fact-finding has been justified by the special expertise developed by the agency—although "that expertise is not sufficient by itself. Findings supported by substantial evidence are required." *ICC v. J-T Transp. Co.*, 368 U.S. 81, 93 (1961) (emphasis omitted); *accord Dickinson v. Zurko*, 527 U.S. 150, 160–61 (1999) ("expertise" in addressing "technically complex subject matter" is one of the "reasons that courts and commentators have long invoked to justify deference to agency factfinding"); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68 (1962) ("Expert discretion is the lifeblood of the administrative process, but . . . [t]he agency must make findings that support its decision, and those findings must be supported by substantial evidence."). The substantial-evidence standard of review, which "requir[es] a court to ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion," *Dickinson*, 527 U.S. at 162 (internal quotation marks omitted), also predates the APA, *see* 2 Kristen E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise* § 10.2.1, at

1083–84 (6th ed. 2019) ("In [*ICC v. Louisville & Nashville Railroad Co.*, 227 U.S. 88, 94 (1913)], the Supreme Court borrowed the substantial evidence standard from its original context of review of jury findings and applied the test to review of agency findings. . . . The test has not changed over the course of the century in which it has been applied to findings by juries and by agencies. It has been among the most stable and satisfactory features of our system of administrative law."); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

But, as we were recently reminded by the Supreme Court, there are exceptions to the general paradigm of exhaustion and deference. *See Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 897–906 (2023) (respondents in enforcement actions by SEC and FTC who challenge the constitutionality of the proceedings against them may seek injunctions in federal district court against the administrative proceedings); *see also McCarthy*, 503 U.S. at 146–49 (recognizing several exceptions to common-law exhaustion requirements). The citizen-suit provisions set forth above create another exception. They allow challenges to agency action or inaction to be brought directly in federal district court without first pursuing relief through agency procedures. In enacting these provisions, however, Congress obviously took into consideration the virtues of the general paradigm for reviewing agency actions. It limited direct review by a district court to nondiscretionary decisions—decisions that require no special experience or expertise, but only the will to follow clear mandates. In that context the above-described advantages of requiring the complaining party to exhaust administrative processes are minimal.

Thus, as we explain below, the courts of appeals have uniformly interpreted the language *failure to perform any act or duty under this statute which is not discretionary* as not encompassing challenges to the substance of agency action, including arguments that the agency acted arbitrarily and capriciously. Instead, these citizen-suit provisions serve a more limited, mandamus-like role of ensuring that agencies perform required tasks. In other words, these provisions allow parties to challenge agency failures to take nondiscretionary actions, but *not* to challenge the agency's exercise of discretion. We now turn to a discussion of the relevant case law.

We first look to binding precedent. But there is not much from the Supreme Court or this court. The sole Supreme Court opinion on the subject does not analyze the meaning of *not discretionary*, although it provides suggestive examples. In *Bennett v. Spear*, 520 U.S. 154, 159 (1997), the plaintiffs challenged a Fish and Wildlife Service biological opinion concluding that the long-term operation of a federal irrigation project would likely imperil two endangered species of fish. According to the plaintiffs, the Secretary of the Interior had failed to "take into consideration the economic impact" and use "the best scientific data available" in determining whether the project would adversely affect a critical habitat of the two species of fish, thus violating two requirements imposed by 16 U.S.C. § 1533(b)(2) of the Endangered Species Act. *Id.* at 172 (brackets and internal quotation marks omitted).[8] The Supreme

[8] 16 U.S.C. § 1533(b)(2) (1994), as it existed at the time of *Bennett*, stated:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section *on the basis of the best scientific*

Court held that the plaintiffs could bring this suit under the Endangered Species Act's citizen-suit provision. *See id.* The Court acknowledged that an area could still be excluded from critical habitat if the Secretary decided that the benefits of exclusion exceeded the cost, and this ultimate decision would be reviewable only for abuse of discretion. *See id.* But, it said, "discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking. Since it is the omission of these required procedures that [the plaintiffs] complain of, their § 1533 claim is reviewable under" the citizen-suit provision. *Id.* (citation omitted). Or, to state the Court's conclusions in the reverse order, even though the agency was mandated to use the best available scientific data and to take economic impact into consideration (and failure to do so could be the subject of a citizen suit), the agency still had discretion to make the ultimate critical-habitat decision, which could not be reviewed under the citizen-suit provision.

As for this circuit, only once have we needed to grapple with the scope of a citizen-suit provision. *Hayes v. Whitman*, 264 F.3d 1017, 1021 (10th Cir. 2001), concerned a type of water-pollutant-discharge limit called the total maximum daily

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> *data available and after taking into consideration the economic impact*, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(emphasis added).

load (TMDL). Under the Clean Water Act each State must identify "impaired waterbodies" within its borders, *id*. at 1020, and then establish a TMDL for each impaired waterbody, *see id.* at 1021. "[F]rom time to time," "[e]ach State shall submit" proposed TMDLs to the Environmental Protection Agency (the EPA), which the EPA "shall either approve or disapprove . . . not later than thirty days after the date of submission." 33 U.S.C. § 1313(d)(2). If the EPA disapproves a proposed TMDL, it "shall not later than thirty days after the date of such disapproval" establish a TMDL for the State to follow. *Id.* In *Hayes* the plaintiffs "alleged that Oklahoma had identified over 500 impaired waterbodies, but that in the eighteen years between 1979 (when the first submission to the EPA was due) and 1997 (when the [lawsuit was] filed) the state had failed to develop TMDLs for the impaired waterbodies." 264 F.3d at 1021. They argued that Oklahoma's failure to submit any TMDLs during this 18-year time period was "so deficient as to constitute a constructive submittal of no TMDLs," *id.*, that "the EPA ha[d] a mandatory duty to approve or disapprove the constructive submission," *id.* at 1020, and that the resulting disapproval would "trigger[] the EPA's mandatory duty to develop the TMDLs itself," *id.* at 1021 (internal quotation marks omitted). We agreed in part. We said that once a State "act[s] in such a way that it conveys to the EPA the message that it has affirmatively determined not to submit TMDLs for its impaired waterbodies," the EPA would have a "nondiscretionary duty under § 1313(d)(2) to approve or disapprove the submission of 'no TMDLs' within thirty days. If the EPA fail[ed] to respond within this period, it [would be] subject to suit under the citizen-suit provision of the Clean Water Act to compel it to perform this

nondiscretionary duty." *Id.* at 1023.[9] On the other hand, the EPA's determination of the "adequacy of the state's TMDL submissions . . . involve[d] discretionary (rather than nondiscretionary) duties." *Id.* at 1024. We proceeded to hold that the EPA had not violated its nondiscretionary duty because "[t]he uncontradicted evidence [was] that Oklahoma ha[d] submitted a number of TMDLs and [was] making progress toward completing about 1500 TMDLs over a twelve-year period. In these circumstances, a constructive-submission claim [was] not viable," so the plaintiffs "could not proceed under the Clean Water Act's citizen-suit provision." *Id.*[10]

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[9] Our account of the constructive-submission doctrine in *Hayes* has been cited with approval by other circuits. *See Colum. Riverkeeper v. Wheeler*, 944 F.3d 1204, 1209–10 (9th Cir. 2019); *Ohio Valley Env't Coal., Inc v. Pruitt*, 893 F.3d 225, 230–31 (4th Cir. 2018). *Hayes* also is consistent with an earlier opinion by the Seventh Circuit, *Scott v. City of Hammond*, 741 F.2d 992, 996–98 (1984) (per curiam).

[10] In three other opinions we have described the scope of citizen-suit provisions in dictum during the course of reviewing a statutory scheme. *See Maier v. U.S. EPA*, 114 F.3d 1032, 1034, 1038–39 (10th Cir. 1997) (petitioners properly brought in court of appeals an arbitrary-and-capricious challenge to the EPA's refusal to consider revising a rule under the Clean Water Act, which was a decision within the EPA's discretion; "[t]his is not a case which could have been brought in district court as a citizen's suit," which "may lie only for failure to perform a nondiscretionary duty"; distinguishing cases which involved "the EPA's refusal to promulgate regulations at all, or its failure to do so by a date certain set by law," which were properly challenged via citizen suits); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980) (in course of holding that petitioner lacked standing, observing that "Congress thus restricted citizens' suits to actions seeking to enforce specific non-discretionary clear-cut requirements of the Clean Air Act"); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1302–04 (10th Cir. 1973) (plaintiff filed suit in district court seeking injunctive relief against the EPA's "promulgation of a proposed rule controlling emissions of sulfur oxide" at the company's smelter; action could not be brought under the Clean Air Act's citizen-suit provision, "which authorizes a citizen to commence a civil action against the administrator for failure to perform a non-discretionary duty," because Congress's inclusion of the petition-for-review provision "made clear . . . that the courts of appeals are to review the promulgation or implementation of a clean air plan").

What the above opinions say is fully consistent with the view adopted in this opinion. But the database of binding precedent is sufficiently thin that we look to decisions by other circuits to confirm that our view can withstand repeated scrutiny. We therefore now turn to our survey of decisions by the other circuits. The survey is not exhaustive, but we think it is comprehensive. We are not aware of any circuit that departs from the approach of these cases; certainly, we have not encountered any opinion that supports the contentions by Plaintiffs that we here reject.

Perhaps the most thorough opinion on the subject is the Fourth Circuit opinion in *Sanitary Board of City of Charleston v. Wheeler*, 918 F.3d 324 (2019). The plaintiff challenged the EPA's decision to disapprove "a revised [water-quality] standard for the receiving waters of the [plaintiff's] wastewater treatment facility." *Id.* at 327. The circuit court rejected the plaintiff's attempt to sue under the Clean Water Act's citizen-suit provision. It explained that "[l]ike other provisions of federal law that authorize courts to compel agency action," such as 5 U.S.C. § 706(1) of the APA,[11] "the citizen suit provision here reaches only non-discretionary acts; in other words, acts that the agency 'is required to take.'" *Id.* at 331 (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)); *see also Norton*, 542 U.S. at 64 ("§ 706(1) empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act." (internal quotation marks

[11] Section 706(1) states: "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."

omitted)).[12] In *Sanitary Board*, "[t]he EPA had discretion to reach its own conclusion" on whether it should approve the proposed standard. 918 F.3d at 331. "As part of its review, the EPA engage[d] in its own calculations and br[ought] its own understanding of the most recent science to bear. This sort of inquiry is a paradigmatic example of agency discretion." *Id.* at 332. The court contrasted the EPA's duty to decide whether to approve the proposed water-quality standard with its duty to make a decision (one way or the other) within the statutory deadline (the plaintiff's original claim in its citizen suit had been that the EPA had not rendered a decision within the time limit, but that claim was mooted when the EPA made a belated decision):

> The procedure for EPA review of state standards contemplated by the [Clean Water Act] . . . uses a familiar and entirely sensible structure, whereby the agency has latitude to exercise its judgment, but must do so within a fixed time period. The judgment is discretionary; the timing is not. When combined with the citizen suit provision, the result is that a citizen can prod the agency to take some action once it has missed a deadline. . . . At the same time, the substance of the decision is left to the expertise of the agency and it can exercise its judgment as it sees fit, so long as it does not refuse to exercise it altogether.

Id.

Thus, the plaintiff's original claim in district court—seeking to compel the EPA to act on the revised-standard application when it had failed to act before the statutory deadline expired—had been properly brought under the Clean Water Act's citizen-suit

[12] *Accord Murray Energy Corp. v. Adm'r of EPA*, 861 F.3d 529, 535 (4th Cir. 2017) (also recognizing correspondence of mandamus with § 706(1) and the Clean Air Act's citizen-suit provision); *Coos Cnty. Bd. of Cnty. Comm'rs v. Kempthorne*, 531 F.3d 792, 802 (9th Cir. 2008) (comparing § 706(1) to the citizen-suit provision of the Endangered Species Act).

provision. *See id.* But the decision about *whether* to approve the plaintiff's application "inevitably require[d] the exercise of independent judgment and discretion"—and thus did not implicate the sort of clearcut duty amenable to a challenge under the Clean Water Act's citizen-suit provision. *Id.* at 332–33.[13]

Like the decisions by the Supreme Court in *Bennett* and the Fourth Circuit in *Sanitary Board*, several circuit opinions have similarly held that the ultimate decision by the agency was a matter of discretion even though some steps along the way were mandated. That is, once the agency performed the required act, the agency enjoyed discretion about *what* to do, and the citizen-suit provision no longer had a role to play. This is most clear when the mandate is simply to make a decision by a deadline. *See*, *e.g.*, *Env't Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 804, 813 (D.C. Cir. 1983)

[13] Consistent with *Sanitary Board*, the earlier Fourth Circuit opinion in *Murray Energy* interpreted the nondiscretionary-duty citizen-suit provision as "confin[ed] . . . to the enforcement of legally required acts or duties of a specific and discrete nature that precludes broad agency discretion." 861 F.3d at 535. We note, however, that this interpretation appears to be contrary to the attorney-fee opinion in *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315–16 (4th Cir. 1988) (stating that Army Corps of Engineers "has a mandatory duty to ascertain the relevant facts, correctly construe the applicable statutes and regulations, and properly apply the law to the facts" when deciding whether a permit should be issued for dredged or fill material in wetlands). But *Hanson* has never been cited by the Fourth Circuit on the nondiscretionary-duty issue, and the only opinions by any circuits to examine its nondiscretionary-duty holding have been the Eleventh Circuit opinion in *Preserved Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1249 n.5 (1996) (*PEACH*), which explicitly rejected *Hanson* on this issue, and the Seventh Circuit opinion in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 101 F.3d 503, 506 (1996), which opined that "[t]he grant of [the type of permit at issue in *Hanson* and *PEACH*] would almost certainly be considered a discretionary act." To complete the circle, the *PEACH* opinion by the Eleventh Circuit was cited with approval on this issue by *Sanitary Board*, 918 F.3d at 332.

(plaintiff "challenge[d] the EPA Administrator's decision to defer processing operating permits for existing hazardous waste incinerators and storage impoundments under performance standards called for by [RCRA]"; RCRA created a nondiscretionary duty to promulgate the regulations governing issuance of the permits within a limited period of time, but the EPA did not have "a non-discretionary duty . . . to perform some additional act to put the regulations into effect").[14]

But other mandatory requirements may also be in play. In *Frey v. EPA*, 751 F.3d 461, 463 (7th Cir. 2014), the plaintiffs (proceeding under CERCLA's citizen-suit provision) challenged aspects of the EPA's efforts to decontaminate several Superfund

[14] Duties of timeliness are generally treated as nondiscretionary for purposes of citizen-suit provisions when a statute or regulation sets a date certain by which the agency must act. *See, e.g.*, *Friends of Animals v. Ashe*, 808 F.3d 900, 903–05 (D.C. Cir. 2015) (Kavanaugh, J.) ("The [Fish and Wildlife] Service's duties to make initial and final determinations [on petitions for endangered-species status within a certain timeframe]—once triggered—are nondiscretionary and are therefore enforceable under the [Endangered Species Act's] citizen-suit provision"; but dismissing the suit because of plaintiff's failure to comply with pre-suit notice requirements); *Sierra Club v. U.S. EPA*, 992 F.2d 337, 345, 347 (D.C. Cir. 1993) (per curiam) ("Section 4010(c) of RCRA require[d] the [EPA], by March 31, 1988, to promulgate revisions to the criteria established for" various types of hazardous-waste facilities, "includ[ing] not only municipal solid waste landfills ('MSWLFs'), but also industrial landfills, surface impoundments, land application units, waste piles, and construction/demolition waste landfills. Nonetheless, the final rule under review revised the criteria only for MSWLFs. . . . [T]he Sierra Club's attack on the [EPA's] failure to promulgate revised criteria for these facilities by the deadline is most naturally seen, not as a challenge to a final rule, but rather as a claim that the [EPA] has failed to perform a nondiscretionary act." (citation omitted)); *Armco, Inc. v. U.S. EPA*, 869 F.2d 975, 977, 981 (6th Cir. 1989) (court of appeals lacked jurisdiction over claims brought in petition for review to require EPA to issue sludge-removal regulations after expiration of deadlines created by 1987 amendments to Clean Water Act because such issuance was a nondiscretionary function of the EPA; the case should have been brought as a citizen suit in district court).

sites. The Seventh Circuit read the "citizen suit provision to allow review of claims regarding whether the EPA complied with required procedures under CERCLA, but not claims regarding the substance of the EPA's decisions, which is a matter of discretion for the agency." *Id.* at 470. First, the court "agree[d] with plaintiffs that the EPA had a non-discretionary duty to prepare the functional equivalent of [a remedial investigation and feasibility study (RI/FS)] for Stage 1" of the decontamination, and therefore the court could "review whether the EPA completed the necessary components of an RI/FS." *Id.* But "the undisputed facts show[ed] that the EPA completed the functional equivalent of an RI/FS prior to selecting Stage 1 [decontamination remedies]," and the applicable regulations "did not require more" at that stage. *Id.* Second, the court "agree[d] with plaintiffs that the EPA had a non-discretionary duty to select remedial actions that are protective of human health and the environment." *Id.* But the court could "review only whether the EPA determined that, *in its estimation*, Stage 1 was protective of human health and the environment," and it was "clear that the EPA made the required determination" here because the EPA had "concluded that Stage 1 was protective of human health and the environment." *Id.* at 470–71 (emphasis added).[15] Thus, the plaintiffs had no claim under the statute's citizen-suit provision.

[15] The court also recognized that "the EPA ha[d] a non-discretionary duty to enter party agreements as consent decrees in the district court." *Frey*, 751 F.3d at 470. But the EPA "ha[d] now filed and the district court ha[d] approved an amendment to the consent decree that incorporate[d] all of the Records of Decision" related to the clean-up for each Superfund site, so this claim by the plaintiffs was moot. *Id.* at 471.

And in *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1351–52 (9th Cir. 1978), a copper-smelting company petitioned Nevada to revise its Clean Air Act state implementation plan (SIP) and grant a one-year variance for the company's smelter,[16] arguing that the reductions in sulfur-dioxide emissions required by Nevada's SIP would be economically infeasible. After Nevada assented, the company's requests were submitted to the EPA for approval. *See id.* at 1352. "Before the EPA had a chance to act on these submissions, however, [the company] filed suit [in district court] against the Administrator of the EPA," seeking "a declaratory judgment that the revision complied with the requirements of the Clean Air Amendments, a mandatory injunction or mandamus requiring the Administrator to approve the variance and the revision, and an injunction prohibiting the Administrator from enforcing the originally approved SIP or taking any other action to impede the operation of the [company's] smelter." *Id.* The Ninth Circuit held that the company could not proceed under the Clean Air Act's citizen-suit provision because the EPA Administrator did "not have a *mandatory* duty to approve either the revision or the variance." *Id.* at 1354. The court explained:

> It is clear that the Administrator has a non-discretionary duty to make a decision regarding the state revision. The Administrator, however, retains

[16] Under the Clean Air Act, "[t]he EPA promulgates National Ambient Air Quality Standards (NAAQS), which set limits on maximum concentrations of various pollutants," but "[t]he States have the primary responsibility to ensure that those limits are satisfied." *Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1235 (10th Cir. 2021). "Each State must submit to the EPA a state implementation plan (SIP) that provides for implementation, maintenance, and enforcement of NAAQS. The SIP is subject to approval by the EPA Administrator." *Id.* (brackets, citation, and internal quotation marks omitted). The EPA must also approve any proposed revision to the SIP. *See Sierra Club v. EPA*, 47 F.4th 738, 740 (D.C. Cir. 2022).

> a good deal of discretion as to the content of that decision. . . . [T]he Administrator's duty to approve a revision depends, not only on whether there will be a timely attainment and maintenance of ambient air standards, but also on whether [the revision] satisfies the other general requirements of [42 U.S.C. § 7410(a)(2)]. Among those other general requirements is that which makes mandatory the inclusion of emission limitations, which . . . requir[es] that the air quality standards be met to the extent feasible by constant emission controls. The determination whether a particular form of emission control is feasible is obviously a matter requiring an exercise of the Administrator's discretion. . . . [T]he Administrator must approve a revision only when the SIP, as revised, meets *all* the requirements of [§ 7410(a)(2)]. Determining whether such is the case requires the fusion of technical knowledge and skills with judgment which is the hallmark of duties which are discretionary.

Id. (citations, footnote, and internal quotation marks omitted); *see also Env't Def. Fund v. Thomas*, 870 F.2d 892, 894, 896 (2d Cir. 1989) (plaintiffs brought a Clean Air Act citizen suit "challeng[ing] the [EPA] Administrator's failure to revise the 'National Ambient Air Quality Standards' ('NAAQS') for sulphur oxides"; although "the Administrator ha[d] discretion to decide on the precise form and substance of the NAAQS at issue," "the Administrator ha[d] a non-discretionary duty to make *some* formal decision whether to revise those NAAQS"; "[b]ecause the duty to make *some* decision [was] non-discretionary, it [was] enforceable under [the Clean Air Act's citizen-suit provision] in the district courts," but "[t]he substance of the Administrator's decision [was] beyond the power of the district court").

In other cases the sequence of the nondiscretionary duty and the discretionary duty is the reverse of what it was in the cases just discussed—that is, the nondiscretionary duty is triggered only if the discretionary duty is exercised in a particular way. For instance, in *City of Seabrook v. Costle*, 659 F.2d 1371, 1372–73

(5th Cir. Unit A 1981), the plaintiffs argued that the EPA Administrator had "fail[ed] to notify certain persons that they ha[d] been violating the Texas SIP," contrary to the requirements of 42 U.S.C. § 7413. Section 7413 imposes a mandatory duty on the Administrator to provide such notification, but only after determining that there has been a violation. The plaintiffs did not allege that the Administrator had made violation findings but argued that "the Administrator had a nondiscretionary duty to make such findings on the basis of information available to him." *Id.* That argument did not fly with the court. The Fifth Circuit held that the "plaintiffs did not allege a failure to perform a nondiscretionary duty entitling them to bring a citizens' suit under" the Clean Air Act. *Id.* at 1374 (internal quotation marks omitted). It explained that § 7413 did not "impose[] a mandatory duty on the Administrator to make a finding every time some information concerning a possible violation of a SIP is brought to his attention. In the absence of a clear statutory mandate, [the court] decline[d] to impose such a duty on the Administrator," so the plaintiffs could not proceed with their citizen suit. *Id.*;[17] *see also, e.g.*, *Askins v. Ohio Dep't of Agric.*, 809 F.3d 868, 877 (6th Cir. 2016)

[17] This holding was reinforced by the "tradition of broad prosecutorial discretion." *City of Seabrook*, 659 F.2d at 1374. The court said that the "principle of almost absolute discretion in initiating enforcement action should apply with equal force to the decision to take the preliminary investigatory steps that would provide the basis for enforcement action." *Id.*; *see Sierra Club v. Whitman*, 268 F.3d 898, 902–05 (9th Cir. 2001) (reaching similar conclusion in interpreting similar provision of the Clean Water Act); *see also New Eng. Legal Found. v. Costle*, 475 F. Supp. 425, 433–34 (D. Conn. 1979) ("[O]nce a Notice of Violation [of SIP requirements] has been issued, the decision to proceed further [with enforcement measures] is discretionary with EPA, and is not subject to review. Accordingly, the plaintiffs cannot state a cognizable claim [under the citizen-suit provision] to compel EPA enforcement." (citation omitted)), *aff'd*, 632 F.2d 936, 937 (2d Cir. 1980) (per curiam) ("We affirm

("[T]he [plaintiffs] allege[d] [that] the U.S. EPA was required to conduct a hearing whenever a State is not administering a program in accordance with [National Pollutant Discharge Elimination System (NPDES)] program rules . . . . While the Clean Water Act *does* require the U.S. EPA to withdraw approval of a state-NPDES program after a hearing, notice, and time to cure, it does *not* require the U.S. EPA to hold a hearing in the first place. Accordingly, the non-discretionary action does not kick in until *after* the hearing, but the hearing itself is discretionary. Here, the U.S. EPA did not hold a hearing regarding whether Ohio [was] meeting the requirements of the state-NPDES program, nor was [the EPA] required to [do so]"; thus, plaintiffs could not proceed under the citizen-suit cause of action (internal quotation marks omitted)); *Coos Cnty. Bd. of Cnty. Comm'rs v. Kempthorne*, 531 F.3d 792, 794, 810–11 (9th Cir. 2008) (the Fish and Wildlife Service (the FWS) determined, in its statutorily required five-year review of the threatened-species list, that a species of seabird no longer "me[t] the definition of a 'distinct population segment,' one of the population categories which may be protected under the [Endangered Species Act], but determined that they nonetheless remain threatened"; plaintiff filed a citizen suit claiming that the "FWS had a mandatory duty" to delist the bird; but the FWS had given "reasons for continuing the listing, entirely independent of its distinct population segment determination," so "[n]o duty to delist" had "arise[n]"; citizen-suit provision "allow[ed] challenges to

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that portion of the judgment of the district court which dismissed the complaint as against the [EPA], substantially for the reasons set forth in [the district court's] opinion.").

[the] FWS's alleged failure to act, not to the substantive content of its actions" (citation omitted)); *Nat. Res. Def. Council, Inc. v. Thomas*, 885 F.2d 1067, 1069, 1073–74 (2d Cir. 1989) (plaintiffs could not use Clean Air Act's citizen-suit provision "to compel the [EPA] to add two metals . . . and six organic chemicals . . . to a list of hazardous air pollutants" subject to regulation under 42 U.S.C. § 7412; duty to add pollutants to list arose once the EPA had made the requisite factual findings, but the EPA "resolutely maintain[ed] that it ha[d] made no final determination as to the degree of risk posed by each of the pollutants and specifically denie[d] that it ha[d] found any of the pollutants to be hazardous air pollutants under the terms of the statute," so no nondiscretionary duty had arisen (internal quotation marks omitted));[18] *Council of Commuter Orgs. v.*

[18] The *Thomas* court distinguished an earlier Second Circuit case where the plaintiffs successfully brought a citizen suit forcing the EPA Administrator to add lead to a "list of pollutants adverse to public health or welfare." *Nat. Res. Def. Council, Inc. v. Train*, 545 F.2d 320, 322 (2d Cir. 1976). The difference in outcome was because the Administrator in *Train* had *already* made the requisite findings, and thus the plaintiff could bring a citizen suit to compel the Administrator to add lead to the list. *See id.* at 324–25 ("the Administrator *must* list those pollutants which he has determined meet the two requisites set forth" in the statute, i.e., that the pollutant "has an adverse effect on public health and welfare, and that the presence of [the pollutant] in the ambient air results from numerous or diverse mobile or stationary sources"). As the court stated in *Train*, "The discretion given to the Administrator under the Act . . . does not extend to the issuance of air quality standards for substances derived from specified sources which the Administrator *had already adjudged injurious to health*." *Id.* at 327 (emphasis added). No such findings, however, had been made in *Thomas*. *See* 885 F.2d at 1074–75; *accord Zook v. EPA*, 611 F. App'x 725, 726 (D.C. Cir. 2015) ("[T]he [EPA] Administrator's duty to regulate [air pollutants under the Clean Air Act] is triggered by an endangerment finding that the Act entrusts to the Administrator's sole judgment. The plaintiffs do not allege that the Administrator has made the requisite endangerment findings," and "scientific evidence alone—even if EPA is aware of that evidence—cannot give rise to a mandatory duty to regulate. . . . Because the plaintiffs are wrong in asserting that the Administrator has a nondiscretionary duty to list these

Metro. Transp. Auth., 683 F.2d 663, 665–67, 671–72 (2d Cir. 1982) (plaintiffs sued federal and state agencies and officials to enforce various provisions of the Clean Air Act "in connection with efforts to reduce air pollution in the New York City metropolitan area"; "the District Court has jurisdiction [under the citizen-suit provision] to compel EPA to carry out only non-discretionary duties. Under [42 U.S.C.] § 7413(a), EPA has a non-discretionary duty to issue a notice of violation whenever it determines that a violation has occurred. But here EPA has expressly stated . . . that it was not aware of any violation of the 1973 and 1980 plans. Therefore, EPA ha[s] fulfilled any non-discretionary duties with regard to alleged violations." (citations and footnote omitted)).

The above decisions illustrate the distinction the courts of appeals have made between discretionary and nondiscretionary duties. If the agency has a choice, it has discretion. Duties are nondiscretionary only if there is no room for choice by the agency, as when it must make a decision by a certain date or issue a notification once it makes the requisite findings.

We complete our survey by discussing only two more opinions, one where the agency action was discretionary and one where it was not. The first was one of the early, and influential, opinions on the meaning of *not discretionary*. In *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 655–56 (D.C. Cir. 1975), the petitioners challenged the EPA Administrator's "refusal . . . to revise his previously promulgated

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pollutants and sources without the agency having made the prerequisite determinations, they do not state a claim for relief under the citizen-suit provision." (citation omitted)).

standards of performance for new coal-fired power plants." The D.C. Circuit held that "any litigation seeking revision of a national standard of performance must be brought as a direct appeal to this court," rather than in district court under the Clean Air Act's citizen-suit provision, *id.* at 661, because "[t]he decision to revise a standard of performance is in fact discretionary with the Administrator," *id.* at 662.[19] The court rejected the petitioners' argument "that even if the decision is within the Administrator's discretion[,] an abuse of that discretion—here the allegedly improper refusal to revise a standard of performance—constitutes a failure to perform a nondiscretionary act, thereby creating jurisdiction under [the citizen-suit provision]." *Id.* It said, "While the distinction between an abuse of discretion and a failure to perform a nondiscretionary act tends to be abstract and conceptual, there is undoubtedly a distinction, and it is on that distinction that Congress intended to base

[19] Other matters that courts have characterized as discretionary for purposes of environmental citizen-suit provisions include the EPA Administrator's authority to overrule a decision by the U.S. Army Corps of Engineers to issue a wetlands permit for a highway-construction project, *see PEACH*, 87 F.3d at 1245, 1249; the EPA's decision to issue or deny an NPDES permit for a sewage-treatment plant, *see Sun Enters., Ltd. v. Train*, 532 F.2d 280, 284, 288 (2d Cir. 1976) ("It is not the failure of the Administrator to perform a non-discretionary duty which is at issue; rather it is the manner in which those duties were performed which appellants are challenging."); and the EPA's choice between two possible courses of action upon discovering an unconfirmed purchase of lead-usage rights (namely, demand a report from the seller or refuse to accept plaintiff's report), *see Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 758–61 (9th Cir. 1989) ("Absent some provision requiring EPA to adopt one course of action over the other," the court could "only conclude that EPA's choice represented an exercise of discretion."); *cf. SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

[citizen-suit] jurisdiction." *Id.* at 662–63 (citation, footnote, and internal quotation marks omitted). "If an abuse of discretion were held to be a failure to perform a nondiscretionary act, failure to perform *any* duty, discretionary or nondiscretionary, under the [Clean Air] Act would be drawn within the scope of [the citizen-suit provision]. Since this is exactly the result Congress intentionally deleted from the [Clean Air] Act, petitioners' interpretation is contrary to the clearly expressed intent of Congress and must be rejected." *Id.* at 663 (footnote omitted).[20]

The second case is *Natural Resources Defense Council, Inc. v. Perry*, 940 F.3d 1072, 1074 (9th Cir. 2019), which arose when four energy-conservation standards received final approval by the Department of Energy at the end of the Obama administration, but the Department of Energy declined to promulgate them under the Trump administration. The plaintiffs brought suit under EPCA's citizen-suit provision,

[20] The D.C. Circuit relied in part on legislative history, which was de rigueur at the time. *See Oljato Chapter*, 515 F.2d at 663. The court noted that the Senate's proposed language permitting suits for failure to perform "any duty" was changed in conference committee to "any act or duty . . . which is not discretionary" and inferred that "the change was meant to have significance: to limit suits against the Administrator to a chosen few." *Id.* (internal quotation marks omitted). We note, however, that the court could easily have reached the same conclusion by applying the interpretive canon that ordinarily no word in a statute should be treated as superfluous. *See Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (noting the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute" (internal quotation marks omitted)); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 105 (2010) ("[C]ourts are obliged to give effect, if possible, to every word Congress used." (internal quotation marks omitted)); *Carlile v. Reliance Standard Life Ins. Co.*, 988 F.3d 1217, 1224 (10th Cir. 2021) ("We avoid interpreting statutes in a manner that makes any part superfluous." (internal quotation marks omitted)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) ("If possible, every word and every provision is to be given effect.").

arguing that a "regulation known as the 'error-correction rule,' 10 C.F.R. § 430.5, impose[d] upon [the Department] a non-discretionary duty to publish the standards in the Federal Register, and that its refusal to do so violate[d] the rule." *Id.* at 1075. The essence of the error-correction rule was simple: It stated that the Department "will" publish a final rule in the Federal Register after the conclusion of the 45-day period during which people could submit corrections of inadvertent errors. *See id.* at 1075–76. The Ninth Circuit said that "ordinarily, agencies are free to withdraw a proposed rule before it has been published in the Federal Register, even if the rule has received final agency approval." *Id.* at 1077. But the Department of Energy "relinquished whatever discretion it might have had to withhold publication of the rules at issue here when it adopted the error-correction rule." *Id.*[21] And there was "nothing in the rule's text or regulatory history to suggest that the word 'will' was meant to carry anything other than its ordinary, mandatory connotation." *Id.* at 1078. Thus, the Department "had a non-discretionary duty to submit all four rules for publication in the Federal Register within 30 days after the [45-day] error-correction process ended. . . . By delaying publication of the four rules beyond the period permitted under the error-correction rule," the Department "violated the non-discretionary duty imposed by its own regulation." *Id.* at 1079–80.

[21] Although nondiscretionary duties typically arise from a statute, it is well established "that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 U.S. 363, 372 (1957); *accord* 1 Hickman & Pierce, *supra* § 4.3.2, at 433.

To sum up, in applying citizen-suit statutes that authorize suit only when the challenge is to nondiscretionary agency action, courts have been willing to grant relief only if the agency has wholly abdicated a clear-cut duty to perform a specific task. In such cases, either the agency has performed the mandated act, or it has not; this determination is not something requiring deference to special expertise.

Turning now to the SMCRA, where there have been few, and limited, interpretations of the citizen-suit provision invoked by Plaintiffs,[22] we follow the

[22] The appellate-court decisions discussing 30 U.S.C. § 1270(a)(2) have done so only fleetingly (and often in dicta). *See, e.g.*, *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 324 n.13 (3d Cir. 2002); *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 298–99 (4th Cir. 2001); *W. Va. Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 800 (4th Cir. 1998). While a member of the D.C. Circuit, then-Judge Ginsburg authored an opinion involving § 1270(a)(2), but the court's concern was the proper district court for bringing citizen suits (rather than the scope of such suits). *See Save Our Cumberland Mountains*, 963 F.2d at 1542–44, 1546–52. We have found several district-court decisions construing § 1270(a)(2), however, and all have interpreted it consistently with the way we do here. *See, e.g.*, *Sierra Club v. Kempthorne*, 589 F. Supp. 2d 720, 732 (W.D. Va. 2008) ("The plaintiffs further concede that, under 30 U.S.C. § 1270(a)(2), the court may compel the Secretary to act only in the most clear-cut, non-discretionary obligations," and the Office "had discretion to determine whether these logging activities [were] coal surface mining operations." (internal quotation marks omitted)); *W. Va. Highlands Conservancy v. Norton*, 190 F. Supp. 2d 859, 866 & n.6 (S.D. W. Va. 2002) ("Under [30 C.F.R. §] 732.17(f), once the predicate conditions occur, as they did more than a decade ago in the case of the [state alternative-bonding system], the Director [of the Office] has a mandatory duty to begin Part 733 proceedings [ultimately either to enforce West Virginia's surface-coal-mining program or to withdraw federal approval of the program and implement a federal program]. Because that duty [to commence the proceeding] is mandatory, it is enforceable under the SMCRA citizen suit provision [although the Office has discretion about which course of action to take]." (footnote omitted)); *Okla. Wildlife Fed'n v. Hodel*, 642 F. Supp. 569, 570 (N.D. Okla. 1986) ("The Court's jurisdiction under § 1270(a)(2) is limited to compelling the Secretary to take some action. Once the administrative agency has taken action, SMCRA provides for a comprehensive system of administrative and judicial review of the enforcement taken. Section 1276(a)(2) and (b) provides the Court with jurisdiction to review final actions upon

uniform interpretation by the courts of appeals of the identical language in other citizen-suit statutes. Our approach follows from the "elementary principle of statutory construction that similar language in similar statutes should be interpreted similarly." *Tulelake Irrigation Dist. v. U.S. Fish & Wildlife Serv.*, 40 F.4th 930, 937 (9th Cir. 2022) (internal quotation marks omitted); *see Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 126 (2016) ("Similarity of language is a strong indication that the two statutes should be interpreted *pari passu*." (brackets, ellipses, and internal quotation marks omitted)). We must be careful not to overlook context that may suggest otherwise, but "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion); *see also Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is

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completion of the administrative process."); *Nat'l Wildlife Fed'n v. Burford*, 677 F. Supp. 1445, 1469 (D. Mont. 1985) ("The predominant purpose of the [SMCRA's] citizen suit provision is to allow citizens a forum to seek enforcement of nondiscretionary duties owed under established regulatory standards rather than to provide a means to challenge the standards themselves"; in this case the duty allegedly violated was discretionary since the duty was to integrate unsuitability-for-mining criteria "as closely as possible" with agency's land-use planning); *Castle Mountain Coal. v. Off. of Surface Mining Reclamation & Enf't*, No. 3:15-cv-00043-SLG, 2016 WL 3688424, at *6 (D. Alaska July 7, 2016) ("Castle Mountain's First Amended Complaint [which challenged the Office's finding that it did not have reason to believe that a violation had occurred] does not directly concern the [Office's] non-discretionary actions or duties, and does not seek to compel the [Office] to take some action. Accordingly, the citizen suit provision in § 1270(a)(2) does not provide a jurisdictional basis for the Complaint." (footnote omitted)).

obviously transplanted from another legal source, it brings the old soil with it." (internal quotation marks omitted)).

Because we are persuaded by the reasoning of the decisions interpreting materially identical language in other environmental statutes, we hold that 30 U.S.C. § 1270(a)(2)'s scope is limited to ensuring that the Office performs precisely defined acts or duties that are required by the Act or an implementing regulation. This "narrow construction," which "confin[es] [the citizen-suit provision's] scope to the enforcement of legally required acts or duties of a specific and discrete nature that precludes broad agency discretion," "reduces the risk of judicial disruption of complex agency processes—a vice that Congress appeared intent on avoiding by writing a non-discretionary requirement into the statute." *Murray Energy Corp. v. Adm'r of EPA*, 861 F.3d 529, 535 (4th Cir. 2017) (interpreting the Clean Air Act). Still, § 1270(a)(2) plays an important role: It gives interested parties a means of ensuring that when Congress tells the Office that it must do something (or when the Office similarly binds itself through regulation), the Office does not sit on its hands and refuse to perform its nondiscretionary duty. Notably, this understanding of § 1270(a)(2) gives it a similar scope to 5 U.S.C. § 706(1), which allows a court to "compel agency action unlawfully withheld or unreasonably delayed."[23] This interpretation also ensures that § 1270(a)(2) does not deprive the Office of the "opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a

[23] *See Audubon of Kan., Inc. v. U.S. Dep't of Interior*, 67 F.4th 1093, 1108–11 (10th Cir. 2023).

record which is adequate for judicial review." *Weinberger*, 422 U.S. at 765 (setting forth the benefits of requiring exhaustion). In sum, a citizen-suit provision operates only where the agency has essentially no choice; where the agency has at least some modicum of discretion under the law, the citizen suit has no role to play.

b. Applying § 1270(a)(2)

Plaintiffs focus on four provisions of the SMCRA which the Office allegedly violated in approving the expanded permit for the Mine: (1) 30 U.S.C. § 1257(b)(11); (2) 30 U.S.C. § 1260(b)(1); (3) 30 U.S.C. § 1260(b)(3); and (4) 30 U.S.C. § 1265(b)(10). Examining each in turn, we conclude that the Office has performed every nondiscretionary act or duty imposed by these provisions.

First, Plaintiffs complain that the Office did not collect the "sufficient data" required by 30 U.S.C. § 1257(b)(11). Aplts. Br. at 18 (internal quotation marks omitted). That provision states that *permit applications* "shall contain":

> a determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and *the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impacts of all anticipated mining in the area upon the hydrology of the area and particularly upon water availability*: Provided, however, That this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate Federal or State agency: Provided further, That the permit shall not be approved until such information is available and is incorporated into the application.

(original emphasis omitted; emphasis added). The statute's use of the word *shall* in this context is strong evidence that the corresponding duties are nondiscretionary—

i.e., one is not free to choose whether to perform them. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive." (further internal quotation marks omitted)); *Bennett*, 520 U.S. at 175 ("[A]ny contention that the relevant provision of 16 U.S.C. § 1536(a)(2) is discretionary would fly in the face of its text, which uses the imperative 'shall.'"). But this "collection of sufficient data" requirement applies to permit *applications* submitted by potential operators, not to permit *decisions* by the Office. This is in contrast to the "best scientific data" requirement of the Endangered Species Act at issue in *Bennett*, which applied directly to the agency's decisionmaking process. *Compare* 30 U.S.C. § 1257(b)(11) ("The permit application . . . shall contain . . . sufficient data."), *with* 16 U.S.C. § 1533(b)(2) (1994) ("The Secretary shall designate critical habitat, and make revisions thereto, . . . on the basis of the best scientific data available."). Because this provision specifies the requirements for a permit application, it does not impose any applicable nondiscretionary duties on the Office and cannot be the basis for a citizen suit. Moreover, GCC Energy's permit application does not appear in Plaintiffs' appendix, so we could not review any challenge to its sufficiency anyway. *See Travelers Indem. Co. v. Accurate Autobody, Inc.*, 340 F.3d 1118, 1121 (10th Cir. 2003) ("An appellant who provides an inadequate record does so at [its] peril." (emphasis and internal quotation marks omitted)). We therefore must reject Plaintiffs' contention that the Office failed to discharge its nondiscretionary duties under § 1257(b)(11).

Second, 30 U.S.C. § 1260(b)(1) states that "[n]o permit or revision application shall be approved unless . . . [the Office] 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 . . . [that] the permit application is accurate and complete and that all the requirements of [the SMCRA] and the State or Federal program have been complied with." Again, we agree that this provision imposes a nondiscretionary duty on the Office. But "we can review only *whether*" the Office "made the required determination[s]." *Frey*, 751 F.3d at 470–71 (emphasis added). "The substance of [those determinations], on the other hand, is at least partly discretionary, and therefore beyond the scope" of the SMCRA's citizen-suit provision. *Id.* at 469. And the Office *did* comply with the nondiscretionary duty imposed by § 1260(b)(1); in its approval document for the Dunn Ranch Area, it certified: "The revision application is accurate and complete, and the applicant has complied with all requirements of SMCRA and the Indian Lands Program for the permit revision." Aplees. App. at 78. As explained in the prior section of this opinion, any further duty imposed on the Office to be sure that its certification was correct as a substantive matter "requires the fusion of technical knowledge and skills with judgment which is the hallmark of duties which are discretionary," and thus falls outside the scope of the citizen-suit provision. *Kennecott*, 572 F.2d at 1354.

Third, 30 U.S.C. § 1260(b)(3) mandates that "[n]o permit or revision application shall be approved unless" the Office "finds in writing" that "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 [Office] and the proposed operation thereof has been designed to prevent material damage to hydrologic balance outside [the] permit area." Once again, we think that this provision establishes a nondiscretionary duty, and again we conclude that the Office performed it. The Office stated in the permit-approval document that the previous hydrologic-impact assessment for the Mine did "not need to be updated" to reflect the Dunn Ranch Area expansion. Aplees. App. at 78. And that prior assessment determined that the Mine's "mining operation [was] designed to prevent material damage to the hydrologic balance outside the permit area." *Id.* at 14. We need not and do not evaluate whether this decision was flawed; we hold only that the Office fulfilled the nondiscretionary duty imposed by § 1260(b)(3). "While [Plaintiffs] may disagree with the [Office's] decision, that disagreement alone does not convert the matter into a non-discretionary act." *Sanitary Bd.*, 918 F.3d at 331.

Fourth and finally, 30 U.S.C. § 1265(b)(10) states that "[g]eneral performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation . . . [to] minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems" in various ways. Plaintiffs, however, make no argument that the Office has failed to devise such standards, nor could they. *See* 30 C.F.R. § 715.17 (the Office's hydrologic-system-protection regulation). Further, the mining-plan-approval document for the Dunn Ranch Area expansion states explicitly that the approval "is subject to all applicable laws and

regulations of the Secretary of the Interior which are now or hereafter in force; and all such laws and regulations are made a part hereof." Aplts. App., Vol. I at 14. Plaintiffs have once more failed to point to any nondiscretionary duty under this section that was not performed by the Office.

Plaintiffs may think that the Office conducted substandard analysis and reached the wrong conclusions on matters addressed by these four statutory provisions. But any errors by the Office were in the exercise of its discretionary functions. Such errors may be challenged under some other statutory provision, but not § 1270(a)(2).

To be sure, Plaintiffs state the statutory duty imposed on the Office as the "duty to ensure permits comply with SMCRA," Aplts. Reply Br. at 4, and contend that its approval of the permit was arbitrary and capricious, in violation of that duty. But "[i]f an abuse of discretion were held to be a failure to perform a nondiscretionary act, failure to perform *any* duty, discretionary or nondiscretionary, under the [SMCRA] would be drawn within the scope of [the citizen-suit provision]." *Oljato Chapter*, 515 F.2d at 663. As expressed neatly by the Ninth Circuit, an agency "is under no nondiscretionary duty not to abuse its discretion." *Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 761 (9th Cir. 1989); *accord Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987) ("We long ago rejected . . . the convoluted notion that EPA is under a nondiscretionary duty—for purposes of [the Clean Air Act's citizen-suit provision]—not to abuse its discretion."), *superseded by statute in part as recognized by Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015). In

light of the authority holding that duties such as those alleged by Plaintiffs are discretionary, we think it highly unlikely that Plaintiffs can prevail on this claim.

2. 5 U.S.C. §§ 702 and 704

Plaintiffs' fallback position is that even if the SMCRA does not give them a cause of action to challenge the Office's permit approval as arbitrary and capricious, the APA does. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *Bond v. United States*, 564 U.S. 211, 220 (2011) (identifying § 702 as the APA's cause of action); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (same). But the availability of the APA's cause of action is circumscribed in several ways, including by 5 U.S.C. § 704, which limits § 702's availability to challenges to "[a]gency action made reviewable by statute" (that is, a statute other than the APA stating that specified agency action is reviewable under the APA) and, as relevant here, to "final agency action for which there is no other adequate remedy in a court." *See Darby v. Cisneros*, 509 U.S. 137, 146 (1993) ("Although [§ 702] provides the general right to judicial review of agency actions under the APA, [§ 704] establishes when such review is available."). Consistent with "the well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies," *Hinck v. United States*, 550 U.S. 501, 506 (2007) (internal quotation marks omitted), the Supreme Court has ruled that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action," *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

Section 704 "does not provide additional judicial remedies in situations where the Congress has provided special and adequate review procedures." *Id.* (internal quotation marks omitted); *see also Darby*, 509 U.S. at 146 ("Congress intended by [§ 704] simply to avoid duplicating previously established special statutory procedures for review of agency actions.").

The Office argues that there is an adequate alternative under the SMCRA: A party can participate in a formal agency adjudication conducted by the Office under 30 U.S.C. § 1264(c), followed by the opportunity for federal-court review under 30 U.S.C. § 1276(a)(2). We agree with the Office. The permit-review process established under the SMCRA, which includes public-notice requirements, multiple opportunities for participation by interested parties, and the ultimate prospect of judicial review of any challenged permit-approval (or permit-denial) decision, provides an adequate alternative remedy that precludes Plaintiffs from proceeding under the APA's cause of action. To justify this conclusion, we review the features of the Office's permit-decision proceedings in some detail. *See generally* Will A. Irwin, *Federal Administrative Review under the Surface Mining Control and Reclamation Act: An Annotated Procedural Guide*, 3 J. Min. L. & Pol'y 417, 447–53 (1988).

At the time an applicant submits to the Office an application for a new permit (or, as here, an application for a revision of an existing permit), the applicant must place an advertisement "in a local newspaper of general circulation in the locality of the proposed surface mine at least once a week for four consecutive weeks"; the advertisement must specify "the ownership, precise location, and boundaries of the

land to be affected." 30 U.S.C. § 1263(a); *see* 30 C.F.R. § 773.6(a)(1) (listing additional requirements, including that the advertisement contain "[t]he location where a copy of the application is available for public inspection"). For its part, the Office must "notify various local governmental bodies, planning agencies, and sewage and water treatment authorities, [or] water companies" in the area and give them the chance to submit comments regarding "the effect[s] of the proposed operation on the environment which are within their area[s] of responsibility." 30 U.S.C. § 1263(a). "[W]ithin thirty days after the last publication" of the newspaper notice, "[a]ny person having an interest which is or may be adversely affected . . . shall have the right to file written objections." *Id.* § 1263(b).

"If written objections are filed and an informal conference requested, the [Office] shall then hold an informal conference in the locality of the proposed mining," after advertising the conference's "date, time and location . . . in a newspaper of general circulation in the locality at least two weeks prior to the scheduled conference date." *Id.*[24] Any party to an informal conference, upon request, may be granted "access to the proposed mining area for the purpose of gathering information relevant to the proceeding." *Id.* And, excluding limited confidentiality protections, "all applications for permits [and] revisions . . . shall be available, at reasonable times, for public

[24] Although "[a]n electronic or stenographic record shall be made . . . unless waived by all parties," 30 U.S.C. § 1263(b), an informal conference is not an "on the record" hearing subject to the requirements of 5 U.S.C. § 554, *see* 30 C.F.R. § 773.6(c)(2)(iv) (stating this point explicitly). Thus, an informal conference does not qualify as a "proceeding required to be conducted pursuant to [5 U.S.C. § 554]" that is subject to judicial review under 30 U.S.C. § 1276(a)(2).

inspection and copying." 30 C.F.R. § 773.6(d)(1). "If an informal conference has been held," the Office "shall issue and furnish the applicant for a permit and persons who are parties to the administrative proceedings with the written finding of the [Office], granting or denying the permit in whole or in part and stating the reasons" for its decision within 60 days of the conference. 30 U.S.C. § 1264(a). "If there has been no informal conference held," the Office "shall notify the applicant for a permit within a reasonable time . . . whether the application has been approved or disapproved in whole or part." *Id.* § 1264(b); *see* 30 C.F.R. § 773.19(b)(1)–(2) ("The [Office] shall issue written notification of the decision to . . . [t]he applicant, each person who files comments or objections to the permit application, and each party to an informal conference," as well as "[t]he local governmental officials.").

Within 30 days after the applicant is notified of the Office's decision on the permit application, "the applicant or any person with an interest which is or may be adversely affected" may request a formal hearing "on the reasons for the final determination." 30 U.S.C. § 1264(c).[25] The formal hearing is to be held "within thirty days of [the] request," and the Office "shall . . . provide notification to all interested parties at the time that the applicant is so notified." *Id.*[26] The permit applicant and the

[25] We refer to this hearing as a *formal* hearing to distinguish it from the informal conference also provided for by the statute. The catchline of § 1264(c) refers to the formal hearing as a "rehearing"; but we think our nomenclature is less confusing.

[26] This time limit (as well as others established by the SMCRA and implementing regulations) ensures that matters can be resolved expeditiously—thus distinguishing the Office's permit-decision process from the proceedings at issue in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 601 (2016), which the Supreme Court described as too "arduous, expensive, and long" to be an adequate

person who files the request for the formal hearing "shall be considered statutory parties" to the formal hearing. 43 C.F.R. § 4.1105(a)(2)(ii). "Any other person claiming a right to participate as a party may seek leave to intervene in a proceeding by filing a petition to do so pursuant to § 4.1110." *Id.* § 4.1105(b); *see id.* § 4.1110(a) ("Any person, including a State, or [the Office] may petition for leave to intervene at any stage of a proceeding in [the Office of Hearings and Appeals] under the [SMCRA]."); *id.* § 4.1110(c)(2) ("The administrative law judge or the [Interior Board of Land Appeals (the Board)] shall grant intervention where the petitioner . . . [h]as an interest which is or may be adversely affected by the outcome of the proceeding."); *id.* § 4.1105(c) ("If any person has a right to participate as a full party in a proceeding under the [SMCRA] and fails to exercise that right by participating in each stage of the proceeding, that person may become a participant with the rights of a party by order of an administrative law judge or the Board.").

Because the formal hearing "shall be of record and governed by [5 U.S.C. § 554]," 30 U.S.C. § 1264(c), it must comply not only with the requirements of the SMCRA and pertinent regulations, but also with the formal adjudication procedures of 5 U.S.C. §§ 556 and 557, *see* 5 U.S.C. § 554(c)(2). A formal hearing may provide typical elements of civil litigation, including interrogatories, *see* 43 C.F.R. § 4.1139, requests for admission, *see id.* § 4.1141, document productions, *see id.* § 4.1140,

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alternative to APA review. In more complex cases the SMCRA's presumptive deadlines can be extended, but only if "all parties agree in writing to an extension or waiver." 43 C.F.R. § 4.1364 (time for hearing); *id.* § 4.1368 (time to issue a written decision).

depositions, *see id.* §§ 4.1137–38, presentations of oral and documentary evidence (with the opportunity to cross-examine adverse witnesses), *see* 5 U.S.C. § 556(d), submissions of proposed findings of fact and conclusions of law, *see id.* § 557(c); 43 C.F.R. § 4.1126, and verbatim records of the proceedings, *see* 30 U.S.C. § 1264(e).

Within 30 days after the formal hearing concludes, the presiding administrative law judge "shall issue and furnish the applicant, and all persons who participated in the hearing, with [a] written decision . . . granting or denying the permit in whole or in part and stating the reasons therefor." *Id.* § 1264(c). Judicial review is then available: "Any applicant or any person with an interest which is or may be adversely affected who has participated in the administrative proceedings as an objector, and who is aggrieved by the decision . . . shall have the right to appeal in accordance with [30 U.S.C. § 1276]." *Id.* § 1264(f). (A party may, however, first seek discretionary review with the Board. *See* 43 C.F.R. § 4.1369(a); Irwin, *supra*, at 453.) Judicial review is "in the United States District Court for the district in which the surface coal mining operation is located." 30 U.S.C. § 1276(a)(2). The Office's factual findings are subject to substantial-evidence review, *see id.* § 1276(b), and the decision must be affirmed unless it is "arbitrary, capricious, or otherwise inconsistent with law," *id.* § 1276(a)(1). "The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the [Office] for such further action as it may direct." *Id.* § 1276(b).

Plaintiffs' only response to the Office's argument that § 1276 provides an adequate judicial remedy was to list the categories of circumstances in which judicial review is permitted under that section and then state that "[n]one of these categories

includes this permit approval." Aplts. Reply Br. at 14. But even though Plaintiffs included in their list "any other proceeding required to be conducted pursuant to section 554 of title 5," *id.* (quoting 30 U.S.C. § 1276(a)(2)), they failed to recognize how they could have qualified under that category. Plaintiffs could have challenged the Office's approval of the Dunn Ranch Area permit by seeking a formal hearing under § 1264(c), which is "governed by [5 U.S.C. § 554]." 30 U.S.C. § 1264(c). If they were dissatisfied with the outcome of the formal hearing, Plaintiffs then could have sought judicial review under § 1276(a)(2) and asked the reviewing court to "vacate[] or modify any order or decision" by the Office. *Id.* § 1276(b). Plaintiffs have not offered (nor can we see) any reason why the relief they seek—namely, vacating the Office's approval of GCC Energy's permit covering the Dunn Reach Area expansion—would have been unavailable under this framework. Nor do Plaintiffs suggest that they lacked reasonable notice of the status of the Mine's permit during the approval process. *Cf. Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314–15 (1950) (notice required to satisfy due process). Given this existing scheme for court review of permit decisions, Plaintiffs cannot use the APA's cause of action to challenge the Office's approval of the Dunn Ranch Area permit as arbitrary and capricious. *Accord Sun Enters., Ltd. v. Train*, 532 F.2d 280, 288 (2d Cir. 1976) (Clean Water Act's petition-for-review provision was an adequate alternative remedy that precluded review under the APA); *Utah Int'l, Inc. v. EPA*, 478 F.2d 126, 128 (10th Cir. 1973) (per curiam) (same for the Clean Air Act); *Utah Power & Light Co. v. FPC*, 339 F.2d 436, 438 (10th Cir. 1964)

(same for the Federal Power Act); *Amerada Petrol. Corp. v. FPC*, 231 F.2d 461, 465 (10th Cir. 1956) (same for the Natural Gas Act).

III. CONCLUSION

Plaintiffs are unlikely to succeed on the merits. Therefore, the district court did not abuse its discretion in denying their motion for temporary relief.

We **AFFIRM** the district court's order.