IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HEALTHY GULF, *Plaintiff*, v. DAVID BERNHARDT, *et al.*, *Defendants*, AMERICAN PETROLEUM INSTITUTE, *Defendant-Intervenors*.	Case No. 19-cv-2894 (EGS)

INTRODUCTION

At issue in this case are Defendants' ongoing efforts to undermine offshore drilling safety requirements intended to prevent disasters like the *Deepwater Horizon* catastrophe. Plaintiff Healthy Gulf has plausibly alleged that the Department of the Interior ("Department") has adopted an unpublished "Waiver Rule" that provides detailed, technical guidance for waiving certain of those safety requirements. As a result of the Waiver Rule, Federal Defendants have issued waivers at a breakneck pace, including waivers of standards regarding the maintenance and testing of "blowout preventers"—devices that contain uncontrolled eruptions from undersea wells. Because the Waiver Rule was issued without notice, an opportunity for comment, a reasoned explanation, or the requisite environmental analysis, it violates the Administrative Procedure Act ("APA") and the National Environmental Policy Act ("NEPA").

Instead of targeting *that* Complaint, the Motion to Dismiss of Intervenor American Petroleum Institute ("API") tilts at a straw man. API believes that Healthy Gulf's claims are directed against Defendants' regulatory procedures for *applying* the Waiver Rule and argues that such a challenge would warrant dismissal. But Healthy Gulf has no quarrel with the unremarkable procedures cited by API, which are merely the vehicle by which Federal Defendants have executed their troubling new substantive standards. Nor can API close the gap between Defendants' substantive regulations (which Plaintiff has challenged) and their procedural regulations (which Plaintiff has not) by recasting Defendants' technical instructions as "interpretations" of the procedures by which they are applied. That argument misreads Plaintiff's Complaint, declines to take Healthy Gulf's allegations as true, and misapprehends how Defendants administer the Outer Continental Shelf Lands Act ("OCSLA"). The Court should deny API's Motion to Dismiss.

STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) will succeed only where the complaint lacks "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Consistent with the purpose of Rule 8, the "plausibility standard" is not demanding. While it asks "for more than a sheer possibility that a defendant has acted unlawfully," it is not a "probability requirement," *id.*, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the necessary] facts is improbable, and that a [favorable judgment] is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (quotations omitted). *See also id.* at 563 n.8 (citation omitted) (a count will survive so long as there is a "reasonably founded hope that the discovery process will reveal relevant evidence to support the claim"); *Kaupthing ehf. v. Bricklayers & Trowel Trades Int'l Pension Fund Liquidation Portfolio*, 291 F. Supp. 3d

21, 27 (D.D.C. 2017) (pleading requirements are "not meant to impose a great burden upon a plaintiff" (quotations omitted)).

ARGUMENT

I. Plaintiff challenges new technical standards for waivers, not the procedures for applying those standards.

API first asserts that Healthy Gulf's Complaint fails to state a claim because Defendants' waivers were issued under existing procedural regulations. American Petroleum Institute's Mot. to Dismiss, ECF No. 32 at 1-2 ("API Br."). That argument misses the point. Healthy Gulf has plausibly alleged the existence of an unannounced substantive rule applied *through* the Department's preexisting procedures for departures and alternative compliance. Those procedures are therefore not mutually exclusive with the Rule, as API argues, but are rather the means of the Rule's execution. They do not defeat Healthy Gulf's claims.

"[A]cepted as true," *Iqbal*, 556 U.S. at 678, Healthy Gulf's Complaint plausibly alleges an unpublished Waiver Rule that has "governed . . . [a] rapid[] and systematic[] grant [of] waivers and departures," Compl. ¶ 86, for technical standards including, for example, high-pressure tests for blind shear ram-type preventers and safety valves for string casings. *See* Pl.'s Opp'n to Defs.' Mot. to Dismiss, ECF No. 12 at 16 ("Opp. Br."); *see also* Compl. ¶¶ 84, 86 (alleging "an extraordinary number and pace of waivers," including 960 between January 2017 and March 2018). This practice of issuing waivers as a matter of course is on all fours with other cases in which courts have plausibly inferred an agency policy based on an alleged pattern of behavior. *See* Opp. Br. at 13-15 (collecting cases). Such an inference is particularly plausible here given Defendants' internal emails (which explicitly contemplate a waiver policy), Compl. ¶¶ 74-78, and the highly technical nature of the underlying blowout preventer testing

requirements (which would be difficult to waive routinely in the absence of technical guidance), *id.* ¶¶ 64-67. *See also* Opp. Br. at 15-20.

API argues that the Waiver Rule does not exist because Defendants had promulgated existing regulations providing the Department with authority to waive regulatory requirements and prescribing the relevant processes. API Br. at 1-2 (citing 30 C.F.R. §§ 250.141, 250.142, 250.701, 250.702). API is correct that those regulations supply the scaffolding by which Defendants' substantive rule is applied, but the existence of that scaffolding—which Healthy Gulf acknowledges, Compl. ¶¶ 32-33, 86, 100—has nothing to do with the new technical standards actually used in resolving requests for waivers. As Healthy Gulf alleges, it is this *new* substantive guidance that has "allow[ed] Defendants to rapidly and systemically grant waivers and departures" under the *existing* "Well Control Rule's exceptions provision." *Id.* ¶ 86. API's argument has nothing to say on this crucial point and is inconsistent with controlling authority.[1] *Compare Hisp. Aff. Project v. Acosta*, 901 F.3d. 378, 382-83 (D.C. Cir. 2018) (describing defendants' *procedures* for granting and extending visas) *with id.* at 387 (allowing challenge to unpublished rule supplying new *standards* for visas).

II. The challenged standards are legislative.

According to API, Healthy Gulf's Complaint attacks an interpretive rule on grounds applicable only to legislative rules, *i.e.*, the rule's failure to comply with the APA's requirements

[1] For the same reason, API's reliance on *Foundation On Economic Trends v. Lyng*, 943 F.2d 79, 85-86 (D.C. Cir. 1991), is inapposite. In that case, the plaintiffs challenged an entire agency program, described "only in the most general terms," rather than "an identifiable action or event." *Id.* (seeking NEPA analysis for the "collection, storage, labeling, distribution, and other related actions pertaining to plant germplasm under the National Plant Germplasm System . . . and those actions affecting the potential preservation, loss deterioration and/or destruction of plant germplasm") (quotation omitted). In contrast, Healthy Gulf describes a discrete final agency action: an improperly promulgated Waiver Rule supplying standards for circumscribed regulatory requirements.

for notice and comment. *See* 5 U.S.C. § 553(b). To the contrary, Healthy Gulf's Complaint alleges the existence of a legislative rule supplying new, binding, and technical standards for blowout preventer testing. In any event, even interpretive rules are subject to the requirements of NEPA and the APA set forth in Plaintiff's second and third claims for relief, respectively. API's argument therefore does not warrant dismissal.

To begin, Healthy Gulf's Complaint plausibly alleges the existence of a legislative rule, not an interpretive rule. The D.C. Circuit has described the distinction between legislative and non-legislative rules as "fuzzy," "difficult," and "confused," but has outlined a handful of tests for legislative rulemaking. *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017). Most relevant here is whether the Waiver Rule "effects a substantive regulatory change to the statutory or regulatory regime," in which case it is legislative. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). *Accord Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) ("legislative rules are those that grant rights . . . or produce other significant effects on private interests . . . , or which effect a change in existing law or policy") (quotations omitted).

Healthy Gulf has alleged just this sort of rule, describing an "unpublished policy allowing Defendants to . . . *systematically* grant waivers and departures for the testing of blowout preventers, rather than [by] undertaking careful, case-by-case analysis[.]" Compl. ¶ 86 (emphasis added). *See also id.* ¶ 87 (alleging rule "governing the grant of waivers" for "regulations concerning the testing to blowout preventers"); *id.* ¶ 76 (Defendants' email, contemplating document "instruct[ing]" grants of waivers); *id.* ¶ 100 (alleging "consistent, concentrated application" of the rule). The Rule alleged by Plaintiff is legislative because it provides a unform "policy decision" otherwise omitted from OCSLA and its implementing regulations: the precise circumstances in which Defendants will waive blowout preventer testing. *Mendoza*, 754 F.3d at

1023. *Cf. Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014) ("An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is a legislative rule.").[2]

API argues that the Waiver Rule must be interpretive because, in its view, the Rule "requires that no new language be added to or subtracted from any existing regulation[.]" API Br. at 5. That is wrong. As set forth above, the *sin qua non* of Plaintiff's Complaint is that Defendants have pinpointed specific circumstances where blowout preventer testing purportedly meets the requirements for waivers. In other words, Defendants allegedly formulated substantive, detailed, and technical standards found nowhere in OCSLA's implementing regulations and independent of Defendants' codified and general *authority* to issue waivers. *See* 30 C.F.R. §§ 250.141, 250.142, 250.701, 250.702. Such standards are quintessentially legislative. *Nat'l Mining Ass'n*, 758 F.3d at 251-52.

API also argues that the Waiver Rule chiefly interprets Defendants' "authority" to issue waivers, thereby exempting the Rule from notice and comment requirements. API Br. at 5. But rules are interpretive under APA when they clarify or explain a preexisting "statutory or regulatory *term*," and API identifies no such term as the genesis for the Rule. *Mendoza*, 754 F.3d at 1021 (emphasis added). *See also, e.g., POET Biorefining, LLC v. EPA*, 970 F.3d 392, 407

[2] The "characteristics of a substantive rule" listed by API add nothing to this analysis and are mostly inaccurate. For example, API claims that legislative rules are those with "future effect," API Br. at 4 (citation omitted). But, of course, *all* rules under the APA have "future effect" by definition. 5 U.S.C. § 551(4) (defining "rule"). Likewise, the court in *Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17 (D.D.C. 2009), did not even address the distinction between legislative and non-legislative rules. Instead, it addressed the APA's good cause exemption to notice and comment procedures and merely noted that those procedures were "especially warranted where the rule in question creates a complex and far-reaching regulatory regime." *Id.* Finally, this case does not address "an agency's prosecutorial discretion," as do the cited passages in *Community Nutrition Institute v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).

(D.C. Cir. 2020) (deeming rule interpretive where it clarified the term "reasonable accuracy" in Renewable Fuel Standard regulations). That failure defeats API's argument, *Mendoza*, 754 F.3d at 1023, and cannot be cured by Intervenor's speculation that what Defendants interpreted was the undefined *concept* of agency "authority." Plaintiff is not aware of any case exempting a rule from notice and comment on the grounds that the rule parses a vague idea rather than a specific statutory or regulatory word or phrase. Such an exemption could apply to virtually any rulemaking, gutting the APA's notice and comment requirements.[3]

More to the point, Defendants have not publicized the Rule, so it is virtually impossible to accurately characterize the Rule as purporting to interpret a particular statutory or regulatory term. For the reasons set forth in Plaintiff's Opposition to Federal Defendants' Motion to Dismiss, Defendants' omission weighs against dismissal: because Plaintiff has alleged one *plausible* explanation for Defendants' opaque and rapid-fire dispensation of waivers—an unpublished rule—Plaintiff has met the pleading requirements of Federal Rule of Civil Procedure 8 and the APA, as interpreted by *Hispanic Affairs Project*, 901 F.3d at 387, and similar cases. *See* Opp. Br. at 20. API supplies no authority distinguishing that line of cases on the theory that an unpublished rule *might* purport to be interpretive. To the contrary, dismissal on API's theory is inappropriate because Plaintiff has "made clear" that it has alleged the existence of a legislative "policy and practice." *Hisp. Aff. Project*, 901 F.3d at 387.

But even if API were right that the Waiver Rule was interpretive, Plaintiff's second and third claims for relief would survive. That is because arbitrary and capricious reviews—the basis for Plaintiff's second claim—is "available" for interpretive rules. *Perez v. Mortg. Bankers Ass'n*,

[3] Likewise, API's string citation to various OCSLA regulations, API Br. at 5, does not supply a specific term that the Waiver Rule interprets and therefore does not corroborate the existence of an interpretative rule.

575 U.S. 92, 106 (2015). *See also Cent. Texas Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) (reviewing interpretive rule under 5 U.S.C. § 706(2)(A)). The same is true for Plaintiff's third claim, which alleges that the Waiver Rule was adopted absent required NEPA procedures, 5 U.S.C. § 706(2)(d). Unlike the exceptions for notice and comment supplied in 5 U.S.C. § 553, nothing in the APA or NEPA exempts interpretive rules from the latter statute's requirements. To the contrary, NEPA expressly extends those requirements to "interpretations adopted under the [APA]." 40 C.F.R. § 1508.1(q)(3)(i). *See Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 397 F. Supp. 3d 430, 453-55 (S.D.N.Y. 2019) (denying motion to dismiss NEPA claims against interpretive rule). In all events, therefore, Plaintiff's second and third claims should proceed to the merits.

CONCLUSION

The Court should deny API's Motion to Dismiss.

December 21, 2020

Respectfully submitted,

/s/ Travis Annatoyn

Travis Annatoyn (D.C. Bar No. 462679)
Kristen Miller (D.C. Bar No. 220627)
Democracy Forward Foundation
1333 H St. NW
Washington, DC 20005
(202) 639-6500
tannatoyn@democracyforward.org
kmiller@democracyforward.org

Counsel for Plaintiff