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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and STATE OF MONTANA, Petitioners, and STATE OF NORTH DAKOTA and STATE OF TEXAS, Intervenor-Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Respondents, and WYOMING OUTDOOR COUNCIL, *et al.*, Intervenor-Respondents.	No. 16-cv-00285-SWS [Consolidated with 16-cv-00280-SWS] **FEDERAL RESPONDENTS' RESPONSE TO PETITIONERS' AND INTERVENOR-PETITIONERS' MOTIONS TO LIFT THE STAY AND FOR OTHER RELIEF**

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INTRODUCTION

In the face of concerns that the costs of the Waste Prevention Rule outweigh its conservation benefits—concerns that this Court highlighted just one year ago—the Bureau of Land Management ("BLM") published a proposed rule to revise the 2016 Waste Prevention Rule on February 22, 2018. As part of its notice-and-comment rulemaking, BLM is assessing whether: (1) the Waste Prevention Rule's economic analysis relied on unsupported assumptions; (2) the benefits of the Waste Prevention Rule justified its costs; (3) the Waste Prevention Rule exceeded BLM's statutory authority; and (4) the complexities of the Waste Prevention Rule rendered it infeasible. In the interim, BLM exercised its authority to temporarily suspend many of the provisions of the Waste Prevention Rule—after full notice and comment—and prevent those substantial costs while the agency completes its reconsideration of the Rule.

The question before this Court is whether the agency should be forced to litigate—and implement—the Waste Prevention Rule while the agency is actively reconsidering it, and which BLM promulgated a notice-and-comment rulemaking to suspend. All the original parties to these cases—Federal Respondents, Wyoming, Montana, and Industry Petitioners—agree that the answer to this question is *no*. Though Petitioners have proposed a range of different mechanisms by which this Court could provide relief from the Waste Prevention Rule, they all agree with this Court's assessment that "moving forward to address the merits" of this suit given BLM's efforts to revise the Waste Prevention Rule "would be a waste of resources." ECF No. 189 at 4.

The prudential ripeness and mootness concerns that motivated the Court to stay this litigation in December are amplified where, as here, the proposed revision is presently subject to notice-and-comment rulemaking on the very issues before the Court. *Id.* (citing *Wyoming v. Zinke*, 871 F.3d 1122, 1142 (10th Cir. 2017)). Moving forward to consider the merits now

would risk substantial interference in the administrative process. It would also force BLM prematurely to stake out positions on issues that are part of an ongoing rulemaking. Federal Respondents believe the Court should exercise its ample equitable authority to stay its hand and let the rulemaking process play out.

Federal Respondents recognize that the current burden imposed on the regulated community is significant. Operators are saddled with imminent, substantial, and unrecoverable costs to comply with a regulatory regime that may soon be replaced. Many are not poised to comply due to the flux and uncertainties over the past year caused by challenges to BLM's postponement and suspension of the Waste Prevention Rule. Because compliance requires equipment acquisition and the implementation of new protocols, operators cannot simply become compliant overnight. Indeed, these are amongst the reasons that BLM gave for implementing the Suspension Rule. Accordingly, Federal Respondents support the pending requests to stay the implementation deadlines in the Waste Prevention Rule until BLM completes its present rulemaking or until January 17, 2019, whichever is earlier.

In short, the most appropriate course now is for the Court to stay this litigation to allow for completion of the administrative process. And, by staying the Waste Prevention Rule's implementation deadlines at the same time, the Court will protect the regulated parties while avoiding entanglement with the administrative process.

FACTUAL BACKGROUND

I. The Waste Prevention Rule

On November 18, 2016, BLM issued the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Waste Prevention Rule"). 81 Fed. Reg. 83,008-01 (Nov. 18, 2016). The Waste Prevention Rule applies to the development of federal and Indian minerals nationwide. It prohibits the venting of natural gas by oil and gas operators, except in

certain limited situations, and requires that operators capture a certain percentage of the gas they produce each month. *Id.* at 83,023-24; 43 C.F.R. §§ 3179.6-3179.7. The Waste Prevention Rule also requires that operators inspect equipment for leaks and update equipment that contributes to the loss of natural gas during oil and gas production. 81 Fed. Reg. at 83,011, 83,022; 43 C.F.R. §§ 3179.301-3179.305, 3179.201-3179.204.

Many of the Waste Prevention Rule's requirements, including those related to gas capture, reporting on vented and flared gas volumes, pneumatic controller equipment, pneumatic diaphragm pumps, storage vessels, and leak detection and repair, were to be phased in over time to allow operators time to come into compliance. 81 Fed. Reg. at 83,023-24, 83,033; 43 C.F.R. §§ 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, 3179.301-3179.305. These phased-in requirements were not to have become operative until January 17, 2018. *Id.*

II. BLM's Reconsideration of the Waste Prevention Rule

As Defendants have previously explained to this Court, President Donald J. Trump issued an Executive Order on March 28, 2017 requiring that the Secretary of the Interior "review" the Waste Prevention Rule and "if appropriate, . . . as soon as practicable, . . . publish for notice and comment proposed rules suspending, revising, or rescinding" it. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, § 7(b) (Mar. 28, 2017). As directed, BLM reviewed the Waste Prevention Rule and determined that it does not align with the policy set forth in Executive Order 13,783, which states that it is "in the national interest to promote the clean and safe development of our Nation's vast energy resources while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." 82 Fed. Reg. at 16,093; 82 Fed. Reg. 46,458, 46,459-60 (Oct. 5, 2017).

On February 22, 2018, BLM published a proposed rule to reconsider the Waste Prevention Rule entitled "Waste Prevention, Production Subject to Royalties, and Resource

Conservation; Rescission or Revision of Certain Requirements" ("Revision Rule"). 83 Fed. Reg. 7924 (Feb. 22, 2018). The proposed Revision Rule would rescind the provisions of the Waste Prevention Rule addressing waste minimization plans, well drilling, well completion, pneumatic controllers, pneumatic diaphragm pumps, storage vessels, and leak detection and repair. 83 Fed. Reg. at 7928. The proposed rule would also modify many of the remaining requirements of the Waste Prevention Rule, including gas capture, downhole well maintenance, and measurement and reporting of vented and flared gas, to bring them more in line with the requirements of Notice to Lessees-4A ("NTL-4A"), BLM's previous venting and flaring regulations. *Id.*

The proposed Revision Rule is subject to a 60-day comment period that ends April 23, 2018. *Id*. at 7924. BLM anticipates completing the final Revision Rule in August 2018. Decl. of James Tichenor ¶ 10, attached as Ex. A.

III. The Postponement Notice and Suspension Rule

On June 15, 2017, BLM postponed certain of the provisions of the Waste Prevention Rule pursuant to 5 U.S.C. § 705 in light of the "serious questions" raised by Petitioners in this litigation "concerning the validity" of the Waste Prevention Rule. 82 Fed. Reg. 27,430-01, 27,431 (June 15, 2017). The Intervenor-Respondents in this litigation—the States of California and New Mexico and a coalition of citizen and tribal organizations ("Citizen Groups")—challenged the postponement in the U.S. District Court for the Northern District of California. *California v. BLM*, No. 17-cv-3804-EDL (N.D. Cal. filed July 5, 2017); *Sierra Club v. Zinke*, No. 17-cv-3885-EDL (N.D. Cal. filed July 10, 2017). On October 4, 2017, that court held that BLM lacked authority to postpone future compliance dates under Section 705 and vacated the postponement. *California v. BLM*, Nos. 17-cv-03804-EDL, 17-cv-3885-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017).

To "avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future," on December 8, 2017, BLM issued a final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements" ("Suspension Rule"). 82 Fed. Reg. 58,050, 58,051 (Dec. 8, 2017). For provisions of the Waste Prevention Rule that were set to take effect in January 2018, the Suspension Rule "temporarily postpone[s] the implementation dates until January 17, 2019, or for 1 year." *Id.* For certain provisions of the Waste Prevention Rule that had already taken effect, the Suspension Rule "temporarily suspend[s] their effectiveness until January 17, 2019." *Id.*

On the basis of BLM's reconsideration of the Waste Prevention Rule and its issuance of the Suspension Rule, the Court stayed this litigation on December 29, 2017. ECF No. 189. The Court recognized in its order that BLM's ongoing reconsideration of the Waste Prevention Rule raises "prudential ripeness concerns," and found that "moving forward to address the merits" of the Waste Prevention Rule "would be a waste of resources." *Id.* at 4-5.

On December 19, 2017, Intervenor-Respondents California, New Mexico, and Citizen Groups brought suit challenging the Suspension Rule in the U.S. District Court for the Northern District of California. *California v. BLM*, No. 17-cv-7186 (N.D. Cal. filed Dec. 19, 2017); *Sierra Club v. Zinke*, No. 17-cv-7187 (N.D. Cal. filed Dec. 19, 2017). They moved for a preliminary injunction of the Suspension Rule, which was granted on February 22, 2018. *California v. BLM*, Nos. 17-cv-7186-WHO, 17-cv-7187-WHO, 2018 WL 1014644 (N.D. Cal. Feb. 22, 2018).

IV. The Instant Motions to Lift the Stay and for Other Relief

Petitioners States of Wyoming and Montana, Petitioners Western Energy Alliance and the Independent Petroleum Association of America (together, "Industry Petitioners"), and Intervenor-Petitioners North Dakota and Texas have moved to lift the stay in this litigation and for other relief. ECF Nos. 194, 195, 196. North Dakota and Texas have requested expedited briefing on the merits of the Waste Prevention Rule, while Wyoming, Montana, and Industry Petitioners have requested a stay or injunction of the Waste Prevention Rule pending the completion of BLM's reconsideration of that Rule. *Id.*

ARGUMENT

Recent events have put the parties in a difficult position: due to the California court's order granting a preliminary injunction against the Suspension Rule, the Waste Prevention Rule is arguably back in effect for the parties to these proceedings, despite BLM's suspension of much of the Rule and its active reconsideration of the Rule, which it hopes to complete by August 2018.[1] The circumstances that justified the Court's stay of this litigation in the first place have not changed. The doctrines of prudential ripeness and mootness continue to counsel the Court to stay its hand. Reviving litigation over a rule that the agency is actively reconsidering risks substantial interference in the administrative process and wastes judicial resources considering issues that may soon be moot. It would also put BLM in the difficult situation of litigating a rule that it is in the midst of reconsidering and of taking positions on issues that are currently subject to public comment.

[1] The United States is currently assessing whether to appeal the Northern District of California's order enjoining the Suspension Rule.

At the same time, Federal Respondents recognize that Petitioners, and the regulated community as a whole, are also in untenable positions due to the order enjoining the Suspension Rule. Operators now face imminent, substantial, and unrecoverable costs to comply with a regulatory regime that may be replaced by this fall. Many are unprepared to comply with the Waste Prevention Rule due to the postponement and suspension of much of that Rule for half of the past year, as well as the agency's active reconsideration of the Rule.

Because Petitioners now face imminent harm due to the reinstatement of the Waste Prevention Rule, Federal Respondents do not oppose a stay of the Rule's implementation deadlines. The Court need not decide whether vacatur is appropriate here, as the parties have provided the Court with alternative remedies that will achieve the same goals—relief from a rule that may change and stability of the regulatory regime during the reconsideration process.

I. The Court Should Continue the Stay of These Cases

The Court's continuing concerns regarding prudential ripeness and mootness justify a continuation of the stay. This Court's authority to stay proceedings flows from its inherent equitable authority to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997). Courts routinely exercise this authority when they have concerns regarding prudential ripeness and mootness. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006) (The "ripeness doctrine reflects not only limits on the jurisdiction of federal courts under Article III but 'important prudential limitations' that may 'require us to stay our hand until the issues in [the] case have become more fully developed.'" (quoting *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004))); *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 623 (10th Cir. 1983) (holding

a petition for review in abeyance for agency review of actions); *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387, 390 (D.C. Cir. 2012) (holding unripe case in abeyance).

As the Tenth Circuit has recently explained, "the prudential ripeness doctrine contemplates that there will be instances when the exercise of Article III jurisdiction is unwise." *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017). "[T]he doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once." *Am. Petroleum Inst.*, 683 F.3d at 387. The ripeness doctrine is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977))); *see also Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1191-92 (10th Cir. 2008) (same); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 n.11 (1980) ("[O]ne of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review." (internal citation and quotation marks omitted)).

The related doctrine of prudential mootness is rooted in the court's equitable powers to fashion remedies and to withhold relief. The doctrine "counsel[s] the court to stay its hand, and to withhold relief it has the power to grant" in situations where "considerations of prudence and comity for coordinate branches of government" are at play. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010). Courts often invoke prudential mootness where "a defendant, usually the government, has already changed or is in the process

of changing its policies" and therefore "any repeat of the actions in question is . . . highly unlikely." *Bldg. & Const. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993); *see also A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961) (declaratory judgment is a discretionary remedy that may be withheld where challenged practice is undergoing significant change).

These two prudential doctrines counsel the Court to continue to stay its hand in these cases. The concerns regarding prudential ripeness and mootness that motivated the original stay in these cases remain. BLM is now midway through the process of reconsidering the Waste Prevention Rule, and expects to complete its reconsideration in August 2018. Ex. A ¶ 10. Once that rulemaking is complete and a new decision is reached, this case will become moot. *See S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (noting that the "central inquiry" for prudential mootness is whether "circumstances have changed since the beginning of litigation that forestall any occasion for *meaningful* relief" (emphasis added)).[2]

There is nothing to be gained in litigating the merits of a rule for which a substantive revision has been proposed and is expected to be completed within a period of months.

[2] North Dakota's and Texas's claim that any further stay of the litigation is inappropriate relies on their conflation of two distinct doctrines: prudential mootness and Article III mootness. *See Rio Grande Silvery Minnow*, 601 F.3d at 1121-22 (describing differences between Article III mootness and prudential mootness). They rely on *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018), in which the Supreme Court, in a footnote, held that proposed rules to revise a rulemaking and to delay its effective date did not render the case moot because the rule remains in effect. *Id.* at 627 n.5. But Federal Respondents are not claiming that this litigation is now moot under Article III of the Constitution. Rather, they believe that concerns regarding prudential mootness—including the fact that the case is soon likely to become moot due to the ongoing revision rulemaking—weigh in favor of a continued stay. *See Bldg. & Constr. Dep't*, 7 F.3d at 1492 (finding court may decline to grant declaratory or injunctive relief if a government defendant "is in the process of changing its policies"). *National Association of Manufacturers* is of no relevance here as it did not address prudential mootness.

Proceeding with the merits forces BLM to take positions in litigation while it is simultaneously seeking public comment regarding whether and how to change its positions. The agency has expressed specific concerns with the Waste Prevention Rule—including concerns raised by this Court in last year's order denying Petitioners' request for a preliminary injunction—and proposed ways to address those concerns in the proposed Revision Rule. *See, e.g.*, 83 Fed. Reg. at 7925-26 ("[T]he 2016 final rule is more expensive to implement and generates fewer benefits than initially estimated."); *id.* at 7926 ("[M]any of the 2016 final rule's requirements would pose a particular compliance burden to operators of marginal or low-producing wells . . . ."); *id.* ("[T]he 2016 final rule has many requirements that overlap with the EPA's authority under the Clean Air Act."); *id.* ("[S]ome States with significant Federal oil and gas production have similar regulations addressing the loss of gas from these sources."); *id.* at 7927 ("BLM is not confident that all provisions of the 2016 final rule would survive judicial review."). Thus, the most judicious and efficient course is for BLM to obtain the benefits of public comment free from potential conflicts from litigating a rule that may be short-lived.

For example, in the proposed Revision Rule, BLM explains that it has concerns about the cost-benefit analysis supporting the Waste Prevention Rule. It notes that the Regulatory Impact Analysis ("RIA") for the Waste Prevention Rule likely "underestimated" compliance costs and "overestimated" the benefits of the rule. 83 Fed. Reg. at 7928. Given that the methodology for calculating the social cost of methane and the cost-benefit analysis underlying the Waste Prevention Rule have been specifically challenged in these cases, if merits litigation were to proceed, BLM might be forced to take positions on those issues, despite the fact that they are currently subject to public comment.

In short, there is simply no way for this Court to reach the merits of the Waste Prevention Rule without impacting the scope, content, and outcome of BLM's ongoing revision rulemaking. This is precisely the type of judicial interference in administrative proceedings that the Supreme Court and Tenth Circuit have repeatedly warned against. *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807-08; *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998) (noting "immediate judicial review directed at the lawfulness" of agency action "could hinder agency efforts to refine" that action); *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1254 (10th Cir. 2009) ("[F]lexibility in reconsidering and reforming of policy . . . is one of the signal attributes of the administrative process . . . and courts will not lightly interfere with it." (internal quotation marks and citations omitted)). As BLM is just months away from completing its reconsideration of the Waste Prevention Rule—and the proposed rule is currently out for public comment—a stay of the litigation pursuant to this Court's equitable authority continues to be the most appropriate path forward.

II. Federal Respondents Do Not Oppose a Stay of the Implementation Deadlines of the Waste Prevention Rule While BLM Completes Notice-and-Comment Rulemaking

Petitioners and Intervenor-Petitioners have put forth a range of options for how this Court could provide relief from the sudden and unexpected applicability of the Waste Prevention Rule in light of the developments in California. In recognition of the significant disruption caused by the injunction of the Suspension Rule and the immediate reinstatement of the Waste Prevention Rule, all while BLM nears completion of the Revision Rule, Federal Respondents do not oppose a stay of the Waste Prevention Rule's implementation deadlines. A stay will provide certainty and stability for the regulated community and the general public while BLM completes its rulemaking process, is consistent with the agency's own suspension of much of the Waste Prevention Rule after notice and comment, and would prevent the potentially unrecoverable

expenditure of millions of dollars in compliance costs. But Federal Respondents do oppose the request of the Intervenors—North Dakota, Texas, and the Citizen Groups—to proceed with merits briefing in light of the serious prudential concerns discussed above.

A. Federal Respondents Do Not Oppose a Stay of the Rule

Federal Respondents recognize that the California court's order enjoining the Suspension Rule has generated significant regulatory uncertainty for both Petitioners and the regulated community writ large. This has forced Petitioners to return to this Court for relief from the Waste Prevention Rule. While Federal Respondents firmly believe that this Court's adjudication of the merits of the Waste Prevention Rule is imprudent, they acknowledge that a stay of the litigation without a concomitant stay of the Rule would prejudice Petitioners. Thus, Federal Respondents do not oppose a stay of the implementation deadlines of the Waste Prevention Rule.[3] Given the availability of alternative means of providing the relief sought by Petitioners, the Court need not reach the question of whether vacatur of the Waste Prevention Rule without a merits decision is appropriate.

With the Suspension Rule subject to a preliminary injunction, the suspended and delayed provisions of the Waste Prevention Rule arguably now affect the interests of the parties here. Because the Waste Prevention Rule has been postponed or suspended for nearly half of the past year, many operators are not prepared to immediately comply with the Rule, especially the provisions that were set to take effect in January 2018, but were suspended before they became operative. *See* 82 Fed. Reg. at 58,052-56. Petitioners now face real and imminent harm if the Waste Prevention Rule is left in place, as they must immediately expend unrecoverable funds to

[3] Federal Respondents take no position on the most appropriate authority under which the Court stays the Waste Prevention Rule.

comply with a rule that may be revised or rescinded within a matter of months. *See* 2016 RIA at 106 (VF_0000551-52) (estimating $110-$114 million in compliance costs in first year of Waste Prevention Rule); Ex. A ¶¶ 5-6 (describing unrecoverable costs of Waste Prevention Rule).

In addition, a stay of the Waste Prevention Rule's implementation deadlines pending BLM's reconsideration of the Rule is in the public interest, as it would provide regulatory certainty and stability to the nation's oil and gas industry. It would also allow BLM to focus its limited resources on completing the revision rulemaking rather than administering a rule that it is in the midst of reconsidering.

A stay of the Waste Prevention Rule would not be contrary to BLM's statutory obligations. In enacting the Waste Prevention Rule, BLM exercised its discretionary authority to manage waste under the Mineral Leasing Act ("MLA"). But nothing in the MLA requires BLM to manage waste in the specific manner envisioned by the Waste Prevention Rule. *See Wyoming v. U.S. Dep't of the Interior*, Nos. 16-cv-285-SWS, 16-cv-280-SWS, 2017 WL 161428, at *6 (D. Wyo. Jan. 16, 2017) (finding BLM has broad statutory authority "to regulate the development of federal and Indian oil and gas resources for the prevention of waste" and is "entitled to deference regarding the determination of how best to minimize losses of gas . . . and incentivize the capture and use of produced gas"); *California*, 2018 WL 1014644, at *12 ("I agree with BLM that given its range of statutorily-mandated duties and responsibilities, it is best suited to evaluate its competing options and choose a course of action."). Indeed, there was a lawful, albeit substantially different, regulatory regime in place for decades before the Waste Prevention Rule's enactment. This Court can therefore stay the implementation deadlines of the Rule without implicating any non-discretionary duty on the part of the agency. Such a stay, moreover,

would be consistent with BLM's own exercise of its authority and discretion in promulgating the Suspension Rule.

Federal Respondents recognize that this Court may have comity concerns given the California Court's recent injunction of the Suspension Rule. But a stay of the Waste Prevention Rule would not conflict with the California court's preliminary injunction order for three reasons. First, the California court expressly excluded consideration of the merits of the Waste Prevention Rule from its review of the Suspension Rule, recognizing that the Waste Prevention Rule was not before it. *California*, 2018 WL 1014644, at *4 ("I express no judgment whatsoever in this opinion on the merits of the Waste Prevention Rule."). It's notable that the California court was fully informed of the proceedings in this Court. Yet it declined to defer to this Court by transferring the challenge to the Suspension Rule here because it found the cases to be "substantively distinct, and the challenges to each [rulemaking] raise unique legal questions and require the evaluation of two separate rules promulgated for different reasons." *Id.* Likewise, any order issued by this Court would be in response to its evaluation of the discrete agency action before it, namely, the 2016 Waste Prevention Rule. While the practical effect of the California court's order is arguably to bring the Waste Prevention Rule back into effect as against certain parties, the California court did not find that the Waste Prevention Rule *must* remain in effect. It was explicit that the Waste Prevention Rule was not before it when it acted against the Suspension Rule. *Id.*

Second, in its injunction order, the California court acknowledged this Court's concerns with the Waste Prevention Rule and anticipated that a stay of portions of that Rule could be appropriate on that basis. *Id.* at *9 (noting that this Court's "reasoned skepticism" regarding the

"propriety of the Waste Prevention Rule" could "serve to justify a suspension or delay of specific provisions addressed by the court").

Third, the California court's assessment of the balance of harms in the context of the Suspension Rule is not controlling on this Court in deciding whether to stay the implementation deadlines of the Waste Prevention Rule. As discussed above, Petitioners here face real and imminent harm if the Waste Prevention Rule is left in place, as they must immediately expend unrecoverable funds to comply with a rule that may be revised or rescinded within a matter of months. Given the serious and pragmatic concerns presented by Petitioners, Federal Respondents do not oppose this Court's exercise of its independent authority, in light of the specific facts before it, to stay the implementation deadlines of the Waste Prevention Rule.

B. Proceeding to Merits Briefing Wastes Judicial Resources

Intervenor-Petitioners North Dakota and Texas and Intervenor-Respondent Citizen Groups seek to proceed to merits briefing on an expedited schedule, despite the significant prudential concerns outlined above.[4] ECF No. 194 at 3; ECF No. 198 ¶ 3. Federal Respondents oppose this proposal as it would be a waste of judicial resources to litigate a rule that is soon likely to change, and proceeding to the merits would put BLM in the difficult position of litigating a rule that is under reconsideration. *See* Part I, *supra*.

To the extent that North Dakota and Texas urge this Court to consider the merits on the grounds that the forthcoming Revision Rule will violate the law, they engage in improper speculation as to the outcome of the ongoing rulemaking process and invite the Court to issue an advisory opinion about an issue not before it and that is not yet ripe for consideration. *See* ECF

[4] Notably, none of the original parties to these cases (as opposed to the intervenors) believe that proceeding to the merits is the appropriate path forward. *See* ECF No. 195 ¶ 11; ECF No. 197.

No. 194 at 8; ECF No. 199 at 4. The proper forum for North Dakota and Texas to raise their concerns about the proposed Revision Rule is in comments on that rule. It is not the place for the parties or this Court to predict the contents of a future rule, or to predicate the proceedings in this litigation on speculative future challenges to a rule that has not yet been promulgated.

The Citizen Groups assert that a stay of the Waste Prevention Rule is improper here because a stay must be issued pending a merits decision. ECF No. 198 at 2 & n.1. The point is inapposite. As Federal Respondents have explained, prudential concerns counsel a continued stay of merits briefing. Any stay of the Waste Prevention Rule in the interim is done pending a future adjudication of the merits. The Citizen Groups point to no requirement that a court ultimately reach the merits of a stayed action. Indeed, such a finding would place nonsensically strict limits on a court's equitable authority to manage its docket and on the parties' right to reach an alternative resolution of a matter.

Finally, North Dakota, Texas, and the Citizen Groups assert that, if merits briefing proceeds, only reply briefs remain to be filed. This assertion ignores the fact that (1) circumstances have changed since the parties filed their initial merits briefs, including the order preliminarily enjoining the Suspension Rule and the issuance of the proposed Revision Rule; and (2) Federal Respondents moved for dismissal or a stay of these cases in lieu of responding on the merits in light of the ongoing revision rulemaking process and publication of the Suspension Rule. *See* ECF No. 176. If the Court decides to address the merits, Federal Respondents request leave to file a new response brief that would address these changed circumstances.

CONCLUSION

Because Petitioners' claims remain prudentially moot and prudentially unripe in light of BLM's reconsideration of the Waste Prevention Rule, this Court should continue the stay of the

litigation. Federal Respondents do not oppose a stay of the implementation deadlines of the Waste Prevention Rule in the interim.

Respectfully submitted this 14th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2018, a copy of the foregoing was served by filing a copy of that document with the Court's CM/ECF system, which will send notice of electronic filing to counsel of record.

/s/ *Clare Boronow*
Clare Boronow