



for review for possible inclusion in a supplemental Administrative Record, Defendants were unable to provide the materials to Plaintiffs by July 17, 2019. Defendants now intend to complete the review of the additional materials and to provide Plaintiffs with additional material to supplement the Administrative Record by no later than August 16, 2019.

4. Once the record is complete, there may be issues requiring judicial resolution regarding the appropriateness of including materials in the Administrative Record that Defendants assert are deliberative and Defendants providing a privilege log.

#### Additional Review of NEPA Rule

5. Defendants are now in the process of reviewing the Farm Service Agency's (FSA) National Environmental Policy Act regulation that was published on August 3, 2016, at 81 Fed. Reg. 51274 and is at issue in this case (the NEPA Rule).
6. To that end, Defendants are in the process of preparing a final rule for publication in the Federal Register to rescind 7 C.F.R. § 799.41(a)(9) and (10). Decl. of Steven Peterson ¶ 5. Exhibit 1 herein. Defendants anticipate that the rule will be published in January 2020. *Id.* ¶ 7.
7. When the final rule rescinding these two provisions is published and in effect, Defendants will revert to the procedure for treatment of medium and large Confined Animal Feeding Operations (CAFOs) that was set forth in 7 C.F.R. part 1940, subpart G. *Id.* ¶ 5.
8. Any further revisions to the NEPA Rule for the treatment of medium and large CAFOs would take place in a separate rulemaking proceeding as a proposed rule and would include a public comment period pursuant to 5 U.S.C. § 553. *Id.*

Remaining Issues

*Defendants' Position*

9. Because FSA is preparing a final rule that will rescind the part of the NEPA Rule that Plaintiffs challenge in this case, *i.e.* the medium CAFO categorical exclusion, Defendants believe that further judicial proceedings challenging that rule will no longer be necessary. Defendants accordingly intend to file a motion, no later than August 30, 2019, to hold this case in abeyance until FSA publishes the final rule or until January 31, 2020, whichever is earlier.

*Plaintiffs' Position*

10. Plaintiffs do not intend to oppose abeyance, provided Defendants move the Court *after* Defendants have certified the complete Administrative Record and provided the Administrative Record to Plaintiffs.
11. However, Plaintiffs are concerned the approach Defendants have outlined in the Peterson Declaration (implementing an environmental review process through a preamble rather than text of a rule, and possibly without notice-and-comment procedures) may be unlawful and not binding on CAFO operators. *See Kennecott Utah Copper Corp. v. Dept. of Interior*, 88 F.3d 1191, 1122-23 (D.C. Cir. 1996) (holding that substantive provisions of preamble do not have force of law because it is not “sufficiently clear” agency intends to bind itself); *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (“[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter such a rule without notice and comment.”) (alterations and internal quotation marks omitted). Plaintiffs’ claims thus may not be resolved by

FSA's proposed plan.

12. Therefore, the parties jointly believe the appropriateness of abeyance, and any conditions thereto, should be resolved after briefing from both parties on Defendants' motion.

Respectfully submitted this 31st day of July 2019.

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