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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al., Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Respondents.	)	Civil Case No. 2:16-cv-00285-SWS [Lead] Consolidated with: Case No. 2:16-cv-00280-SWS Assigned: Hon. Scott W. Skavdahl

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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR VACATUR OF CERTAIN PROVISIONS OF THE RULE PENDING ADMINISTRATIVE REVIEW

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Petitioners Western Energy Alliance (Alliance) and the Independent Petroleum Association of America (IPAA) (collectively, "Industry Petitioners') seek immediate relief from certain obligations of Respondent Bureau of Land Management's (BLM) rule related to the reduction of venting and flaring from oil and gas production on federal and Indian lands, 81 Fed. Reg. 83,008 (Nov. 18, 2016), VF_0000360 ("the Waste Prevention Rule"), which is currently in effect, including for the very first time its January 17, 2018 compliance deadlines.[1] Specifically, Industry Petitioners request the Court enjoin BLM's nationwide enforcement of the Core Provisions pending resolution of this litigation. Alternatively, Industry Petitioners request that the Court exercise its equitable powers to vacate the Core Provisions until BLM concludes its rulemaking process.

I. BACKGROUND

This Court has characterized this matter as a "roller coaster," *see* Order Granting Mot. for an Extension of the Merits Briefing Deadlines, Dkt. No. 163 at 4 (Oct. 30, 2017). Unfortunately, the ride has just gotten far worse. Industry Petitioners now face the very outcome they repeatedly

[1] As noted in Industry Petitioners accompanying motion, the provisions of the Waste Prevention Rule from which Industry Petitioners are requesting immediate, nationwide relief through either a preliminary injunction or vacatur are those with compliance deadlines of January 17, 2018, and certain provisions of the Waste Prevention Rule that went into effect on January 17, 2017. Specifically, these provisions are: drilling applications and plans (43 C.F.R. § 3162.3-1(j)); gas capture requirements (§ 3179.7); measuring and reporting volumes of gas vented and flared from wells (§ 3179.9); determinations regarding royalty-free flaring (§ 3197.10); well drilling (§ 3179.101); well completion and related operations (§ 3179.102); equipment requirements for pneumatic controllers (§3179.201); requirements for pneumatic diaphragm pumps (§3179.202); requirements for storage vessels (§ 3179.203); downhole well maintenance and liquids unloading (§3179.204); and operator responsibility for leak detection, repair, and reporting requirements (§§ 3179.301-305). We refer to these collectively as the "Core Provisions" in this memorandum.

sought to avoid:[2] the Waste Prevention Rule has unexpectedly sprung back into effect, and oil and gas operators face immediate compliance obligations that cannot be met anytime soon following lengthy stays of the rule's key provisions, which total 186 days (roughly 6 months) since it took effect on January 17, 2017.[3]

Recognizing the Court is well aware of this case's history, Industry Petitioners will not detail it again but will pick up where the parties left off before the Court. In December 2017, the Federal Defendants, Industry Petitioners, and the Petitioner States of Wyoming and Montana moved to stay this case following BLM's publication of a rule suspending certain compliance deadlines contained in the Waste Prevention Rule, including deadlines of January 17, 2018 ("Suspension Rule"). 82 Fed. Reg. 58,050 (Dec. 8, 2017), attached as Ex. "A". The States of California and New Mexico and numerous Citizen and Tribal Groups then challenged the Suspension Rule in the United States District Court for the Northern District of California. *See* Complaint for Dec. & Inj. Relief, *California v. U.S. Bureau of Land Mgmt.*, No. 3:17-cv-07186 (N.D. Cal. Dec. 19, 2017); *Sierra Club v. Zinke*, No. 3:17-cv-07187 (N.D. Cal. Dec. 19, 2017)

[2] In both the California litigation and before this Court, Defendant-Intervenor Citizen Groups have disingenuously attempted to lay blame for the delay in resolution of this case at the feet of Industry Petitioners. *See e.g.*, Dkt. No. 175 at 5. As we have noted, however, following resolution of concerns about the administrative record and a filing of a complete administrative record, Industry Petitioners have repeatedly opposed further delay in obtaining relief in this case. *See e.g.*, Dkt No. 130. The need for such relief has now reached its apex.

[3] Although the Suspension Rule was published on December 8, 2017 but did not take effect until January 8, 2018, *see* 82 Fed. Reg. at 58,050, it was effectively stayed on December 8, 2017 because the Suspension Rule's publication put operators on notice that they were not obligated to take steps or begin spending resources to ensure compliance with the Core Provisions. *See e.g.*, *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 823 F.2d 608, 614-15 (D.C. Circ. 1987) (a final agency stay has the status of law); *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (a stay that marks the consummation of an agency's decision making process also affects regulated parties "rights or obligations."). Accordingly, many operators did not. Even before then, BLM announced to this Court that it was actively drafting the Suspension Rule. *See* Mot. for an Extension of the Merits Briefing Deadlines, Dkt. No. 155 (Oct. 20, 2017).

("California Litigation"). Both plaintiffs filed motions for preliminary injunction also on December 19, 2017. *See id*. at Dkt. No. 3; Dkt. No. 4.

On February 22, 2018, BLM published a proposed rule to revise the Waste Prevention Rule ("Proposed Revision Rule"). 83 Fed. Reg. 7924 (Feb. 22, 2018). That same day, the Northern District of California preliminarily enjoined the Suspension Rule. *See* Order Denying Motion to Transfer Venue and Granting Preliminary Injunction, California Litigation, Dkt. No. 89 (attached as Ex. "B"). In doing so the court expressly declined to address the merits of the Waste Prevention Rule. *Id*. at 8 ("I express no judgment whatsoever in this opinion on the merits of the Waste Prevention Rule."). As a result, the Waste Prevention Rule is in effect. Most importantly, this means the Core Provisions of the Waste Prevention Rule that would have taken effect on January 17, 2018, but for the Suspension Rule, suddenly and immediately require compliance.

The Northern District of California's ruling puts the legality of the Waste Prevention Rule squarely at issue and directly back in front of this Court. Notably, unlike when this Court issued its PI Order, BLM has questioned whether parts of the Waste Prevention Rule are within its statutory authority and is proposing to address those concerns. And it is now abundantly clear that oil and gas producers operating on federal and Indian leases are faced with concrete, immediate, and arguably overdue compliance obligations with all of the Waste Prevention Rule's requirements. Accordingly, Industry Petitioners ask this Court to preliminarily enjoin the Core Provisions pending resolution of this litigation, or alternatively, to vacate the Core Provisions until BLM concludes its ongoing rulemaking process.

II. INDUSTRY PETITIONERS HAVE DEMONSTRATED PRELIMINARY RELIEF IS WARRANTED

To prevail on a motion for preliminary injunction, a movant must demonstrate: (1) a likelihood of success on the merits; (2) that the movant is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in favor of an injunction; and (4) that an injunction is in the public interest. *Petrella v. Brownback*, 787 F.3d 1242, 1257 (10th Cir. 2015); *see also Winter v. Natural Res. Defense Counsel*, 555 U.S. 7, 20 (2008); *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). The purpose of a preliminary injunction is to "preserve the relative position of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing[.]" *Id*. (citations omitted); *see also Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). The grant or denial of a preliminary injunction lies within the sound discretion of the district court. *Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 557 (10th Cir. 1984). The Court also has wide latitude and discretion to issue a necessary and appropriate injunctive remedy. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (crafting a preliminary injunction is an exercise of discretion, dependent as much on the equities of a given case as the substance of the legal issues it presents); *Int'l Mfrs. Ass'n v. Norton*, 304 F.Supp.2d 1278, 1286 (D. Wyo. 2004); *Eaton Corp. v. Parker-Hannifin Corp*, 292 F.Supp.2d 555, 582 (D. Del. 2003) (courts are given wide latitude in framing injunctive relief).

A. **Compliance with the Waste Prevention Rule Will Irreparably Harm Industry Petitioners**

Petitioners will be immediately and irreparably harmed absent an injunction. To demonstrate irreparable harm, a petitioner "seeking preliminary relief [must] demonstrate that irreparable injury is likely in the absence of an injunction." *Winter* 555 U.S. at 22 (emphasis in original). The movant must show "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)). Although economic loss alone is generally insufficient, "imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Crowe Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (internal citations omitted). "Where a plaintiff cannot recover damages from the defendant due to the defendant's sovereign immunity, any economic loss suffered by a plaintiff is irreparable *per se*." *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, No. CIV. 08-633MV/RLP, 2008 WL 5586316, at *5 (D.N.M. Oct. 3, 2008) (citations omitted). Moreover, "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 200–21 (1994) (Scalia, J., concurring in part). Finally, the court must determine "whether such harm is likely to occur before the district court rules on the merits." *RoDa Drilling Co.*, 552 F.3d at 1210 (citation omitted).

The imminent, irreparable, and severe harms associated with the Core Provisions of the Waste Prevention Rule are inescapable following invalidation of the Suspension Rule. Industry Petitioners will continue to be harmed before this Court has an opportunity to rule on the merits or otherwise resolve this litigation.

Over one year ago, this Court recognized the "undoubtedly certain and significant compliance costs attached to the Rule, which are unrecoverable from the federal government." *See* PI Order at 25. At that time, however, the Court was not convinced these harms were of "such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id*. In arriving at this conclusion, the Court cited to the provisions of the Waste Prevention Rule, including equipment replacement, that did not take effect for a year. *Id*. The provisions the Court cited are the same Core Provisions that have abruptly sprung back into effect and which now present a clear and present need for injunctive relief.

Operators cannot comply with the Core Provisions by simply flipping a switch. Rather, compliance requires lengthy lead time, planning, and significant expenditures. For example, some companies with many sites or significant distances between sites require multiple months to complete the initial LDAR inspections alone. *See* Sgamma Declaration at ¶ 11, attached as Ex. "C". In addition to the LDAR requirements, the storage tank controls, pneumatic controller replacement, pneumatic pump control/replacement provisions each requires substantial advanced planning and organization in addition to time for implementation. *Id*.

The Core Provisions form the heart of the Waste Prevention Rule and comprise, by far, its most substantial costs. *See e.g.*, AR, VF_0000451 (estimating the LDAR, storage tank, pneumatic controller, and pneumatic pump requirements to constitute 86 percent of the estimated annual costs of the Waste Prevention Rule, excluding gas capture limit costs over time). Industry Petitioners estimated in late October 2017 that the cost to the industry of complying with just these four provisions between then and January 17, 2018 would have exceeded $115.0 million. *See* Sgamma Declaration at ¶ 10. The costs of conducting initial LDAR inspections and putting on storage tank controls, alone, would have exceeded $85.0 million. *Id*. In addition, these

estimated costs would have resulted in a reduction of 1,800 potential new (or capped) oil wells. *Id*. This reduction equates to approximately 16.9 million barrels of oil that would not be produced from the federal and Indian leaseholds over just the next several months. *Id*. Although four months have passed since those estimates, it is unlikely these estimates have changed in any material respect because the requirements were effectively suspended for most of this period—December 8, 2017 through February 22, 2018. *See id*. at ¶ 10. Accordingly, the immediate harms in terms of compliance costs remain substantial. By contrast, BLM estimated the Waste Prevention Rule would yield additional royalty of $3 million to $10 million per year. VF_0000563.

Moreover, these costs assumed for the sake of analysis that it was even possible to fully bring all facilities into compliance before January 17, 2018, but it was not. "It is arbitrary and capricious to require compliance with a regulation when compliance is impossible." *Messina v. U.S. Citizenship & Immigration Servs.*, No. Civ.A. 05-CV-73409-DT, 2006 WL 374564, at *6 (E.D. Mich. Feb. 16, 2006). The significant and most costly Core Provisions were not in effect for roughly six out of the past thirteen months. The Core Provisions with a January 17, 2018, compliance deadline were postponed between June 15, 2017, when BLM published a notice under section 705 of the Administrative Procedure Act (the "Postponement Notice"), 82 Fed. Reg. 27,430 (June 15, 2017), and October 4, 2015, when the United States District Court for the Northern District of California overturned the Postponement Notice and ordered BLM to "immediately reinstate the [Rule] in its entirety."[4] *Id*. The Core Provisions were again stayed between December 8, 2017, when BLM finalized the Suspension Rule, and February 22, 2018, when the Suspension Rule was enjoined. Because of this six-month suspension, it is now

[4] *See State of California v. U.S. BLM, et al.*, 3:17-cv-03804-EDL, Dkt. Nos. 95 and 96.

impossible for certain Alliance members to immediately and fully comply. *See* Sgamma Declaration at ¶ 11.

To the extent Industry Petitioners' members cannot comply with the Core Provisions, they are immediately harmed further because they are incurring a financial penalty in the form of additional royalty obligations when they have not been given a reasonable opportunity to comply and thus avoid the financial penalty. The Waste Prevention Rule imposes royalty on all "avoidably lost" gas, which is gas lost due to noncompliance with the Waste Prevention Rule. *See* 43 C.F.R. §§ 3179.4(a) (defining "unavoidably lost" and "avoidably lost" gas), 3179.5(a) (imposing royalty on "avoidably lost" gas). Accordingly, Industry Petitioners' members that cannot comply with the Core Provisions suffer additional federal royalty obligations in addition to unrecoverable compliance costs.

Although these irreparable harms are imminent and serious, their severity is not determinative of whether injunctive relief is warranted. Injunctive relief is appropriate when harms are imminent or ongoing. For example, the Tenth Circuit Court of Appeals found a likelihood of irreparable harm when members of a trade association alleged an annual cost of $1,000 or more per company to comply with a new law and sovereign immunity precluded recovery of these compliance costs. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756, 770–71 (10th Cir. 2010); *see also Direct Mktg. Ass'n v. Huber*, No. 10-CV-001546, 2011 WL 250556, at **6–7 (D. Colo. Jan. 26, 2011) (granting injunctive relief because a trade association's members would spend $3,100 to $7,000 per company to comply with new state requirements). The severe costs and stranded production demonstrated in this case, combined with the fact full and immediate compliance is not possible given the delays over the past year, more than meet applicable standards for the Court to grant the injunctive relief requested.

In sum, the nature and immanency of the harms has changed drastically since the Court's order of January 16, 2017. The Core Provisions require lengthy planning and substantial expenditures by operators. In many cases, because of the six-month delay of their effectiveness, operators cannot fully comply with the Core Provisions absent additional time and are, therefore, being uniquely and irreparably harmed. It was these exact serious and permanent harms that served as one of the key rationales for the Suspension Rule. *See* 82 Fed. Reg. at 58,050 ("[BLM] intends to avoid imposing likely considerable and immediate compliance costs on operators for requirements that may be rescinded or significantly revised in the near future.") Accordingly, injunctive relief is necessary and appropriate.

B. **Industry Petitioners Are Likely to Succeed on the Merits of Their Claims**

Industry Petitioners are likely to succeed on the merits of their petition because the Waste Prevention Rule, and more specifically the Core Provisions, cannot survive judicial review. This Court already has recognized the Waste Prevention Rule's fundamental flaws. In its Order on Motions for Preliminary Injunction, this Court determined "[t]he Rule upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under the CAA to the Environmental Protection Agency (EPA), states, and tribes to manage air quality." Order on Motions for Preliminary Injunction, No. 2:16-cv-00280-SWS, at 17 (D. Wyo. Jan. 16, 2017) ("PI Order"). The Court also observed that the Waste Prevention Rule "conflicts with the statutory scheme under the CAA . . . particularly by extending its application of overlapping air quality provisions to existing facilities . . . ." *Id*. at 18. The Court described BLM as having "hijacked the EPA's authority under the guise of waste management" and stated that "BLM cannot use overlap to justify overreach." *Id*. at 19. The Court directed these statements largely at the Core Provisions.

Since the Court's PI Order, Federal Defendants have also expressed similar concerns about certain provisions of the Waste Prevention Rule not conforming to statutory authority. *See* 82 Fed. Reg. at 58,050 ("The BLM has concerns regarding the statutory authority . . . of the 2016 final rule"). The BLM noted in the Suspension Rule that "neither the MLA nor FLPMA provide statutory 'mandates' that the BLM maintain the regulatory provisions that are being suspended for a year in the [Suspension Rule]." *Id*. at 58,059. BLM appears to have suspended the Core Provisions partly out of concerns of statutory authority.

More recently, BLM stated in the Proposed Revision Rule it "is not confident that all the provisions of the 2016 final rule would survive judicial review," specifically citing state and industry comments "that the proposed rule, rather than preventing 'waste,' was actually intended to regulate air quality, a matter within the regulatory jurisdiction of EPA and the States under the Clean Air Act." 83 Fed. Reg. at 7,927. In short, the Core Provisions that Industry Petitioners now seek to enjoin, are the same provisions that the Federal Defendants both suspended and omitted from the Proposed Revision Rule over concerns about statutory authority. Thus, Industry Petitioners are likely to successfully demonstrate that at least considerable portions of the Waste Prevention Rule, and particularly the Core Provisions, exceed BLM's statutory authority.

To further establish their likelihood of success on the merits, Industry Petitioners incorporate by reference their Brief in Support of Western Energy Alliance and Independent Petroleum Association of America's Petition for Review of Final Agency Action, filed October 2, 2017 ("the Merits Brief"). (Dkt. No. 142.).[5] The Merits Brief, attached as Ex. "D" to this

[5] As with their October 27, 2017 Motion for Preliminary Injunction, Industry Petitioners are including their previously filed merits brief along with this request for preliminary injunction in support and demonstration of their likelihood of success on the merits. *See* Dkt. Nos. 160, 161, 162. When Industry Petitioners last filed this Motion for Preliminary Injunction, Industry

Memorandum, identifies numerous substantive and procedural flaws with the Waste Prevention Rule. Notably, the January 17, 2018 provisions at issue (LDAR, storage tank, pneumatic controllers, and pneumatic pumps air control requirements) most clearly and unlawfully impose air quality requirements on existing facilities in excess of BLM's statutory authority. Because of these flaws, Industry Petitioners are likely to succeed on the merits of their claims.

C. **The Equities Weigh in Favor of an Injunction**

The equities favor an injunction. For the reasons detailed in Section II.A, *supra*, Industry Petitioners' interests will be irreparably harmed absent an injunction because they face impending, unrecoverable compliance costs. Furthermore, the requirement that Industry Petitioners' members comply with the Core Provisions immediately is inequitable given the stay of the Core Provisions for nearly half of the last thirteen months. When it issued the Waste Prevention Rule, BLM determined that more than one year was necessary to allow operators to come into compliance. *See* VF_0000434–VF_0000440 (43 C.F.R. §§ 3179.7(b)(1), 3179.201(d), 3179.202(h), 3179.203(c), 3179.301(f)). Yet, of this essential preparatory period, compliance dates were postponed or suspended for 151 days, *see* 82 Fed. Reg. 27,430 (June 15, 2017); 82 Fed. Reg. 58,050 (Dec. 8, 2017). Thus, operators have had slightly more than half the time BLM initially determined was necessary to comply with the Waste Prevention Rule. The sudden resurrection of the Core Provisions has exponentially complicated this situation and forced operators into an untenable position, which carries substantial enforcement risk.

Petitioners also moved for leave to exceed page limits out of an abundance of caution. Dkt. No. 159. The Court, however, denied as moot Industry Petitioners' motion to exceed page limits. Dkt. No. 169. Accordingly, Industry Petitioners have not filed another motion to exceed page limits.

In contrast, BLM will suffer little if any harm from a preliminary injunction. BLM has now attempted to postpone or suspend compliance with the January 2018 compliance dates twice: once in June 2017 under Administrative Procedure Act section 705 and again in December 2017 with the Suspension Rule. These attempts have focused on the Core Provisions that Industry Petitioners seek to enjoin. Therefore, a preliminary injunction will be consistent with BLM's regulatory and administrative objectives. In addition, BLM has identified concerns with the factual and regulatory bases for the Waste Prevention Rule and has proposed to revise the rule to address its concerns. *See* 83 Fed. Reg. at 7,928.

In fact, a preliminary injunction may actually lessen the burdens of the Waste Prevention Rule on BLM. BLM is now required to administer the Waste Prevention Rule and, for the first time, the provisions of the Waste Prevention Rule with compliance deadlines of January 17, 2018. In particular, BLM must now consider individual requests for exemptions from various provisions of the Waste Prevention Rule that render compliance uneconomic. *See* 43 C.F.R. §§ 3179.102(d), 3179.201(c), 3179.202(f), 3179.203(d), 3179.303(c). Given that the Waste Prevention Rule regulates approximately 81,600 low-producing wells,[6] BLM will bear a significant administration burden. A preliminary injunction would reduce these administrative harms.

The harms to the Industry Petitioners also outweigh the harms, if any, to the other parties to this litigation. The states of Wyoming, Montana, North Dakota, and Texas all previously sought a preliminary injunction, so the Petitioners' requested relief will satisfy their prior requested relief. In part because immediate compliance presumably is impossible for oil and gas

[6] BLM estimates that 96,000 existing wells will be subject to the Rule, 85 percent of which are low production. *See* VF_0000361.

producers in New Mexico and California, a preliminary injunction also will not harm Defendant-Intervenors States of New Mexico and California and the Citizen Groups despite the injunction in the California Litigation. Furthermore, whereas the Core Provisions impose immediate and severe compliance costs on the Industry Petitioners, the harms alleged by the Defendant-Intervenors have thus far consisted of generalized concerns with lost royalty revenue (which is contradicted on the record) and global methane emissions, the significance of which has been drastically diminished through adjustments to the social cost of methane calculation. These speculative and generalized concerns conflict with and are outweighed by the overwhelming, substantial evidence on this record demonstrating the adverse economic consequences from curtailed or shut-in production and irrevocable costs.

D. **An Injunction is in the Public Interest**

Finally, a preliminary injunction "would not be adverse to the public interest." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012) (citation omitted). First and most significant, a preliminary injunction will avoid the substantial costs and other adverse economic impacts of implementing a rule that BLM has already proposed to revised. Second, enjoining the Core Provisions would not appreciably impact the public's interest in a healthy environment. As noted elsewhere, many operators cannot come into full compliance for many months. In addition, effective provisions of the Waste Prevention Rule and state and federal regulations governing venting and flaring will continue to mitigate any harm while BLM proposes to revise the Waste Prevention Rule. *See e.g.*, 82 Fed. Reg. 58,052 ("[The Suspension Rule] does not leave unregulated the venting and flaring of gas from Federal and Indian oil and gas leases."). Finally, injunctive relief would prevent the lost revenue associated with a decrease in or shut down production, including lost revenues from non-federal/non-Indian leases that are unitized or communitized with federal or Indian leases. The Waste Prevention Rule could render over 300

leases uneconomical, requiring production to be shut down and will strand significant production. *See* VF_0031676–77 ("Permanent shut-in of wells could have significant consequences on resource conservation, royalty revenue, job loss, and the economic viability of operators."); *see also*, Sgamma Declaration, *supra*.[7] These impacts would deliver a financial blow to western states at a time when many are still struggling to rebound from recent fluctuations in commodity prices.

In sum, injunctive relief would serve public interest goals while avoiding unnecessary and unrecoverable compliance costs that are real and concrete on this record. The Court's issuance of a nationwide preliminary injunction over BLM's enforcement of the Core Provisions would not harm the environment and would avoid the financial and administrative costs of temporarily implementing an unlawful, duplicative rule.

III. THE COURT SHOULD VACATE PROVISIONS OF THE RULE PENDING ADMINISTRATIVE REVISION

In the alternative, Industry Petitioners respectfully request that the Court invoke its equitable powers and vacate the Core Provisions pending conclusion of BLM's ongoing rulemaking process.

"Vacatur is an equitable remedy . . . and the decision whether to grant vacatur is entrusted to the district court's discretion." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1139 (10th Cir. 2010). This Court may vacate the Core Provisions even though the Court has not yet ruled on the Waste Prevention Rule's merits, particularly when doing so preserves the status quo that has existed since January 17, 2017. "[V]acation of an agency action without an express determination on the merits is well within the bounds of traditional equity jurisdiction."

[7] *See also* VF_0031676–77 (estimating that as many as 40 percent of wells could be permanently shut-in under the Rule because they would become uneconomical).

Ctr. for Native Ecosystems v. Salazar, 795 F. Supp.2d 1236, 1241–42 (D. Colo. 2011); accord *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp.3d 1059, 1063–65 (C.D. Cal. 2016); *Coal. of Ariz./N.M. Counties for Stable Economic Growth v. Salazar*, No. 07-CV-00876, 07-CV-00876, at *5 (D. N.M. May 4, 2009).

Industry Petitioners submit that this case presents the right circumstances for such relief and encourage this Court to apply a pragmatic, equitable approach similar to the District Court for the District of Colorado. In *Center for Native Ecosystems v. Salazar*, that court vacated an agency rule based on principles of equity without determining whether the rule was in error. Specifically, the court vacated a U.S. Fish and Wildlife Service ("USFWS") rule delisting a species under the Endangered Species Act ("ESA") without reaching the merits. 795 F. Supp.2d 1236, 1241–42 (D. Colo. 2011). The USFWS had based the delisting rule on an opinion of the Solicitor of the Interior interpreting the ESA that was rejected by federal courts and later withdrawn. *Id*. at 1238. Upon the USFWS's motion, the district court vacated the rule and remanded it back to the agency without evaluating the propriety of the agency's decision. *Id*. at 1243. Given this Court's PI Order questioning the legality of the Waste Prevention Rule and BLM's decision to reevaluate the Waste Prevention Rule, the equitable authority exercised in *Center for Native Ecosystems* is directly relevant here.

The District of Colorado court explained that "the decision to vacate an agency's decision without an express determination on the merits is achieved through a careful balancing of a variety of equitable considerations." *Ctr. for Native Ecosystems*, 795 F. Supp.2d at 1241 n.6. Specifically, the court evaluated: (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"; and (2) "any harm that might arise from vacating the

existing rule, including the potential disruptive consequences of an interim change." *Id*. at 1242 (quoting *United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1993)); accord *Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp.2d 1269, 1286 (2012).

Both of these factors support vacatur here. This Court has already recognized the "seriousness of the deficiencies" with the Waste Prevention Rule in its PI Order. *See* PI Order at 17 ("[t]he Rule upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under the CAA to the Environmental Protection Agency (EPA), states, and tribes to manage air quality"), 18 (observing the Waste Prevention Rule "conflicts with the statutory scheme under the CAA . . . particularly by extending its application of overlapping air quality provisions to existing facilities . . . ."), 19 (describing BLM as having "hijacked the EPA's authority under the guise of waste management" and stating "BLM cannot use overlap to justify overreach"). These deficiencies are acutely present with respect to the Core Provisions.

With respect to the second factor, the Court is well aware of "the potential disruptive consequences" that will result without vacatur. Industry Petitioners' members will be forced to expend millions of dollars to comply with a fundamentally flawed Waste Prevention Rule of limited duration. In contrast, vacatur of the Waste Prevention Rule allows the regulatory status quo to remain intact and prevents the "disruptive consequences of an interim change" suddenly brought into effect by invalidation of the Suspension Rule.

Broader equitable considerations also support an exercise of the Court's equitable discretion to vacate the Core Provisions. Parts of the Waste Prevention Rule has been under some form of review, postponement, or suspension since March 28, 2017, when the President directed the Secretary of the Interior to review it. *See* Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar.

31, 2017); 82 Fed. Reg. 27,430 (June 15, 2017); 82 Fed. Reg. 46,458 (Oct. 5, 2017); 82 Fed. Reg. 58,050 (Dec. 8, 2017). In the Court's view, these administrative efforts rendered judicial review unwise and inefficient. In June 2017, this Court declined to proceed with this litigation because "the shifting sands" surrounding the Waste Prevention Rule rendered judicial review "inefficient and a waste of both the judiciary's and the parties' resources." Order Granting Mot. to Extend Briefing Deadlines, Dkt. No. 133 (June 27, 2017). The Court reached the same conclusion in October and again in December 2017. *See* Order Granting Mot. for an Extension of the Merits Briefing Deadlines, Dkt. No. 163, at 4 (Oct. 30, 2017); Order Granting Joint Mot. to Stay, Dkt. No. 189, at 4 (Dec. 29, 2017). Although Industry Petitioners respect these concerns, Industry Petitioners should not be obligated to comply with a rule so uncertain that, in the Court's view, it does not warrant judicial review.

Moreover, vacatur is consistent with the concerns of prudential ripeness this Court has previously articulated. This Court has expressed that its review of the Waste Prevention Rule while BLM is proposing to revise the same rule raises ripeness concerns and, particularly, a need for the Court to avoid "premature adjudication, from entangling [itself] in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized . . . ." *See* Order Granting Joint Mot. to Stay, Dkt. No. 189, at 4–5 (Dec. 29, 2017) (quoting *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017)). Although Industry Petitioners maintain that the Waste Prevention Rule is ripe for review, vacatur of the Core Provisions allows the Court to balance its ripeness concerns while simultaneously providing Industry Petitioners relief. A narrowly-tailored vacatur similarly allows BLM to freely reconsider the Waste Prevention Rule free from judicial intrusion, consistent with agencies' inherent rulemaking authority. *See Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir.

1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."). Simply put, to the extent this Court seeks to avoid interfering with BLM's rulemaking process, vacatur of the Core Provisions allows it to do so.

Notably, an agency request for a voluntary remand for further rulemaking proceedings often causes a court to consider whether to vacate a rule (or portions thereof) without deciding its legality. *See, e.g.*, *Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp.2d 1236, 1241–42 (D. Colo. 2011). Here, even though BLM has not requested a remand, it has nonetheless expressed concerns with the factual and regulatory bases for the Waste Prevention Rule, *see* 83 Fed. Reg. at7928, and is proceeding to review the rule. Specifically, in its Proposed Revision Rule, BLM stated that emissions from oil and gas sources and operations "are more appropriately regulated by EPA under its Clean Air authority." *Id*. BLM also recognized that the "emissions-targeting provisions" of the Waste Prevention Rule—i.e., the Core Provisions—"create unnecessary regulatory overlap in light of EPA's Clean Air Act authority." *Id*. BLM's review of the Waste Prevention Rule would function as a remand, and the fact that BLM has not requested a remand of the Waste Prevention Rule does not preclude vacatur of the Core Provisions. Thus, the Court may use its broad equitable powers to vacate the problematic Core Provisions. Doing so would preserve the status quo and is the most narrowly tailored relief available to prevent the clear irreparable harm to Industry Petitioners.

For these reasons, Industry Petitioners alternatively request that the Court vacate the Core Provisions effective nationwide. Notably, if the Court grants this request, Industry Petitioners request that this Court retain jurisdiction over the matter until the Waste Prevention Rule is no longer the subject of controversy.

IV. CONCLUSION

Industry Petitioners request that the Court issue a nationwide injunction that prevents BLM from enforcing the Core Provisions of the Waste Prevention Rule until the resolution of this litigation for the reasons set forth herein. The currently effective compliance deadlines will cause the Industry Petitioners and Industry Petitioners' members irreparable harm. The Waste Prevention Rule represents unlawful and unconstitutional agency action, and the balance of equities and public interest favor a preliminary injunction. Accordingly, the Court should grant the Motion for Preliminary Injunction.

Alternatively, Industry Petitioners request that this Court exercise its equitable powers to vacate the Core Provisions of the Venting and Flaring Rule until BLM completes its administrative rulemaking efforts. If this Court vacates the Core Provisions, however, it should retain jurisdiction over the Waste Prevention Rule until it is no longer the subject of controversy.

Respectfully submitted this 28th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2018, the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR VACATUR OF CERTAIN PROVISIONS OF THE RULE PENDING ADMINISTRATIVE REVIEW** was filed electronically with the Court, using the CM/ECF system, which caused automatic electronic notice of such filing to be served upon all counsel of record.

s/ Eric Waeckerlin