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UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

STATE OF WYOMING, *et al.*, Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Respondents, and STATE OF CALIFORNIA and STATE OF NEW MEXICO, State Respondent-Intervenors.	Case No. 2:16-cv-00285-SWS [Lead] [Consolidated with 2:16-cv-00280-SWS] **STATE RESPONDENTS' CONSOLIDATED OPPOSITION TO PETITIONERS' MOTIONS TO SUSPEND IMPLEMENTATION DEADLINES AND FOR PRELIMINARY INJUNCTION OR VACATUR**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Federal Register Notices

Court Rules

Other

INTRODUCTION

The States of California (by and through the California Air Resources Board) and New Mexico ("State Respondents") oppose Petitioners' latest motions for preliminary injunctive relief. *See* ECF No. 195 ("State Petitioners' Motion"); ECF No. 196 ("Industry Petitioners' Motion"). On two separate occasions, this Court has denied or declined to hear Petitioners' requests for such relief in their challenges to the U.S. Bureau of Land Management's ("BLM") updated regulations governing the waste of natural gas and royalty payments from oil and gas operations on federal and Indian lands, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (the "Waste Prevention Rule" or "Rule"). *See* ECF Nos. 92, 163. Petitioners are precluded from relitigating issues that this Court has already decided in its Order denying their first set of preliminary injunction motions—a ruling that has not been appealed. Petitioners have also failed to meet their burden to demonstrate a right to the extraordinary relief of a preliminary injunction or stay, and have failed to provide any basis for vacatur of a duly-promulgated rule.

Meanwhile, Federal Respondents take the untenable position that this Court should enjoin the Rule's already-effective requirements pending BLM's own reconsideration of the Rule, while simultaneously asking this Court to stay the case and decline to rule on the merits of Petitioners' legal challenges. ECF No. 207 ("BLM Response"). Federal Respondents have offered no authority for their position that this Court can enjoin existing regulatory requirements pending *not* this Court's adjudication of the merits, but rather the agency's own reconsideration.

The Court has previously voiced its concerns about judicial economy and prudential ripeness. *See* ECF No. 189 at 4–5. To the extent that these concerns weigh against adjudication of the merits of this case, they apply with equal force to adjudication of the motions for preliminary relief, all of which require the Court to evaluate the merits of the underlying challenge. Should the Court wish to proceed with this litigation, State Respondents agree with Intervenor-Petitioners North Dakota and Texas that the logical next step is to complete its adjudication of the merits of Petitioners' challenges. *See* ECF No. 194 at 8-9.

Consequently, State Respondents request that the Court deny State Petitioners' and Industry Petitioners' Motions.

BACKGROUND

State Respondents have detailed the background of this action in their Oppositions to Industry Petitioners' Second Motion for Preliminary Injunction and to Petitioners' Briefs in Support of Petitions for Review of Final Agency Action and, for the sake of brevity, do not repeat that background here. *See* ECF No. 172 at 2–7; ECF No. 174 at 1–7. However, there are several mischaracterizations of the record in Petitioners' Motions, as well as recent legal developments, that warrant discussion.

First, Industry Petitioners incorrectly state that the Rule's requirements with "January 17, 2018 compliance deadlines" are now in effect "for the very first time" and "suddenly and immediately require compliance." ECF No. 197 ("Industry Petitioners' Memo.") at 1, 3; *see also* State Petitioners' Motion at 1 ("the Waste Prevention Rule had never been implemented in full"). However, these requirements have been "in effect" since the Rule became effective January 17, 2017. AR[1] 366 (81 Fed. Reg. at 83,009). BLM specifically modified the final Rule to include a one-year phase-in period for several requirements in order to provide operators with ample time to come into compliance well before the January 2018 deadline, not so that they could wait until the last minute to take action. *See* AR 385 (81 Fed. Reg. at 83,033). Moreover, several of the provisions that Petitioners seek to enjoin (such as drilling applications and plans; and downhole well maintenance and liquids unloading) have "required compliance" since the Rule's effective date. *See* AR 430, 438-439 (81 Fed. Reg. at 83,078, 83,086-87).

Second, on December 8, 2017, BLM published a rule purporting to suspend key requirements of the Waste Prevention Rule that were already in effect, or set to take effect in January 2018, until January 17, 2019. 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Suspension Rule"). Following a challenge by State Respondents and others, the Suspension Rule was enjoined by a court in the Northern District of California. *State of California v. Bureau of Land Mgmt.*, --- F. Supp. 3d ---, 2018 WL 1014644 (N.D. Cal. Feb. 22, 2018). In enjoining the Suspension Rule,

[1] The administrative record in this matter is cited as "AR [page number]," excluding leading zeros.

that court found that: (1) Plaintiffs had shown a likelihood of success on the merits of their claim that the Suspension Rule was not grounded in a reasoned analysis and was therefore arbitrary and capricious; (2) Plaintiffs established irreparable harm in the form of environmental injuries including the emission of methane and other hazardous air pollutants; and (3) that the balance of equities and public interest weighed in favor of an injunction because compliance costs to even the smallest regulated entities would be minimal, and "the financial costs of compliance are not as significant as the increased gas emissions, public health harms, and pollution." *Id*. at *13-17. All of the provisions that Petitioners now ask this Court to suspend were included in the Suspension Rule. *Compare* 82 Fed. Reg. at 58,052-56, *with* State Petitioners' Motion at 3; Industry Petitioners' Memo. at 1.

Third, Petitioners are themselves responsible for the delays in adjudicating the merits of their challenge. When this Court denied Petitioners' first set of preliminary injunction motions, it established an expedited briefing schedule that would have concluded merits briefing by the end of April 2017. *See* ECF No. 92 at 29. However, on March 3, 2017, Petitioners requested an extension of the briefing schedule "to allow for review of the administrative record and preparation of a merits brief and for Congress to consider whether to exercise its authority under the Congressional Review Act." ECF No. 97 at 3. This extension was granted by the Court on March 6, 2017. ECF No. 99. On March 30, 2017, Industry Petitioners filed a second request to extend the briefing schedule due to issues related to the administrative record, and requested to file a status report at a later date to establish a new briefing schedule. ECF No. 110. This request was granted in part by the Court. ECF No. 118. Moreover, when Petitioners moved to stay this litigation on December 26, 2017, they recognized that State Respondents had already challenged and moved to enjoin BLM's Suspension Rule. ECF No. 186 at 4. Therefore, Petitioners were well aware that their requests could lead to the Rule coming back into effect prior to a decision by this Court on the merits.

Fourth, the Proposed Revision Rule published by BLM on February 22, 2018 does not reach any conclusions regarding "whether parts of the Waste Prevention Rule are within its statutory authority." Industry Petitioners' Memo at 3; *see* 83 Fed. Reg. 7,924 (Feb. 22, 2018)

("Proposed Revision Rule"). Rather, the Proposed Revision Rule discusses this Court's stated concerns in its Order denying Petitioners' motions for a preliminary injunction, and then "requests comment on whether the 2016 final rule was consistent with its statutory authority." 83 Fed. Reg. at 7,927. The Suspension Rule expressed similar, undefined "concerns" but made no determinations regarding the extent of BLM's statutory authority. Industry Petitioners' Motion at 10; *see* 82 Fed. Reg. at 58,051. Moreover, neither the Suspension Rule nor the Proposed Revision Rule are part of the administrative record in this action and were not before the agency at the time the Rule was promulgated.

Finally, while Petitioners claim that this Court "has recognized the Waste Prevention Rule's fundamental flaws" in its earlier preliminary injunction ruling, *see* Industry Petitioners' Memo. at 9, they omit the fact that this Court denied their motions and held that Petitioners had failed to establish a likelihood of success on the merits or irreparable harm in the absence of an injunction. ECF No. 92. Specifically, this Court preliminarily found that Petitioners had not established that any aspects of the Rule were inconsistent with the Clean Air Act, lacked an independent waste prevention purpose, or exceeded BLM's authority. *Id*. at 20. This Court also denied Petitioners' claims that the Rule was arbitrary and capricious. *Id*. at 22. Finally, the Court found that Petitioners had failed to demonstrate irreparable harm in the absence of an injunction. *Id*. at 25-27.

STANDARD OF REVIEW

The purpose of a preliminary injunction is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction is an "extraordinary and drastic remedy" that "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal quotations and citations omitted). Rather, such relief "should not be issued unless the movant's right to relief is 'clear and unequivocal.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or

withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008) (internal quotations omitted).

To obtain a preliminary injunction, the moving party must demonstrate four factors: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest. *Id*. at 20. A plaintiff's failure to prove any one of the four preliminary injunction factors renders its request for injunctive relief unwarranted. *See id*. at 23–24. "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id*. at 24 (internal quotations and citations omitted).

The standard for a judicial stay of regulatory requirements under Section 705 of the Administrative Procedure Act is the same as the preliminary injunction standard. *See* 5 U.S.C. § 705 ("On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court … may issue all necessary and appropriate process … to preserve status or rights pending conclusion of the review proceedings."); State Petitioners' Motion at 3-4. Therefore, a party moving for a stay under Section 705 must establish that the four equitable factors articulated by Supreme Court in *Winter* weigh in the movant's favor. *See Bill Barrett Corp. v. U.S. Dep't of Interior*, 601 F. Supp. 2d 331, 336 (D.D.C. 2009) (applying *Winter* and noting that plaintiff's "failure to establish irreparable harm is also fatal to [plaintiff's] request for relief under Section 705 of the APA").

ARGUMENT

Petitioners and Federal Respondents have offered this Court no valid basis for suspending effective requirements of the Waste Prevention Rule without establishing all four prongs of the preliminary injunction test. This Court's prior denial of injunctive relief precludes Petitioners' (again) renewed motions for preliminary relief, and Petitioners have failed to offer any new information that would entitle them to an injunction.

Further, the regulatory "chaos and uncertainty" of which Petitioners complain will not be mitigated by the requested relief. *See* State Petitioners' Motion at 1. The Waste Prevention Rule

went into effect on January 17, 2017 and remains in effect today, despite BLM's repeated illegal attempts to postpone and suspend the Rule's key requirements. *See State of California v. U.S. Bureau of Land Mgmt*., 277 F. Supp. 3d 1106, 1127 (N.D. Cal. 2017); *California v. BLM*, 2018 WL 1014644 at *10. To the extent that regulated entities have been subject to a "ping-ponging" of regulatory requirements, *see* State Petitioners' Motion at 2, a suspension of these already-effective provisions would only exacerbate that uncertainty. The ultimate result of BLM's currently-pending reconsideration of the Rule is as yet unknown, and may not be consistent with the requested relief. Therefore, suspending some of the Rule's requirements, as Petitioners and Federal Respondents suggest, would merely add to the "significant harm and uncertainty" that Petitioners assert has resulted from BLM's "dramatic flip flops in the regulatory regime." *See* State Petitioners' Motion at 5.

Finally, because the currently-pending motions for preliminary relief require this Court to evaluate the merits of Petitioners' underlying challenges to the Waste Prevention Rule, *see Winter*, 555 U.S. at 20, any concerns regarding judicial economy and prudential ripeness would apply equally to these motions as to the ultimate adjudication of the merits. Given that briefing on the merits is nearly complete, should the Court decide to proceed with this litigation, State Respondents request that the Court deny Petitioners' latest requests for preliminary relief and move forward with deciding the merits of this action.[2] *See U.S. ex rel. Beringer v. O'Grady*, 737 F. Supp. 478, 480 n.1 (N.D. Ill. 1990) ("Since a decision on the motion for a preliminary injunction would require the same extensive review of the record necessary to decide the merits of this case, and since the parties have agreed to have the court resolve the merits at this time, the court finds that a decision on the merits is now appropriate in lieu of a ruling on the motion for a preliminary injunction.").[3]

[2] State Respondents take no position on Intervenor-Petitioners' motion to expedite any remaining merits briefing or the hearing on the merits. *See* ECF No. 194 at 3, 9-10.

[3] This is particularly true here given that Industry Petitioners have simply attached their merits brief to their Motion in order to demonstrate a likelihood of success on the merits. *See* Industry Petitioners' Memo. at 10-11 and Exhibit D.

I. THIS COURT'S PRIOR DENIAL OF THE FIRST SET OF PRELIMINARY INJUNCTION MOTIONS PRECLUDES PETITIONERS' MOST RECENT ATTEMPTS TO OBTAIN AN INJUNCTION.

This Court should deny Petitioners' latest attempts to enjoin, stay, or vacate the Waste Prevention Rule based on the same grounds that this Court already addressed in the first set of preliminary injunction motions. In particular, the doctrine of issue preclusion "bars a party from relitigating an issue once it has suffered an adverse determination on the issue." *Park Lake Resources Ltd. Liability v. U.S. Dept. of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004). Preliminary injunction rulings often lack preclusive effect because they are not a judgment on the merits. However, "[p]reclusion may properly be applied" where the "same showing" on the merits and balance of hardships "are made and it appears that nothing more is involved than an effort to invoke a second discretionary balancing of the same interest." 18A Charles Alan Wright *et al*., Fed. Prac. & Proc. Juris. § 4445 (2d ed.); *see Pinson v. Pacheco*, 424 F. App'x 749, 755 (10th Cir. 2011) ("As the magistrate judge explained, and the district court adopted [in denying plaintiff's third preliminary injunction motion, plaintiff] 'provided no new, substantial evidence to support his motion for a preliminary injunction.'"); *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461, 474 n.11 (3d Cir. 1997) ("findings made in granting or denying preliminary injunctions can have preclusive effect if the circumstances make it likely that the findings are 'sufficiently firm' to persuade the court that there is no compelling reason for permitting them to be litigated again"); *Hayes v. Ridge*, 946 F. Supp. 354, 364-65 (E.D. Pa. 1996) (discussing cases that "support the proposition that a preliminary injunction ruling has preclusive effect with regard to subsequent motions for preliminary injunction").

State Petitioners rely entirely on their earlier motion for a preliminary injunction and do not even attempt to satisfy the factors required for a stay. *See* States Petitioners' Motion at 4-5. Similarly, Industry Petitioners have failed to raise any new arguments to demonstrate a likelihood of success on the merits that were not already briefed in their first preliminary injunction motion. While Industry Petitioners have focused more narrowly on the costs of complying with the Waste Prevention Rule's January 2018 deadlines to demonstrate irreparable

harm, *see* Industry Petitioners' Memo. at 5–9, these allegations are substantially similar to its earlier assertions of harm which the Court rejected. *See* ECF No. 92 at 24–27. Moreover, as discussed below, compliance costs do not provide an adequate basis to demonstrate irreparable harm for purposes of a preliminary injunction. *See infra* at Part II.B. Finally, Industry Petitioners offer no new arguments regarding the balance of the hardships or the public interest. *See* Industry Petitioners' Memo. at 11–14.

Given this Court's thorough consideration of Petitioners' earlier preliminary injunction motions, its Order denying those motions should have preclusive effect here.

II. INDUSTRY PETITIONERS HAVE FAILED TO DEMONSTRATE THAT A PRELIMINARY INJUNCTION IS WARRANTED.

A. Industry Petitioners Fail to Make Any Showing to Demonstrate a Likelihood of Success on the Merits.

Industry Petitioners have offered nothing new in their Motion to demonstrate a likelihood of success on the merits that this Court has not already considered and rejected. Industry Petitioners ignore the fact the Court ultimately concluded that their first preliminary injunction motion failed to establish a likelihood of success on the merits and was denied. *See* ECF No. 92 at 20-22. Rather than briefing new arguments, Industry Petitioners attempt to "incorporate by reference" their merits brief in this action (ECF No. 142), Industry Petitioners Memo. at 9, which repeats arguments already considered and results in their Motion greatly exceeding the page limits set for preliminary injunction motions. *See* Local Civil Rule 7.1(b)(2)(B).[4]

The only additional "fact" added to existing arguments made by Industry Petitioners on the merits are "concerns" expressed by BLM in the Suspension Rule and the Proposed Revision Rule. Industry Petitioners' Memo. at 10. These statements do not provide any basis, however, for a preliminary injunction. As discussed above, BLM has not reached any conclusions

[4] Industry Petitioners tried this same tactic in filing their second motion for a preliminary injunction. ECF No. 161 at 9. On November 16, 2017, the Court denied Industry Petitioners' Motion for Leave to Exceed Page Limit. ECF No. 164. Industry Petitioners have failed to file another motion to exceed the page limit, and their Motion can be denied on that basis alone. To the extent that the Court considers their merits brief as part of this Motion, it should also consider State Respondents' Opposition, ECF No. 174.

regarding its statutory authority for the Waste Prevention Rule. *See* 82 Fed. Reg. at 58,051; 83 Fed. Reg. at 7,927. Moreover, as courts have recognized, "[i]n the context of an ongoing rulemaking, an agency's statement about its legal authority to adopt a proposed rule is not the 'consummation' of the agency's decisionmaking process. Formally speaking, such a statement is a proposed view of the law." *In re Murray Energy Corp*., 788 F.3d 330, 336 (D.C. Cir. 2015) (holding the proposed rules are not final agency action subject to judicial review). Finally, neither the Suspension Rule nor the Proposed Revision Rule are part of the administrative record that was lodged in this action on May 17, 2017, ECF No. 127. *See Western Org. of Resource Councils v. Bureau of Land Mgmt.,* 591 F. Supp. 2d 1206, 1215-16 (D. Wyo. 2008) (Under the APA, "judicial review is limited to the administrative record that was before the agency at the time it made its decision") (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)).[5]

Consequently, Industry Petitioners have failed to demonstrate a likelihood of success on the merits.

B. Industry Petitioners Have Failed to Demonstrate Irreparable Harm.

Industry Petitioners make two arguments to allege they will suffer "irreparable harm" in the absence of an injunction. Industry Petitioners' Memo. at 5-9. First, Industry Petitioners contend that they will be harmed by the costs of complying with the Rule's requirements that have January 2018 compliance deadlines or potential additional royalty obligations. *Id*. at 6-8; Declaration of Kathleen M. Sgamma ("Sgamma Decl."), ECF No. 197-3; *see also* BLM Response at 12-13, 15 (stating that Petitioners must now "expend unrecoverable funds to comply" with the Rule). Second, Industry Petitioners suggest that these compliance costs will

[5] Pursuant to Local Civil Rule 83.6(b)(3), "[e]xtra-record evidence which was not considered by the agency will not be permitted except in extraordinary circumstances. Any request for completion of the record, or for consideration of extra-record evidence, must be filed within fourteen (14) days after the record was lodged with the Clerk of Court." Petitioners have failed to file any such request for consideration of extra-record evidence.

reduce oil production by "approximately 16.9 million barrels … over just the next several months." Industry Petitioners' Memo. at 7. These arguments entirely lack merit.[6]

First, as Industry Petitioners recognize, "economic loss alone is generally insufficient" to demonstrate irreparable harm. Industry Petitioners' Memo. at 5; *see Heideman*, 348 F.3d at 1189 ("[E]conomic loss usually does not, in and of itself, constitute irreparable harm."); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) ("Financial injury is only irreparable where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.") (internal quotations and citation omitted). While Industry Petitioners cite case law regarding "damages" that cannot be recovered as constituting irreparable harm, there are no damages at issue here and these cases are irrelevant. *See* Industry Petitioners' Memo. at 5, 8,

Rather, the primary "harm" alleged by Industry Petitioners are the "cost to the industry of complying" with the Waste Prevention Rule. Industry Petitioners' Memo. at 6. It is well established that compliance costs do not typically constitute irreparable harm for purposes of a preliminary injunction. *See, e.g., Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm"); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm."); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527–28 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction."); *Wisc. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674-75 (D.C. Cir. 1985) (finding that compliance costs do not support a finding of irreparable injury).

[6] Interestingly, Industry Petitioners' irreparable harm allegations are the same estimates provided to this Court in October 2017 when they filed their second motion for preliminary injunction. *Cf.* Industry Petitioners' Memo. at 7 *with* ECF No. 161 at 6-7. Even though this Court did not grant such relief, it appears that the imminent and irreparable harm alleged in October 2017 did not come to pass. Industry Groups' reliance on these same allegations in its current Motion should be viewed with skepticism.

Moreover, "[c]ompliance costs already incurred cannot constitute the irreparable harm Plaintiffs must show because the standard is inherently prospective." *Chamber of Commerce of U.S. v. Hugler*, 2017 WL 1062444, *2 (N.D. Tex. Mar. 20, 2017).

With regard to the Waste Prevention Rule, operators should already be substantially complying with requirements that had January 2017 deadlines, and they have had ample time since the Rule's effective date to prepare to meet the January 2018 deadlines.[7] Any alleged inability to comply with the Waste Prevention Rule is a result of Industry Petitioners' own making and does not provide any basis for injunctive relief. *See Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable"); *Lee v. Christian Coal. of Am., Inc*., 160 F. Supp. 2d 14, 33 (D.D.C. 2001) ("The case law is well-settled that a preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted.") (quotation omitted). As a district court in California recently concluded:

> If some of the regulated entities of the oil and gas industry will not be able to meet the January 17, 2018 compliance date because they suspended compliance efforts after the District of Wyoming denied the preliminary injunction and the Bureau issued the Postponement Notice, that is a problem to some extent of their own making and is not a sufficient reason for the Court to decline vacatur.

California v. BLM, 277 F. Supp. 3d at 1126.

The cases cited by Industry Petitioners on this issue do not support their argument. *See* Industry Petitioners' Memo. at 5, 8. First, Justice Scalia's concurring opinion in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), where six justices joined Justice Blackmun's opinion rejecting a claim of irreparable harm, does not provide authority for the proposition that compliance costs provide evidence of such harm. *See United States v. Williams*, 468 F. App'x 899, 910 n.15 (10th Cir. 2012) ("[A]bsent a fragmented opinion, a concurring opinion does not

[7] In vacating BLM's action to "postpone" the Rule under APA Section 705, the U.S. District Court for the Northern District of California rejected the argument that the January 2018 compliance deadlines had no effect on pre-deadline behavior, noting that "the Rule imposed compliance obligations starting on its effective date of January 17, 2017 that increased over time but did not abruptly commence on January 17, 2018." *California v. BLM*, 277 F. Supp. 3d at 1119 (internal quotation marks omitted).

create law."). Second, Industry Petitioners misread the Tenth Circuit's decision in *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742 (10th Cir. 2010), where the court found irreparable harm not based on compliance costs but on the threat of enforcement, "debarment from public contracts," and potential penalties for violating an unconstitutional state law. *Id*. at 771. Subsequent decisions from that court have recognized that the *Edmondson* case involved more than compliance costs in its evaluation of irreparable harm. *See Planned Parenthood v. Moser*, 747 F.3d 814, 833 & n.4 (10th Cir. 2014) (describing *Edmondson* as affirming injunction "to halt enforcement action" and block imposition of sanctions and penalties).[8]

As the Tenth Circuit has recognized, "[t]o constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189 (internal quotation marks omitted). Given that compliance costs exist for almost any regulation, allowing such costs to constitute irreparable harm for issuance of the "extraordinary" remedy of a preliminary injunction would effectively render this requirement meaningless. *See A.O. Smith Corp.*, 530 F.2d at 527–28. And as BLM already found in promulgating the Waste Prevention Rule—based on data which Industry Petitioners do not challenge in their Motion—compliance costs will be minor and insignificant for even the smallest operators. AR 454, 575-76 (RIA at 8, 129-30) (estimating an average profit reduction for small businesses of 0.15 percent).[9] Industry Petitioners' allegations regarding additional royalty obligations can similarly be rejected. As this Court already found, "if Petitioners ultimately prevail on the merits and the Court sets aside the Rule's royalty requirements, any overpaid royalties can be recovered from the agency" and do not constitute irreparable harm. ECF No. 92 at 25 (citing 30 U.S.C. § 1721a).

Industry Petitioners also speculate that these compliance costs would reduce the number of potential new wells and result in 16.9 million barrels of oil that "would not be produced" from BLM leaseholds. Industry Petitioners' Memo. at 7-8 (citing Sgamma Decl., ¶ 10). As the Tenth

[8] Industry Petitioners also cite an unpublished district court opinion in *Direct Mktg. Ass'n v. Huber*, No. 10-CV-001546, 2011 WL 250556, at *6–7 (D. Colo. Jan. 26, 2011), but that case also found irreparable harm based on a constitutional violation, not simply compliance costs.

[9] Federal Respondents' current litigation position that such costs are "significant" and "substantial" (BLM Response at 2, 7) is contradicted by the record and should be rejected.

Circuit has stated, "purely speculative harm" is insufficient to demonstrate irreparable harm for purposes of an injunction. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Other than generalized statements in an affidavit, Industry Petitioners provide no evidence to support their contentions. Further, this assertion contradicts BLM's findings in the record, which Industry Petitioners do not challenge, that the Rule will only reduce crude oil production by 0.0 – 3.2 million barrels per year (0 – 0.07% of the total U.S. production), and will *increase* natural gas production by up to 41 billion cubic feet per year. AR 366 (81 Fed. Reg. at 83,014). Furthermore, Industry Petitioners fail to consider the numerous exemptions from the Rule's requirements where compliance "would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease." *See* AR 363-65 (81 Fed. Reg. at 83,011-13). Finally, Industry Petitioners cite no authority to support their incorrect proposition that reduced oil production constitutes irreparable harm, or address the fact that operators can simply resume such production activities if they prevail in this litigation. *See Heideman*, 348 F.3d at 1189 ("Plaintiffs presented no evidence that enforcement of the Ordinance during the time it will take to litigate this case in district court will have an irreparable effect in the sense of making it difficult or impossible to resume their activities or restore the status quo ante in the event they prevail.").

Consequently, Industry Petitioners have failed to demonstrate irreparable harm from compliance with the Waste Prevention Rule.

C. The Balance of the Equities and the Public Interest Support Denial of the Requested Injunction.

A party seeking a preliminary injunction "must establish ... that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences" when issuing an injunction. *Id*. at 24. Here, there is no merit to the Industry Petitioners' contention that the balance of equities and the public interest support their request for a preliminary injunction. *See* Industry Petitioners' Memo. at 11-14. As discussed above, the minor compliance costs that will result from implementation of the Rule do not constitute

irreparable harm or outweigh the significant economic and environmental harms that will result from an injunction. *See Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004) ("financial concerns alone generally do not outweigh environmental harm"). Moreover, the harms alleged by Respondent States are not merely "generalized concerns with lost royalty revenue" and "global methane emissions." *See* Industry Petitioners' Memo. at 13.

Enjoining the key requirements of the Waste Prevention Rule will increase the waste of a public resource, decrease royalty revenues, and ignore BLM's trust responsibilities on tribal lands. *See* AR 366 (81 Fed. Reg. at 83,009) (BLM finding that the Rule would "enhance our nation's natural gas supplies, boost royalty receipts for American taxpayers, tribes, and States, reduce environmental damage from venting, flaring, and leaks of gas, and ensure the safe and responsible development of oil and gas resources"). Industry Petitioners' contentions regarding compliance costs and potential slight decreases in revenue from oil production (Industry Petitioners' Memo. at 13-14) do not represent or outweigh the public interest in the effective regulation of oil and gas operations on public lands. *See, e.g., United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989) ("private, financial harm must, however, yield to the public interest in maintaining effective competition"). State Respondents believe that BLM has a crucial role to play in ensuring the responsible development of oil and gas resources on federal and Indian lands, and that it is in the public interest to provide a baseline level of protection against the waste of a such resources and a more level playing field for oil and gas development across states. *See F.T.C. v. Alliant Techsystems Inc*., 808 F. Supp. 9, 22-24 (D.D.C. 1992) (discussing the "public's clear and fundamental interest in promoting competition").

Moreover, enjoining the Waste Prevention Rule will cause irreparable harm to State Respondents by increasing air pollution and related health impacts, exacerbating climate harms, and causing other environmental injury such as noise and light pollution. As the U.S. Supreme Court has stated, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531,

545 (1987). Moreover, injuries where "sovereign interests and public policies [are] at stake" are irreparable. *Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001).

The Waste Prevention Rule is expected to reduce emissions of volatile organic compounds ("VOCs"), including benzene and other hazardous air pollutants, by 250,000–267,000 tons per year, and reduce methane emissions by 175,000-180,000 tons per year. AR 366 (81 Fed. Reg. at 83,014). Even factoring in California's own rules to limit pollution from oil and gas operations, an injunction would likely result in an additional 150 tons of VOC emissions and 4.9 tons of toxic air contaminants, worsening adverse health impacts to Californians and the State. Declaration of Elizabeth Scheehle ("Scheehle Decl."), ¶¶ 16-23, filed herewith as Exhibit A. A large preponderance of BLM-managed oil and gas activity in California is located in close proximity to areas designated Disadvantaged Communities by the California Environmental Protection Agency. *Id*. at ¶ 24. For example, much of the federal drilling within California occurs in Kern County. *Id.* at ¶ 14. The San Joaquin Valley portion of Kern County is in extreme nonattainment with the federal 2008 eight-hour ozone standard, in nonattainment with federal fine particulate matter standards, and in nonattainment with multiple state ambient air quality standards. *Id*. at ¶ 14. Excess air pollution in this region, including emissions of VOCs, particulate matter, and hazardous air pollutants from oil and gas operations, contribute to increased rates of heart disease, lung disease, asthma and other respiratory problems, and elevated cancer risk. *Id*. at ¶¶ 10-12, 14.

In New Mexico, the San Juan Basin has one of the highest rates of natural gas emissions in the country, accounting for nearly 17 percent of national methane losses, and is situated in a 2,500 square mile methane "hot spot" detected by satellites and largely attributable to oil and gas development. Declaration of Sandra Ely ("Ely Decl."), ¶¶ 6, 8, filed herewith as Exhibit B. VOC emissions from oil and gas development contribute to high ozone levels in San Juan County, leading to an "F" grade by the American Lung Association in 2016. *Id*. at ¶ 12. Because natural gas emissions in New Mexico comprise such a large portion of national emissions, thousands of tons of VOC emissions may be expected in New Mexico as a result of an injunction, exacerbating air quality deterioration. *Id*. at ¶¶ 16-17.

State Respondents will also be irreparably harmed by the additional methane emissions resulting from an injunction. Methane is a powerful heat-trapping greenhouse gas with more than 80 times the global warming potential of carbon dioxide within the first twenty years after it is emitted. Scheehle Decl., ¶ 13. Once in the atmosphere, these emissions contribute to climate harms that cannot be undone, including a reduction in the average annual snowpack that provides approximately 35 percent of California's water supply, increased erosion and flooding from rising sea levels, and extreme weather events. *Id*. at ¶ 15. Methane is also a precursor to ground-level ozone and contributes to its associated harmful health effects. *Id*. at ¶ 11. The increased methane emissions that will result from an injunction, which are the equivalent of 15,050,000 metric tons of carbon dioxide over 20 years, will exacerbate climate change impacts within California. *Id*. at ¶ 25. New Mexico, a state with already water-scarce environmental systems, is especially vulnerable to the water supply disruptions which are likely to accompany climate change. Ely Decl., ¶ 10. Average temperatures in New Mexico have been increasing 50 percent faster than the global average over the last century. *Id*. New Mexico is facing warming-caused drought and insect outbreak leading to more wildfires, increased public health threats from amplified heat in urban areas, and disruption to water and electricity supplies. *Id*. The increased methane emissions from an injunction will exacerbate these climate effects in New Mexico. The fact that BLM has arbitrarily ignored the international costs of methane emissions in more recent economic analyses (*see* Industry Petitioners' Memo. at 13) is irrelevant and in no way diminishes the significance of these impacts.

Because the Rule is likely to result in the stronger protection of federal lands, increased royalty payments, reduced air pollution, and greater prevention of the waste of natural resources, which belong to the People, the balance of equities and public interest weigh strongly in favor of denying the injunction. *See California v. BLM*, 2018 WL 1014644 at *16-17 (in enjoining BLM's Suspension Rule, concluding that the "balance of equities and public interest strongly favor issuing the preliminary injunction").

III. STATE PETITIONERS HAVE FAILED TO SHOW THAT A STAY OF THE WASTE PREVENTION RULE PURSUANT TO APA SECTION 705 IS WARRANTED.

As discussed above, this Court has already found that a preliminary injunction is not merited in this case. ECF No. 92. Nevertheless, State Petitioners now contend that this Court should employ its "inherent equitable powers and its broad authority under 5 U.S.C. § 705" to suspend key provisions of the Rule. State Petitioners' Motion at 3. Without offering any new information to support their argument that preliminary relief is appropriate, State Petitioners instead ask this Court to follow a highly fact-specific case from the Western District of New York. *Id*. at 4-5 (citing *Rochester-Genesee Reg'l Transp. Auth. v. Brigid Hynes-Cherin*, 506 F. Supp. 2d 207 (W.D.N.Y. 2007)). In that case, the district court determined that a brief stay to the implementation of an agency decision affecting public school bus routes was warranted, even though Plaintiff did not meet all of the factors required to establish a preliminary injunction, because of an "imminent threat of significant harm to the public." *Id*. at 214. The case is inapposite here for multiple reasons.

First, when evaluating the injunction factors, the district court in New York applied an outdated "sliding scale" approach, which the Tenth Circuit eliminated following the Supreme Court's decision in *Winter*. *See id*. (noting that "[t]he Second Circuit has "treated [the] criteria [for issuing a stay] somewhat like a sliding scale"); *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) ("Under *Winter's* rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible."); *see also New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017) ("Although we have applied this modified approach in the past, our recent decisions admonish that it is not available after the Supreme Court's ruling in *Winter*."). The Supreme Court has held that a movant's failure to prove any one of the four injunction factors is fatal to its request for injunctive relief. *See Winter*, 555 U.S. at 23–24. Given this Court's prior determinations that Petitioners failed to demonstrate either a likelihood of success on the merits or irreparable harm, coupled with State Petitioners' failure to provide any additional showing on these factors, preliminary relief should not be granted.

Second, the brief stay issued by the district court in New York was informed by strong public interest concerns—namely "potential harm to students, their parents and other members of the public that rely on or are affected by the bus transportation in question." *Rochester-Genesee*, 506 F. Supp. 2d at 209 ("It is also not hard to envision the ripple effect of such disruptions in school bus service, since many parents could be forced at virtually, if not literally, the last minute to alter their own work schedules and to seek alternative transportation for their children to and from school, with concomitant effects on their employers, other family members, and so on."). Here, on the other hand, no pressing public interest concern weighs in favor of lifting already-effective waste prevention regulations. *See* ECF No. 92 at 27 ("The Court finds the balance of harms in this case does not tip decidedly in either side's favor."). As State Respondents have argued, the minor compliance costs that will result from implementation of the Rule do not constitute irreparable harm or outweigh the significant economic and environmental harms that will result from an injunction. *See supra* at Part II.B-C.

IV. VACATUR OF THE WASTE PREVENTION RULE IS NOT APPROPRIATE.

Industry Petitioners make a last-ditch attempt to enjoin the Waste Prevention Rule by requesting that "the Court exercise its inherent equitable powers to vacate" the key requirements of the Rule.[10] Industry Petitioners' Motion at 3; Industry Petitioners' Memo. at 1, 14-18. Industry Petitioners incorrectly assert that the Court may vacate an agency action even without ruling on the merits, relying primarily on a single decision from the District of Colorado. *Id.* (citing *Center for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236 (D. Colo. 2011)). However, Industry Petitioners fail to cite any authority to support the proposition that a court may vacate a duly-promulgated regulation simply at the request of an industry group.

Industry Petitioners' own description of *Center for Native Ecosystems* demonstrates that the case is not relevant here. *See* Industry Petitioners Memo. at 15-16. In that case, plaintiff challenged a decision to delist a species under the federal Endangered Species Act ("ESA") based on a "dubious legal opinion" issued by the Solicitor of the U.S. Department of the Interior.

[10] Federal Respondents do not appear to support this argument. BLM Response at 12.

Center for Native Ecosystems, 795 F. Supp. 2d at 1237. During the litigation, two separate district courts ruled that the Solicitor's opinion violated the ESA, and the Solicitor "withdrew the challenged statutory interpretation." *Id*. at 1238. The Colorado district court "reviewed the decisions rejecting the Solicitor's interpretation" and found "them very persuasive." *Id*. at 1240.

Unlike the situation here, the federal defendants in *Center for Native Ecosystems* then moved for remand and vacatur of the delisting decision. In evaluating the vacatur issue, the district court considered (1) "the seriousness of the deficiencies in the completed rulemaking and the doubts the deficiencies raise about whether the agency chose properly from the various alternatives open to it in light of statutory objectives," weighed against (2) "any harm that might arise from vacating the existing rule, including the potential disruptive consequences of an interim change." *Id*. at 1242 (citations omitted). Given the two district court opinions invalidating the Solicitor's opinion and the defendant's "complete disavowment" of that opinion, the district court had no trouble finding that the action "suffered from significant deficiencies." *Id*. The court also found that the "potential disruptive consequences" of costs from delayed transportation or development projects was outweighed by potential harm to the species, and thus granted the federal defendants' motion. *Id.* at 1243.

No such circumstances exist here. To the contrary, this Court has already determined that Petitioners have failed to demonstrate a likelihood of success on their legal claims. ECF No. 92 at 20-22. Moreover, two other district courts have overturned BLM's attempts to postpone or suspend key requirements of the Waste Prevention Rule. *See California v. BLM*, 277 F. Supp. 3d 1106; *California v. BLM*, 2018 WL 1014644. And unlike the situation in *Center for Native Ecosystems*, BLM has not moved for a remand of this action or disavowed the Rule.

Second, vacatur of the Waste Prevention Rule will not "allow[] the regulatory status quo to remain intact" or prevent the "disruptive consequences of an interim change." *See* Industry Petitioners' Memo. at 16. The current regulatory status quo, as has been the case for the majority of time since January 17, 2017, is that the entire Waste Prevention Rule is in effect. Vacatur of specific provisions of the Rule would result in yet another interim change with disruptive consequences. Furthermore, as discussed above in Part II.C, vacatur will result in significant

harm to State Respondents by reducing royalty payments, increasing air pollution and related health impacts, and exacerbating the waste of public resources.

The other cases cited by Industry Petitioners similarly provide no support for vacatur here. In *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059 (C.D. Cal. 2016), the court vacated an action by the State Department, following the agency's own motion for voluntary remand, after the Ninth Circuit had "determined that the State Department failed to provide [plaintiff] adequate procedural protections consistent with the Fifth Amendment's Due Process Clause." *Id*. at 1064-65. Moreover, in *Coal. of Ariz./N.M. County for Stable Economic Growth v. Salazar*, 2009 WL 8691098 (D.N.M. May 4, 2009), the court granted a motion for voluntary remand requested by the federal defendants after an Inspector General Report cast "significant doubt as to whether the Federal Defendants chose correctly in designating critical habitat" for two listed species. *Id*. at *3. However, the court declined to vacate the critical habitat designation because it would not serve the purposes of the ESA. *Id*. at *4.

V. FEDERAL RESPONDENTS OFFER NO LEGAL BASIS FOR STAYING CERTAIN REQUIREMENTS OF THE WASTE PREVENTION RULE PENDING AGENCY RECONSIDERATION.

Federal Respondents argue that this Court should (1) stay certain requirements of the Waste Prevention Rule pending an agency reconsideration process of unknown duration and outcome, yet also (2) stay this litigation and decline to rule on the merits of Petitioners' challenges to the Rule. This argument is untenable for three reasons. First, the purpose of injunctive relief under any theory proposed by Petitioners is the same: to maintain the parties' positions *pending a decision on the merits* of the underlying challenge. *See* 5 U.S.C.§ 705, *Univ. of Texas*, 451 U.S. at 395. Federal Respondents offer no legal authority for ignoring the central purpose of a preliminary injunction, and specifically decline to provide any authority that would support Petitioners' requested relief. *See* BLM Response at 12 n.3.

Second, Federal Respondents argue that prudential ripeness and mootness concerns "counsel the Court to continue to stay its hand in these cases," BLM Response at 9, but do not explain how this Court can "stay its hand" while simultaneously evaluating motions for

preliminary injunctive relief. As discussed above, any consideration of such relief necessarily entails an evaluation of Petitioners' likelihood of success on the merits, as well as irreparable harm, the balance of the equities, and the public interest. *See Winter*, 555 U.S. at 20; *Diné Citizens*, 839 F.3d at 1282.

Third, Federal Respondents' requested relief raises serious concerns of comity with the Northern District of California. In its recent decision enjoining BLM's Suspension Rule, that court explicitly declined to rule on the underlying challenges to the Waste Prevention Rule that are before this Court. However, the court noted that the Suspension Rule was not tailored to the issues central to this litigation, but rather to relieve regulated entities from compliance costs associated with implementation of the Rule. *California v. BLM*, 2018 WL 1014644 at *9 ("While [BLM's] concern for judicial review may serve to justify a suspension or delay of specific provisions addressed by the court in order to evaluate BLM's authority with respect to EPA's, BLM concedes that the Suspension Rule was not tailored with this in mind"). Now, however, Federal Respondents ask this Court to issue the same suspension of regulatory requirements that the Northern District of California found to be illegal, without reaching the underlying merits or any showing that the requirements for such relief have been met.

Consequently, Federal Respondents have provided no basis for this Court to enjoin or stay certain provisions of the Waste Prevention Rule.

CONCLUSION

For the foregoing reasons, the Court should deny State Petitioners' and Industry Petitioners' Motions for interim injunctive relief.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I filed the foregoing STATE RESPONDENTS' CONSOLIDATED OPPOSITION TO PETITIONERS' MOTIONS TO SUSPEND IMPLEMENTATION DEADLINES AND FOR PRELIMINARY INJUNCTION OR VACATUR using the United States District Court CM/ECF system, which caused all counsel of record to be served by electronically.

/s/ George Torgun
GEORGE TORGUN