PATTI A. GOLDMAN (WSBA #24426)
Pro Hac Vice
ASHLEY N. BENNETT (DCBA #1044215)
Pro Hac Vice
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Ph: (206) 343-7340 | Fax: (206) 343-1526
pgoldman@earthjustice.org
abennett@earthjustice.org

MONEEN S. NASMITH (NYSBA #442704)
Pro Hac Vice
Earthjustice
48 Wall St., Floor 19
New York, NY 10005
Ph: (212) 845-7376
mnasmith@earthjustice.org

STACEY P. GEIS (CSBA #181444)
Earthjustice
50 California, Suite 500
San Francisco, CA 94111
Ph: (415) 217-2000 | Fax: (415) 217-2040
sgeis@earthjustice.org

Attorneys for Plaintiffs Sierra Club and A Community Voice-Louisiana

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SIERRA CLUB, and A COMMUNITY VOICE-LOUISIANA Plaintiffs, v. SCOTT PRUITT, in his official capacity as Administrator of the United States Environmental Protection Agency Defendant.	Civ. No. 4:17-cv-6293-JSW PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO EPA'S CROSS-MOTION FOR SUMMARY JUDGMENT Date: January 12, 2018 Time: 9:00 a.m. Courtroom: Courtroom 5, 2nd Floor, Oakland – Hon. Jeffrey S. White

TABLE OF CONTENTS

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

TABLE OF AUTHORITIES

Page(s)

Cases

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Federal Statutes

Regulations

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Federal Register

Congressional Materials

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

INTRODUCTION

Plaintiffs brought this case to protect their members and the general public from exposure to formaldehyde emissions from composite wood products. In enacting the Formaldehyde Act, 15 U.S.C. § 2697, Congress mandated actions on the part of the Defendant Environmental Protection Agency ("EPA") to prevent a recurrence of the needless debacle that occurred after Hurricane Katrina, when so many people suffered from respiratory problems, cancer, nose, eye, and throat irrigation, and asthma from formaldehyde emitted from newly constructed modular housing. Congress directed EPA to make the standards that had been adopted by California applicable nationwide. While most domestic producers were complying with the California standards, Congress wanted to level the playing field and stop the flow of cheap, noncompliant imports that were flooding the U.S. market. Congress did not leave the timing to EPA. It directed EPA to adopt implementing regulations by January 1, 2013, and specified that the emission standards shall apply to composite wood products 180-days later. Although EPA missed these deadlines, it did promulgate the implementing regulations in December 2016. 81 Fed. Reg. 89,674 (Dec. 12, 2016) ("Formaldehyde Rule").

After the change in administrations, EPA twice postponed the date the Formaldehyde Rule would go into effect. While the emission standards are now on the books, they will not stem the tide of wood products that emit dangerous amounts of formaldehyde until compliance is required. Until that time, manufacturers will be able to continue making hardwood plywood, particleboard, and fiberboard that emit more formaldehyde than allowed under the standards, and importers will be allowed to continue importing these wood products. Even once the manufacture and import of such noncomplying wood products is proscribed, any plywood, particleboard, or fiberboard manufactured or imported before that time can be sold or used until existing supplies run out.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

A question of statutory construction lies at the heart of this—whether Congress gave EPA the authority to postpone compliance for as long as it sees fit or whether a provision specifying that the emission standards shall apply to composite wood products 180 days after promulgation of the Formaldehyde Rule constrains EPA's authority. Because the statutory provisions are so central, this brief begins by reviewing the pertinent statutory provisions. It then explains that EPA lacks discretion to extend the compliance deadline and acted arbitrarily, capriciously, and contrary to the Formaldehyde Act in doing so. The brief next shows that the proposed and direct final rule failed to provide sufficient notice to comply with notice-and-comment rulemaking requirements, and flowing in part from that failure and from the *ultra vires* nature of this claim, that Plaintiffs had no obligation to raise this issue in comments and did not waive their ability to present it to this Court. Finally, the brief explains why partial vacatur is the appropriate remedy.

THE PERTINENT STATUTORY PROVISIONS IN THE FORMALDEHYDE ACT

The basic outlines of the Formaldehyde Act are not in dispute. The Formaldehyde Act directs EPA to adopt the formaldehyde emission standards that had already been adopted and put in place in California. 15 U.S.C. § 2697(d)(1). The emission standards applicable to hardwood plywood, particleboard, and medium-density fiberboard, collectively called composite wood products or panels, must be identical to the California standards. *Id*. § 2697(b)(1). The Formaldehyde Act has a 180-day deadline for making those emission standards applicable with the sole exception being the sell-through provisions. *Id*. § 2697(b)(1).

The Formaldehyde Act also directed EPA to determine through rulemaking whether to exempt engineered veneer or laminated products from the emission standards by excluding them from the definition of hardwood plywood. *Id*. § 2697(a)(3)(C). Unlike the emission standards for hardwood plywood, California had yet to adopt emission standards governing veneer and laminated

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

products. In the Formaldehyde Rule, EPA made the hardwood plywood emission standards applicable to whole categories of veneer and laminated products, with a compliance deadline seven years into the future to allow time for the sector to adapt to the new standards.

A. The Compliance Deadline and Sell-Through Provisions

The question of statutory authority at the heart of this case is whether Congress granted EPA the authority to allow composite wood products that violate the emission standards to be newly produced and newly imported into the country for however long EPA deems appropriate. The answer depends on the interplay of two statutory provisions.

The first—the compliance deadline provision—states in full:

> Except as provided in an applicable sell-through regulation promulgated pursuant to subsection (d), effective beginning on the date that is 180 days after the date of promulgation of those regulations, the emission standards described in paragraph (2), shall apply to hardwood plywood, medium-density fiberboard, and particleboard sold, supplied, offered for sale, or manufactured in the United States.

Id. § 2697(b)(1). If the compliance deadline provision did not contain this exception, EPA would have no basis to claim any discretion to make the formaldehyde emission standards effective later than 180 days after their promulgation.

The second subsection—the sell-through provisions—states:

> Sell-through provisions established by the Administrator under this subsection, with respect to composite wood products and finished goods containing regulated composite wood products (including recreational vehicles, manufactured homes, and modular homes), shall--
>
> > (i) be based on a designated date of manufacture (which shall be no earlier than the date 180 days following the promulgation of the regulations pursuant to this subsection) of the composite wood product or finished good, rather than date of sale of the composite wood product or finished good; and
> >
> > (ii) provide that any inventory of composite wood products or finished goods containing regulated composite wood products, manufactured before the designated date of manufacture of the composite wood products or finished goods, shall not be subject to the formaldehyde emission standard requirements under subsection (b)(1).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Id. § 2697(d)(3)(A).

The sell-through provisions allow inventories of noncompliant composite wood products manufactured or imported before the compliance deadline to be sold until supplies run out. The compliance deadline stops the noncompliant panels from entering the pipeline, while the sell-through exception allows panels in the pipeline to be used up. This means that home improvement stores may sell noncompliant hardwood plywood and particleboard provided they were manufactured or imported before the compliance deadline. It also means manufacturers of cabinets, furniture, recreational vehicles, manufactured homes, and other finished goods may use such noncompliant wood products that are already in the U.S. supply chain.[1]

EPA argues that the sell-through provisions authorize EPA to set any deadline it chooses for the emission standards to apply to newly manufactured or newly imported panels. It relies entirely on a parenthetical that states that the date of manufacture used in the sell-through provisions shall be no earlier than 180 days after the regulations' promulgation. *Id.* § 2697(d)(3)(A)(i). Without the parenthetical, EPA would have no basis for its claim of discretionary authority.

The question then is whether the parenthetical is a grant of authority, as opposed to a reference to the compliance deadline mandated elsewhere in the Formaldehyde Act. If it is a grant of authority, can it be read to apply to more than the inventories that are subject to the sell-through provisions? Does it allow EPA to change the statutory compliance deadline so that no composite wood products would need to comply with the emission standards by that date? In other words,

[1] EPA's rule and the emission standards apply to and strengthen the standards applicable to manufactured homes. In addition, the Act requires Housing and Urban Development to update its regulations to incorporate the new EPA standards 180 days after EPA promulgates its implementing rules. Formaldehyde Standards for Composite Wood Products Act, Pub. L. No. 111-199, § 4, 124 Stat 1359, 1367 (2010).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

does the parenthetical in the sell-through provisions swallow the rule?

B. The Sell-Through Provisions Allow the Sale of Existing Inventories of Noncompliant Wood Products.

Sell-through provisions pertain to existing inventories. Both the California Air Resources Board ("CARB") standards and the Formaldehyde Act recognize that there should be a phase-in period during which existing supplies of wood products that do not comply with the new formaldehyde emission standards may continue to be sold. The CARB rule provided such a transition by phasing in the standards over time and establishing different deadlines for the sale of existing inventories that did not conform to particular, new standards. 17 CCR § 93120.12, app. 1.

The Formaldehyde Act took a different tack. Congress decided to allow all existing inventories to be sold as long as the raw materials—*e.g.*, the plywood or particleboard panels—had been manufactured or imported before the compliance deadline.

The Formaldehyde Act established certain parameters in its sell-through provisions that are undisputed:

1. The sell-through provisions allow existing inventories to be sold until they are used up.
2. They apply to the composite wood products—hardwood plywood, particleboard, and fiberboard—covered by the Act.
3. They also apply to finished goods (and component parts) that contain the plywood panels, particleboard, or fiberboard.
4. Neither the emission standards nor the labeling requirements applies to the inventories as long as the raw materials were manufactured or imported before a designated date.
5. It is the date of manufacture rather than the date of sale that is the operative date.
6. Stockpiling of inventory after the designated date is prohibited.
7. Stockpiling is defined as the manufacture or purchase of noncompliant composite wood products between enactment of the Formaldehyde Act and 180 days after promulgation of the implementing regulations in order to accumulate inventories that could be used under the sell-through provisions.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

This means that, if June 12, 2017 was the operative date, hardwood plywood, fiberboard, or particleboard manufactured *before* June 12, 2017, could be sold by home improvement stores until supplies ran out even if it violated the emission standards. It also means that manufacturers of cabinets and furniture could continue to use noncompliant plywood, fiberboard, and particleboard in producing finished goods, again until they used up their existing inventories.

ARGUMENT

I. EPA EXCEEDED AND ACTED CONTRARY TO ITS AUTHORITY.

A. Under the Formaldehyde Act, the Emission Standards Shall Apply to Composite Wood Products 180 Days after Promulgation of the Implementing Regulations.

Congress enacted the Formaldehyde Act to extend the CARB formaldehyde emission standards throughout the country, particularly to imports, and to do so on a fast track. To ensure expeditious implementation, it directed EPA to adopt implementing regulations by January 1, 2013, a deadline that EPA missed by nearly four years. Congress established a compliance deadline; except as provided in applicable sell-through regulations, "effective beginning on the date that is 180 days after the date of promulgation of those regulations" the formaldehyde emission standards "shall apply to hardwood plywood, medium-density fiberboard, and particleboard sold, supplied, offered for sale, or manufactured in the United States." 15 U.S.C. § 2697(b)(1).

Apart from the exception, the compliance deadline provision is absolute and unbending. The statute leaves EPA no discretion to postpone compliance since the emission standards "shall apply" 180 days after the promulgation of the implementing regulations. This mandate uses language that makes it self-effectuating. Once EPA promulgates the sell-through regulations, the emission standards spelled out in the Act "shall apply" to hardwood plywood, fiberboard, and particleboard sold, manufactured, or imported into the United States. As the House Report explains,

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

"the new limits will go into effect 180 days after EPA issues its regulations." H. R. Rep. No. 111-509, pt. 1 at 9, 15 (2010). Another provision directs EPA to promulgate regulations (by January 1, 2013) to implement and ensure compliance with the emission standards set out in the Act. 15 U.S.C. § 2697(d)(1). In addressing the compliance deadline for manufacturing or importing wood panels in the rules, EPA's role is a ministerial one. It must heed the Formaldehyde Act and ensure the emission standards "shall apply" effective 180 days after promulgation of the implementing regulations. EPA cannot change that compliance deadline.

Elsewhere, the Formaldehyde Act expressly gives EPA authority to create exceptions. EPA can create an exception for products containing de minimis amounts of composite wood products, but it cannot create exceptions to the emission standards themselves. *Id*. § 2697(d)(L). EPA also has the authority to exempt veneer or laminated products from the standards, *id.* § 2697(a)(3)(C)(i), which can include a phase-in of the emission standards for such products. Nowhere else does the Formaldehyde Act authorize EPA to delay compliance with the emission standards.

B. The Sell-Through Provisions Do Not Grant EPA Authority to Postpone the Compliance Deadline.

EPA argues that the Formaldehyde Act's sell-through provisions grant it the authority to postpone the compliance deadline beyond 180 days. This argument conflates the Act's compliance deadline, which pertains to the *manufacture and import* of the panels, with the sell-through provisions, which authorize the *sale or use* of existing inventories of panels and other wood products manufactured or imported before that compliance deadline. The Formaldehyde Act gave EPA no discretion to postpone the initial, 180-day compliance deadline. It granted EPA the authority to craft exemptions for veneer and laminated products, which presumably includes the discretion to set a compliance deadline that is longer than 180 days after promulgation. This limited exception, however, extends only to these two specific types of altered hardwood plywood, not to

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

the hardwood plywood itself and certainly not to fiberboard and particleboard.

EPA's argument to the contrary relies entirely on a parenthetical in a sell-through provision in the Formaldehyde Act. This parenthetical merely clarifies that it is the date of manufacture, not the date of sale, that dictates which noncompliant wood products are included in the inventories that may continue to be sold or used in the stream of commerce until they are depleted. The pertinent language states that sell-through provisions "shall":

> (i) be based on a designated date of manufacture (which shall be no earlier than the date 180 days following the promulgation of the regulations pursuant to this subsection) of the composite wood product or finished good, rather than date of sale of the composite wood product or finished good.

Id. § 2697(d)(3)(A)(i). EPA's assertion that this provision grants it the authority to set a compliance deadline for newly manufactured or newly imported panels that violates the Formaldehyde Act's mandatory compliance deadline cannot withstand scrutiny.

First, this sell-through provision is not a grant of authority to EPA to set a compliance deadline, let alone one that violates the Act's mandatory 180-day compliance deadline. It is not stated as a grant of authority, in contrast to other sections that describe what EPA "shall" or "may" do. *See, e.g., id.* §§ 2697(a)(C)(i)(1) (Administrator shall conduct a rulemaking "to determine, at the discretion of the Administrator" whether to exempt veneer or laminated products); 2697(a)(10(C) ("Administrator may" reduce testing requirements for ultra-low emitting formaldehyde resin only if it meets specified criteria); 2697(b)(3) (authority to establish test methods); 2697(d)(4) (Administrator shall revise import regulations "as Administrator deems necessary to ensure compliance"); 2697(d)(5) (authority to substitute successor test methods).

Second, the parenthetical provides an explanation or context that is related to, but not the point of, the subsection. The point of the subsection is to make it clear that the date of manufacture, rather than the date of sale controls, in contrast to the CARB approach, which set deadlines for the

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

sale of specific noncompliant wood products over a period of time. The parenthetical provides additional information about the date of manufacture, explaining that it cannot be earlier than 180 days after promulgation of the formaldehyde regulations. This is reflected in the presentation of the information in parenthesis, which EPA's selective quotations of the provision omit. It is also reflected in the use of the word "which" to begin the parenthetical statement. "Which" is used when referring to something previously mentioned to introduce a clause giving further information. *See Merriam-Webster*, available at https://www.merriam-webster.com/dictionary/which ("the Samnite tribes, which settled south and southeast of Rome."). In terms of its content, the parenthetical explains that the compliance deadline cannot be earlier than 180 days after promulgation under the Act's mandate that the emission standards shall apply on the 180th day to wood panels. It uses the phrase "no earlier than" 180 days in recognition of EPA's authority to set a later compliance deadline for veneer and laminated products.

Third, the Formaldehyde Act's sell-through provisions and definition of stockpiling confirm this reading. The sell-through provisions allow inventories of noncompliant wood products to be sold and used until the inventories run out. Any EPA sell-through regulations must "prohibit the stockpiling of inventory to be sold after the designated date of manufacture." 15 U.S.C. § 2697(d)(3)(B)(i). "Stockpiling" is defined as

> manufacturing or purchasing a composite wood product or finished good containing a regulated composite wood product between July 7, 2010, and the date 180 days following the promulgation of the regulations pursuant to this subsection at a rate which is significantly greater (as determined by the Administrator) than the rate at which such product or good was manufactured or purchased during a base period (as determined by the Administrator) ending before July 7, 2010.

Id. § 2697(d)(3)(C). This definition describes the inventories of noncompliant wood products that may be sold or used under the Act's sell-through provisions. The universe of eligible inventories ends 180 days following promulgation of the Formaldehyde Rule. Prior to that time, noncompliant

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

wood products may be manufactured, imported, and sold and thereby added to existing inventories. However, after the formaldehyde emission standards apply to wood panels under the Act's 180-day compliance deadline, they may no longer be added to the existing inventories that are exempt from the Act's emission standards because they may no longer be manufactured, imported, or sold in the United States.

This is the only plausible reading of the Formaldehyde Act. EPA's reading would eviscerate the Act's mandatory 180-day compliance deadline. It would give EPA unfettered discretion to set a different compliance deadline by designating the date of manufacture under the sell-through provisions. Under EPA's argument, the Act's imposes no limits on this asserted discretion; EPA could designate two, ten, or even twenty years as the date of manufacture and any wood products manufactured or imported by that date could be added to the inventories that would be exempt from the Act's emission standards.[2]

Congress gave EPA no such discretion to delay compliance. It wanted to stop the manufacture and import of highly emitting wood panels and included mandates to make that happen within three years of the Act's enactment. Admittedly, EPA's violations of the Formaldehyde Act's

[2] EPA (at 5) selectively quotes the Senate Report No. 111-169, at 7 (2010), to create the impression that Congress granted EPA discretion to pick the compliance date. The full quote is:

> As introduced, S. 1660 would have made the formaldehyde emission standard for composite wood products effective within 180 days of enactment. The substitute amendment provides that the standard will become effective 180 days after EPA promulgates the regulations required under subsection (d). This change in the effective date will allow sufficient time for industry to comply with the requirements and sufficient flexibility for EPA to promulgate and implement the regulations. This is intended to help industries that have a uniquely long period of time between the date of manufacture and the date of sale

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

deadlines have made that impossible. While it is too late to unravel EPA's past violations, the statutory constraints on its authority prevent it from causing further delays by granting the one-year extension. As a matter of statutory construction, the Act makes the formaldehyde emission standards applicable to newly manufactured and newly imported wood panels 180 days after promulgation, which renders the one-year extension *ultra vires*. *See Schneider v. Chertoff*, 450 F.3d 944, 960-61 (9th Cir. 2006) (rule is *ultra vires* because it established longer time frames than allowed under the controlling statute).

C. The Formaldehyde Rule's Stockpiling Provisions Illustrate How EPA's Approach is Impermissible under the Formaldehyde Act.

The Formaldehyde Rule has a December 12, 2017 effective date after which "hardwood plywood . . ., particleboard, and [medium-density fiberboard] must be manufactured (including imported) in compliance with the provisions of this final rule." 81 Fed. Reg. at 89,675; *id*. at 89,725-26 (40 C.F.R. § 770.2(e)) (December 12, 2017 effective date by which "all manufacturers (including importers), fabricators, suppliers, distributors, and retailers of composite wood products, and component parts or finished goods containing these materials, must comply with this part, subject to a longer phase-in timeline for veneers and laminates). This effective date is subject to the following, which implements the sell-through provisions:

> (4) Composite wood products manufactured (including imported) before December 12, 2017 may be sold, supplied, offered for sale, or used to fabricate component parts or finished goods at any time.

Id. (40 C.F.R. § 770.2(e)(4)). This exception codifies the Act's sell-through directive by allowing inventories of noncompliant wood products to be sold or used until supplies are depleted.

The Formaldehyde Rule also codifies the Act's mandate to prohibit "stockpiling of inventory to be sold," 15 U.S.C. § 2697(d)(3)(B)(i), but does so through two inconsistent provisions. Taken together, these provisions create an irrational compliance schedule and

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

demonstrate how EPA's interpretation of the Act must fail.

On the one hand, the Formaldehyde Rule prohibits the sale of stockpiled inventory after December 12, 2017 in accordance with EPA's claim of discretion to choose a compliance deadline later than 180 days after promulgation of the rules. 81 Fed. Reg. at 89,735 (40 C.F.R. § 770.12(a)). The Formaldehyde Delay Rule further extended this deadline to December 12, 2018 for both manufacturing and importing noncompliant wood products and the prohibition on stockpiling. 82 Fed. Reg. 44,533, 44,335 (Sept. 25, 2017).

On the other hand, EPA heeded the Formaldehyde Act in defining stockpiling as manufacturing or purchasing wood products and finished goods between the date the Formaldehyde Act was enacted and 180 days after promulgation of the implementing rules. *See* 15 U.S.C. § 2697(d)(3)(C). The Formaldehyde Rule provides:

> Stockpiling means manufacturing or purchasing composite wood products, whether in the form of panels or incorporated into component parts or finished goods, between July 7, 2010 and June 12, 2017 at an average rate at least 20% greater than the average rate of manufacturer or purchase during the 2009 calendar year for the purpose of circumventing the emission standards and other requirements of this subpart.

81 Fed. Reg. at 89,728. The Formaldehyde Delay Rule left this definition unchanged.

The conflicting provisions of the Formaldehyde Rule created a 180-day gap between the end of the stockpiling period and the beginning of the prohibition on selling stockpiled inventory, and the delay rule extended that gap so it now spans 1 and ½ years. It makes no sense to define the stockpiling period to end 1 and ½ years before the stockpiling prohibition expires. And the stockpiling definition, which uses 180-days after promulgation as the end date, as it must under the Formaldehyde Act, makes sense only if the compliance deadline for new manufactures or imports is also 180 days.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

The Formaldehyde Rule and Formaldehyde Delay Rule reveal the folly of EPA claiming the authority to postpone compliance deadlines through the sell-through regulatory provisions. There is no rational explanation for why EPA felt constrained to follow the Act's requirement to end the stockpiling period 180 days after promulgation of the regulations, but not the Act's direction to require compliance with the emission standards on that same date. In addition, EPA's interpretation of the sell-through provision as allowing an indefinite extension of the deadline for imports and new manufactures to meet the emission standards effectively creates a 1 and ½ period when its regulations appear to authorize the very stockpiling that the Act requires EPA's regulations to prohibit.

In sum, EPA exceeded its authority and violated the Formaldehyde Act by extending the compliance deadline by one year. It already violated the Act when it postponed the compliance deadline beyond the 180-day deadline mandated by the Act. The Delay Rule made EPA's violation of the law even more egregious.

II. EPA ACTED ARBITRARILY, CAPRICIOUSLY, AND MANIFESTLY CONTRARY TO THE STATUTE IN EXTENDING THE COMPLIANCE DEADLINE.

EPA's decision to delay compliance with the Formaldehyde Act's emission standards not only is contrary to the requirements of the Act, but also is arbitrary, capricious, and contrary to the Formaldehyde Act, because it ignores the factors Congress weighed and conclusions Congress reached in passing the Act. The Delay Rule runs counter to Congress's clear intent to ensure speedy reductions of formaldehyde emissions from composite wood products, ignores the serious illnesses Congress sought to prevent, and fails to defies Congress's intent to make imports subject to the CARB standards. EPA's construction of the statute therefore must be rejected. *See Coyt v. Holder*, 593 F.3d 902, 905-906 (9th Cir. 2010) ("we must reject those constructions that are contrary to clear

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

congressional intent or that frustrate the policy that Congress sought to implement.").[3]

EPA's Delay Rule is based on EPA's belief that "extending the compliance date reflects the Congressional intent under [the Formaldehyde Act] that the agency implement provisions to ensure compliance with the formaldehyde emission standards as soon as possible while enabling regulated entities to achieve compliance." 82 Fed. Reg., at 44533. But in passing the Formaldehyde Act, Congress decided a much shorter timeline was needed. *See* 15 U.S.C. §§ 2697(b)(1), (d). The legislative history of the Act confirms that EPA is wrong and Congress decided that 180 days after EPA promulgated regulations was more than sufficient to enable industry to comply. *See, e.g.*, S. Rep. No. 111-169, at 7 (2010) ("the formaldehyde emission standard for composite wood products…will become effective within 180 days after EPA promulgates the regulations required under subsection (d)…[and] will allow sufficient time for industry to comply with the requirements."); H. R. Rep. No. 111-509, pt. 1 at 9, 15 (2010) ("the new limits will go into effect 180 days after EPA issues its regulations. . . . industry stakeholders have indicated that they plan to comply with the new emissions standards much sooner than 2013."). The timeline Congress selected provided EPA with more than two years from when the Act was signed in July 2010 to promulgate the regulations, and another six months for industry to come into compliance with the emission standards. *See* 15 U.S.C. §§ 2697(b)(1), (d). Because of EPA's repeated delays since passage of the Act, however, regulated entities instead have had more than seven years notice—

[3] EPA is mistaken in asserting (at 9) that its interpretation of the Formaldehyde Act is due deference under *Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). EPA's interpretation is barred under *Chevron* because the Formaldehyde Act speaks to the issue and sets the compliance deadline. Moreover, no deference is warranted because EPA did not promulgate a regulation embodying its interpretation and instead, is advancing its interpretation for the purpose of defending its action in litigation. *See Price v. Stevedoring Servs. of America, Inc.*, 697 F.3d 820, 831 (9th Cir. 2012).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

exceeding the congressionally mandated timeline by more than four years. Adding yet another year of delay is contrary to Congress's direction to ensure prompt reductions in formaldehyde emissions from composite wood products.

The Delay Rule's justification for delaying the compliance deadline also cannot be reconciled with Congress's conclusions about the harm that formaldehyde causes to people's health, and the steps needed to reduce that harm. EPA asserts that delaying compliance with the heart of the Formaldehyde Act will not cause "significant increases in health risk," because of existing industry compliance with CARB and voluntary labeling of those wood products that do comply. 82 Fed. Red., at 44534. Congress, however, disagreed. It found that formaldehyde is a "an irritant and a probable human carcinogen… [and] inhalation of formaldehyde can cause nose and throat irritation, difficulty breathing, burning sensations in the eyes and throat and nausea. Other effects including coughing, wheezing, chest pains, bronchitis, and severe allergic reactions." H.R. Rep. 111-509(I), at 7-8 (2010). To avoid these induced illnesses, Congress gave EPA clear directives to establish emission standards within a limited timeframe. 15 U.S.C. §§ 2697(b)(1), (d). Congress was aware that a significant portion of the domestic market was complying with CARB, and nevertheless wanted EPA to act expeditiously to make the CARB standards applicable to all wood products sold or used in the United States. *See* H.R. Rep. 111-509(I), at 14 ("urg[ing] EPA to complete its rulemaking as quickly as possible."). Congress mandated far more than voluntary labeling of those products that meet the emission standards. It made the emission standards mandatory for all wood products manufactured or imported into the country. EPA's attempts to downplay the adverse health impacts of the extended delay in requiring compliance with the mandatory emission standards lack a rational basis in light of Congress's findings to the contrary.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Finally, EPA's rationale ignores Congress's desire to bring imports into compliance with emission standards to avoid disadvantaging domestic producers that have been complying with CARB standards. The Act explicitly directs EPA to coordinate with U.S. Customers and Border Protection and other appropriate agencies no later than July 1, 2013, to ensure that import regulations comply with the emission standards and other provisions of the Act. 15 U.S.C. § 2697(d)(4). Representative Matsui, one of the sponsors of the House bill, explained that:

> Formaldehyde emissions from composite wood are largely the result of cheap foreign products that enter the U.S. marketplace at much lower cost, which places U.S. manufacturers at a competitive disadvantage. This legislation will level the playing field for our domestic manufacturers by creating one national standard on formaldehyde emissions for both our domestic industry and foreign manufacturers to follow.

156 Cong. Rec. H4701-01, at H4704 (2010). The Delay Rule disregards this central motivation for passing the Act. By giving importers another year to come into compliance with emission standards that most domestic manufacturers already meet, EPA has defied congressional direction to level the playing field and protect the public from harmful formaldehyde emissions, no matter where the products originate. EPA's interpretation of the Formaldehyde Act is therefore impermissible.

III. EPA ADOPTED THE DELAY RULE WITHOUT COMPLYING WITH NOTICE AND COMMENT RULEMAKING REQUIREMENTS.

The Administrative Procedure Act ("APA") establishes procedural requirements applicable to the promulgation of informal rules, like the formaldehyde delay rule. 5 U.S.C. § 553. EPA went through the motions of following these rules by issuing a proposed rule (along with its direct final rule), allowing public comment, and then finalizing the delay rule. Its proposed rule, however, failed to provide adequate notice to the public in two ways. *See Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (invalidating an EPA permit for failure to "afford interested

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

parties the opportunity to comment" on a key difference between the proposed and final version).[4]

EPA proposed to extend the compliance deadlines for three and 1/3 months to coincide with the period of time it had delayed the Formaldehyde Rule's effective date after the inauguration. The proposed rule did not provide notice that EPA might extend the compliance deadline for a full year. And by initially issuing the extension as a direct final rule, EPA conveyed its intent to limit the extension to three and 1/3 months and no longer. It therefore did not put people like Plaintiffs on notice that they should comment on the proposal if they objected to the longer extension, but were willing to let the shorter one go by without challenge. Plaintiffs were deterred from objecting, because adverse comments could create significant additional delays by derailing the direct final rule and possibly expanding its scope and the length of the delay, which is what, in fact, occurred.

IV. THERE IS NO WAIVER BECAUSE EPA MUST AND DID ADDRESS ITS AUTHORITY TO EXTEND THE DEADLINE, OTHERS OBJECTED TO THE EXTENSION, AND EPA FAILED TO PROVIDE SUFFICIENT NOTICE.

EPA overstates the waiver rule (at 11, 12) in calling it a "hard and fast rule" and "a near absolute bar" and in asserting that issues "will not be considered by a court on review" unless they were raised by the plaintiff before the agency. To the contrary, the Ninth Circuit has no "broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1534 (9th Cir. 1997) *quoting Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir.1984).

As a general rule, the Ninth Circuit will not consider challenges to agency action unless they were presented to or considered by the agency. *Portland General Elec. Co. v. Bonneville Power*

[4] Plaintiffs presented this argument in a footnote in their motion for summary judgment. In its opposition, EPA failed to address it, thereby implicitly conceding its violation. In this joint opposition-reply, Plaintiffs are elevating this argument in light of EPA's waiver argument and its claim of unfettered authority to postpone compliance.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Admin., 501 F.3d 1009, 1023 (9th Cir. 2007). This rule does not foreclose judicial review, but rather is construed as a waiver that forecloses consideration of specific arguments. *Id*. at 1023-24.

The rule is inapplicable to this case for three reasons. First, it applies only when the plaintiffs have been put on notice that the issue is relevant to them and the notice provides an incentive to present their arguments. *Universal Health Services, Inc. v. Thompson*, 363 F.3d 1013, 1020-21 (9th Cir. 2004). EPA's proposed and direct final rules failed to provide notice that EPA might extend the compliance deadlines by more than three and 1/3 months. EPA proposed extending the compliance deadlines because it had delayed the Formaldehyde Rule's effective date after the change in administrations. It proposed extending the compliance deadline for the precise amount of time the effective date had been delayed. While Plaintiffs' members are harmed by any delay, it appeared that the end was in sight.

Moreover, EPA proposed the extension as a direct final rule and indicated that the short extension would become effective if EPA received no adverse comments. This approach presented Plaintiffs with a catch-22. If they objected to the three-month delay, EPA would need to go through a notice-and-comment rulemaking proceeding, which could lead to further delay. EPA might decide to tack on additional time to coincide with the time it would take to complete the rulemaking. It also might consider an even longer delay in response to comments from industry groups, particularly importers, that have consistently sought to delay the rules. The prospect of further delay created disincentives for the Plaintiffs to submit comments opposing the three-month delay.

Second, the waiver rule is inapplicable if the agency had an opportunity to consider the issue either *sua sponte* or because it was raised by someone else. *Portland General Elec. Co.*, 501 F.3d at 1024. Here, EPA addressed the issue of its authority to extend the compliance dates beyond 180 days after promulgation of the implementing regulations. EPA's proposed rule states: the

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Formaldehyde Act "states that the manufactured by date must be no earlier than 180 days after promulgation of the final implementation regulations, but EPA has the discretion to establish, by rulemaking, a later date." 78 Fed. Reg. at 34,840. EPA therefore addressed and claimed the authority to extend the compliance deadline beyond the Formaldehyde Act's 180-day timeframe. *See Natural Res. Def. Council v. EPA*, 824 F.2d 1146, 1150-51 (D.C. Cir. 1987) (no waiver where EPA considered the issue, even though the petitioner did not submit comments).

Even though Plaintiffs did not submit comments, other comments opposed the delay and referenced the Formaldehyde Act's statutory deadlines. The Composite Panel Association supported the three-month extension, but no extension beyond then. Dkt. 32-8. It pointed out that EPA had missed its 2013 statutory deadline and stated that "further delay after seven years of development is unwarranted. This regulation has taken almost twice as long to produce as the United States' involvement in World War II. It is time to proceed." Dkt. 32-16, at 5. It also emphasized Congress's intent in adopting the Formaldehyde Act to ensure the California standards apply throughout the country and to level the playing field for U.S. manufacturers. Dkt. 32-16, at 2. An anonymous comment opposed any extension (Dkt. 32-9), while another stated there should be a limit on how many extensions are given. 0003 (Dkt. 32-5). EPA was on notice as demonstrated by the fact that it addressed its authority to extend the compliance dates and it received public comments opposing the extension it ultimately granted.

Third, the waiver rule is inapplicable to issues concerning the agency's power to act. *See Natural Res. Def. Council v. EPA*, 755 F.3d 1010, 1022-23 (D.C. Cir. 2014) (even if not raised in comments, EPA must address its statutory authority to promulgate an exemption from the statute's requirements). The Ninth Circuit has refused to apply the waiver rule to a claim that the agency exceeded its statutory authority in promulgating a regulation extending the time allowed for

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Medicare providers to appeal a reimbursement determination. *W. Medical Enters., Inc., v. Heckler*, 783 F.2d 1376, 1379-80 (9th Cir. 1986). Similarly, it held that a failure to raise a claim during the administrative process does not bar a claim that an agency violated procedural statutory requirements. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d. at 1534-35. Therefore, Plaintiffs' *ultra vires* claim may be decided, even though the issues was not raised by Plaintiffs in comments.

Should the Court disagree, it should excuse Plaintiffs' failure to comment. The rule in the Ninth Circuit is that courts can excuse waiver. *Portland General Elec. Co.*, 501 F.3d at 1024. The Ninth Circuit has described factors to be considered and balanced in determining whether to apply the waiver rule:

> the agency's interests "in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances."

Marathon Oil Co. v. U.S., 807 F.2d 759, 768 (9th Cir. 1986) (quoting *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 369-70 (9th Cir. 1982); *see also Portland General Elec. Co.*, 501 F.3d at 1024 (waiver rule protects agency's prerogative to apply its expertise and create a record for judicial review).

The circumstances warrant dispensing with the waiver rule for two reasons. First, Plaintiffs' challenge is a purely legal one, namely that EPA lacks the authority to grant the extension. Most cases applying the waiver rule involve challenges to the agency's methodologies or its reasoning in the exercise of discretionary authority, not the agency's legal authority to take an action. *See, e.g., Universal Health Services*, 363 F.3d at 1019-21. This is not a situation where EPA could have corrected factual errors or provided a more reasoned explanation that would justify its action. An agency has an independent obligation to ensure it is acting within its statutory authority, as EPA recognized by addressing its authority in the proposed Formaldehyde Rule. Second, given the lack

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

of notice that EPA was considering a year-long extension and the risk of additional delay if their adverse comment derailed the direct final rule process, Plaintiffs had ample reason for failing to raise EPA's lack of statutory authority to push the compliance deadline to December 12, 2018. For these reasons, Plaintiffs did not need to raise the question of EPA's authority to extend the compliance deadlines, and their failure to submit comments doing so should be excused.[5]

V. PARTIAL VACATUR IS THE APPROPRIATE REMEDY.

As Plaintiffs' motion explains, the APA makes vacatur of unlawful agency actions the standard remedy. While it allows an agency action to be remanded without vacatur in rare circumstances, that exception is inapplicable where, as here, the agency has exceeded its statutory authority. *See Fed. Commc'n Comm'n v. Nextwave Pers. Commc'ns Inc*., 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law.'"). Since the agency lacks the authority to take the action, there is nothing to remand. EPA appears to concede that vacatur is appropriate if it exceeded its authority, arguing instead that it had such authority. EPA Opp. at 22 & n.15.

Where an agency action will be remanded for proceedings that could correct the APA violation, the Ninth Circuit allows remand without vacatur based on (1) the seriousness of the agency's legal error; and (2) the disruptive consequences of an interim change that itself may be changed. *Cal. Communities Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). Under this test, even if this Court remands the rule, partial vacatur would still be the appropriate remedy.

[5] Ironically, the National Association of Home Builders joins an *amicus* brief invoking the waiver rule, even though the Home Builders did not comment on the proposed delay rule, the brief far exceeds the scope of the comments the other *amici* submitted, and it cites information that is not in the administrative record. Brief of *Amici* Int'l Wood Products Assoc. *et al*. (Dkt. 37-1).

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

First, the violation is serious since EPA acted contrary to the Formaldehyde Act and Congress's intent by allowing imported wood products to emit (and people to be exposed to) greater amounts of formaldehyde than the mandatory emission limits for years beyond what Congress intended. While EPA could cure its notice-and-comment rulemaking violation, it cannot cure the legal deficiency plaguing the lengthy extension. EPA has offered no response to this argument, nor has it offered any competing analysis of the applicable legal standards.

Second, the Ninth Circuit has left an agency action in place during remand to preserve environmental and health protections. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). In doing so, it has been guided by the protective purposes of the underlying statute. Here, the Formaldehyde Act sought to protect people from exposure to formaldehyde, which causes cancer, respiratory illnesses, and asthma. Remand without vacatur would defeat the purpose of the Act. EPA has offered no response to this line of cases.

Third, EPA asserts (at 22) without any explanation that vacatur will produce disruptive consequences. Three sets of *amici* try to fill the void by focusing on obstacles to obtaining certification under EPA's new third-party certification scheme. Dkts. 37-1, 44, 47-1.

Such obstacles are beside the point because what Plaintiffs seek and what the Formaldehyde Act requires is compliance with the mandatory emission standards, not the third-party certification scheme. The Formaldehyde Act requires that the mandatory emission standards shall apply to wood panels by a date certain—180 days after promulgation of the rules.

While the implementing rules must include provisions relating to third-party testing and certification, the Formaldehyde Act did not preclude EPA from adopting the CARB certification scheme or allowing compliance with the CARB certification requirements to suffice during a

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

transition period. In fact, this is how EPA designed its Formaldehyde Rule. It allows CARB-approved third-party certifiers to certify composite wood products under the Formaldehyde Act during a two-year transition period ending December 12, 2018, 81 Fed. Reg. at 89,676, 89,725 (codified at 40 C.F.R. §770.2(d)), which the Formaldehyde Delay Rule extended to March 22, 2019. 82 Fed. Reg. at 44,536-37. To the extent *amici* have identified a flaw in giving reciprocity to CARB third-party certifiers, *see* Dkt. 37 at 2, 4-7, 10, 12-13; Dkt. 52 at 6-12; Dkt. 47-1 at 3-8, Plaintiffs have no objection to a remedy that corrects that flaw or that allows CARB certification to suffice during the transition period. Two of the *Amici* represent that their members comply with the substantive emission standards. Dkt. 52 at 2-3, 12; Dkt. 47-1 at 2-3. The remedy Plaintiffs seek would have therefore no impact on those *amici.*

Amici International Wood Products Association *et al*. go too far in seeking to delay applicability of the emission standards to imports and to imports from China in particular. Dkt. 37 at 14-15. Such a remedy would defy Congress's intent and the overall purpose of the Formaldehyde Act. The impetus behind the Act was Congress's desire to stop the flow of imports that emit greater amounts of formaldehyde than domestic manufacturers. While most domestic producers were complying with the CARB standards, the same could not be said of imports. Congress wanted to level the playing field for domestic manufacturers and ensure that the U.S. public would stop being exposed to formaldehyde fumes from imported wood products.

Amicus American Home Furnishings Alliance misstates the facts in contending (Dkt. 52 at 12-13) that partial vacatur will not benefit public health. When Congress passed the Formaldehyde Act, most domestic manufacturers were complying with the CARB standards. Congress wanted to protect the American public from the composite wood products not in compliance. Imports were the primary target. Congress crafted the entire formaldehyde regulatory scheme to protect the

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

public from cancer, respiratory illnesses, asthma, and other illnesses from these noncomplying products. The fact that many regulated entities comply with the CARB standards or with voluntary standards based on them misses the point. *See* Dkt. 37 at 3, 17. Congress demanded more. It mandated compliance with binding standards for all wood products used in the United States.

Plaintiffs ask this Court to order a remedy that furthers this congressional intent by requiring all composite wood products manufactured or imported to comply with the emission standards, while allowing certification to be accomplished through either CARB or EPA's third-party certification scheme. This remedy would further the purpose of the Formaldehyde Act, while avoiding the dislocation feared by manufacturers in compliance with the CARB standards.

Plaintiffs recognize that the passage of time has made it impossible to require compliance with the Formaldehyde Act's 180-day compliance deadline or even the Formaldehyde Rule's December 12, 2017 the compliance deadline. The fact that an agency has missed a statutory deadline does not preclude the Court from crafting a remedy that conforms as close as possible to the statutory mandates. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 (2003) (assignment of retirees to coal companies for funding retirement benefits valid even though done after the deadline); *Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1190-91 (9th Cir. 2012) (EPA can adopt remedial plan to meet Clean Air Act obligations after it missed the statutory deadline); *see also Dolan v. United States*, 560 U.S. 605 (2010) (Court has authority to order restitution in accordance with statute directing restitution "shall" be ordered, even though deadline for doing so had passed). The Court's obligation is to vindicate the statutory purposes. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542-43 (1987). This Court can craft a remedy that heeds Congress's direction to require expeditious compliance with the emission standards, even if it cannot be as expeditious as Congress directed.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Two *amici* raise a valid concern that EPA's actions have deprived regulated entities of advance notice of when compliance will be required. Dkt. 47-1 at 7-8; Dkt. 52 at 10-11. Members of these two *amici* already comply with the CARB standards. Given that Plaintiffs seek a remedy requiring such compliance, while allowing CARB certification to satisfy other requirements, these manufacturers need little, if any, notice. Plaintiffs acknowledge, however, that advance notice of regulatory requirements is a feature of administrative law. For that reason and because Plaintiffs did not object to the direct final rule extension to March 22, 2018, a remedy that would do justice to the Act and provide notice to the regulated industry would be to default to the compliance deadline in the direct final and proposed delay rule – March 22, 2018 – and allow certification to be done under either CARB or EPA's certification scheme during a one-year transition period or possibly longer.

CONCLUSION

The Court should declare the Formaldehyde Delay Rule *ultra vires* and arbitrary, capricious, and contrary to law and vacate the compliance deadline extension to the extent it goes beyond March 22, 2018, but allow certification in compliance with CARB during the transition period that currently ends March 22, 2019. A conforming proposed order is attached.

DATED this 15th day of December, 2017.

Respectfully submitted,

/s/ Patti A. Goldman
PATTI A. GOLDMAN (WSBA #24426)
Pro Hac Vice
ASHLEY N. BENNETT (DCBA #1044215)
Pro Hac Vice

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
Ph: (206) 343-7340 | Fax: (206) 343-1526
pgoldman@earthjustice.org
abennett@earthjustice.org

MONEEN S. NASMITH (NYSBA #442704)
Pro Hac Vice
Earthjustice
48 Wall St., Floor 19
New York, NY 10005
Ph: (212) 845-7376
mnasmith@earthjustice.org

STACEY P. GEIS (CSBA #181444)
Earthjustice
50 California, Suite 500
San Francisco, CA 94111
Ph: (415) 217-2000 | Fax: (415) 217-2040
sgeis@earthjustice.org

Attorneys for Plaintiffs Sierra Club and A Community Voice-Louisiana