

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
WICHITA FALLS DIVISION

STATE OF TEXAS, <i>et al.</i> ,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 7:15-cv-00151-O
	§	
UNITED STATES OF AMERICA, <i>et al.</i> ,	§	
	§	
Defendants.	§	

**ORDER**

Plaintiffs assert, among others, claims that Defendants violated the Administrative Procedure Act (“APA”). Defendants argue, among other things, that the Court lacks jurisdiction over Plaintiffs’ APA claims because they were filed outside the applicable statute of limitations. The Court requires further briefing on the statute of limitations issue.

Defendants argue that Plaintiffs’ APA claims are time-barred because the actuarial soundness rule at issue in this case was published in 2002—and the six-year statute of limitations lapsed in 2008, seven years before Plaintiffs filed suit. Defs.’ Br. Supp. Mot. Summ. J. 39–40, ECF No. 63. Plaintiffs respond that the 2015 ASOP 49 functionally altered the definition of “actuarial[] sound[ness]” announced in the original 2002 rule and therefore triggered a new statute of limitations period. Pls.’ Reply 14, ECF No. 66.

For Plaintiffs to proceed on their APA challenge, they must first identify a waiver of sovereign immunity, for “the United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). A waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *United States v. King*, 395 U.S. 1, 4 (1969). Plaintiffs do not allege that any of the statutes and regulations that they attack independently waive sovereign immunity. Accordingly, Plaintiffs must challenge the rule through the APA’s waiver of sovereign immunity for persons legally wronged, adversely affected, or aggrieved by “agency action,” who seek non-monetary relief. 5 U.S.C. § 702. Because the APA lacks a specific statutory limitations period, challenges are “governed by the general statute of limitations provision of 28 U.S.C. § 2401(a), which provides that every civil action against the United States is barred unless brought within six years of accrual.” *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv.*, 112 F.3d 1283, 1286 (5th Cir. 1997).

The limitations period on a procedural challenge to a regulation ordinarily begins to run when the regulation is published in the Federal Register. *Dunn-McCampbell*, 112 F.3d at 1287 (citations omitted).

Here, it is undisputed that Plaintiffs' challenge to the rule was brought more than six years after its 2002 publication. But Plaintiffs may sustain a substantive challenge to the rule after the APA's six-year limitation period if "the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority . . . [and Plaintiffs] show some direct, final agency action involving [them] within six years of filing suit." *Id.* Plaintiffs must also show that this direct, final agency action was applied to them *or* that they had unsuccessfully petitioned the agency for relief from it. *Id.* at 1287–88 ("If *Dunn-McCampbell* were able to point to such an application of the regulations here, or if they had petitioned the National Park Service to change the 9B regulations and been denied, this court might have jurisdiction to hear that case.").

Based on the foregoing, within 10 days from the date of this order, Plaintiffs must file a brief, no more than 10 pages in length, providing all reasons why they believe that their substantive APA claims are timely under the reasoning of *Dunn-McCampbell*. See *Dunn-McCampbell*, 112 F.3d at 1287–88. Defendants must respond to Plaintiffs' brief within 10 days of its filing and Plaintiffs may reply to Defendants brief no later than 5 days of its filing.

**SO ORDERED** this **1st day** of **November, 2017**.

  
Reed O'Connor  
UNITED STATES DISTRICT JUDGE