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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, STATE OF MONTANA, STATE OF NORTH DAKOTA, and STATE OF TEXAS	)	
Petitioners,	)	Case No. 16-cv-00285-SWS [Lead]
v.	)	Consolidated with:
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*	)	Case No. 16-cv-00280-SWS
Respondents,	)	

REPLY IN SUPPORT OF JOINT MOTION BY THE STATES OF NORTH DAKOTA AND TEXAS TO LIFT THE STAY ENTERED DECEMBER 29, 2017 AND TO ESTABLISH EXPEDITED SCHEDULE FOR FURTHER PROCEEDINGS

INTRODUCTION

All the parties agree the current stay should be lifted and further action by this Court is appropriate. The only question for the Court to answer is which course of action to take. For the reasons shown herein, and in prior filings, a merits disposition is now the only course of action that will permit the concerns expressed by all parties to be addressed appropriately and finally. Petitioner-Intervenors the States of North Dakota and Texas (the "States") submit this reply brief in support of their Joint Motion to Lift the Stay Entered December 29, 2017 and to Establish Expedited Schedule for Further Proceedings, *see* ECF No. 194. As the States explained in that Motion, proceeding to the merits is the only appropriate option before the Court for resolving this litigation in a prompt, sensible, and final way. Earlier today, the Northern District of North Dakota denied the United States motion to stay based on similar arguments in a challenge to a different rule, holding that the fact that "additional rulemaking proceedings . . . *might* result in this case becoming moot at some point in the future," are no grounds for a stay of the proceedings and ordered the case to proceed to the merits. Order to Lift the Stay, *State of North Dakota, et al. v. U.S. EPA*, Case No. 3:15-cv-59, Doc. No. 185 at 3 (Mar. 23, 2018) (D. N.D. filed June 29, 2015) ("WOTUS Litigation"). The States of Wyoming and Montana ("Petitioner States") and Industry Petitioners argue for interim and half measures that do not fully address the harms created by the Bureau of Land Management's ("BLM" or "Agency") Waste Prevention, Production Subject to Royalties, and Resource Conservation: Final Rule, 81 Fed. Reg. 83,008 ("Venting and Flaring Rule" or "Rule"), and allow for the unnecessary continuation of the regulatory and judicial "ping pong" that has characterized litigation surrounding the Rule and BLM's revision efforts thus far. *See* ECF Nos. 195 and 196.

Importantly, while we disagree regarding the correct substantive outcome of these proceedings, North Dakota and Texas's request that this Court decide the merits of these challenges to the Rule is shared by Respondent-Intervenor Citizen Groups ("Citizen Group Intervenors") and Respondent States of California and New Mexico ("State Respondents"). *See* ECF Nos. 208 and 209. Rather than apply one of the band-aid proposals proffered by Petitioner States and Industry Petitioners—*i.e.,* a partial stay under Section 705 of the Administrative Procedure Act or a partial preliminary injunction or vacatur of the Venting and Flaring Rule, *see* ECF Nos. 195 and 196—this Court should promptly direct the parties to expeditiously complete merits briefing and then make a final determination on the validity of the Rule. This Court has a "virtually unflagging" responsibility to exercise its jurisdiction, and can only fulfill that obligation by issuing a decision on the merits of these challenges. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014). Even if the Court were to find some merit in either of Petitioner States' or Industry Petitioners' alternative approaches, the Court should nevertheless proceed to decide the merits after granting one of those partial, interim measures. Only a final merits decision will put an end to what has, thus far, been piecemeal litigation, and will continue to be piecemeal litigation under any of the approaches that have been proposed to the Court *except* the one advocated by North Dakota and Texas and endorsed by Citizen Group Intervenors and State Respondents—namely, proceeding to a final merits ruling.

For the reasons set forth in the original motion to lift the stay by North Dakota and Texas, *see* ECF No. 194, and the additional reasons set forth herein, the Court should establish an expedited schedule for completing briefing on the merits of these challenges to the Rule and then proceed to decide the merits issues in order to bring finality to this multi-faceted dispute.

AGRUMENT

I. Prompt Completion of Merits Briefing and a Final Decision on the Merits Is the Only Proper Path Forward.

North Dakota and Texas's proposal is the most appropriate path forward in this litigation. The partial or interim relief requested by Petitioner States and Industry Petitioners, while certainly better than nothing, is neither appropriate nor necessary given the advanced stage of this litigation and the fact that the merits of this case can be decided fully and finally in short order. *See* ECF No. 209 at 8. Disregarding these facts, Federal Respondents argue that proceeding to the merits would be a waste of judicial resources, as BLM believes these challenges the Venting and Flaring Rule to be prudentially moot or unripe, given the Agency's publication of a proposed rule revising or rescinding that Rule, 83 Fed. Reg. 7924 ("Proposed Revision Rule"), and its forecasted intent to finalize the Proposed Revision Rule by August of this year. *See* ECF No. 207. On these misguided grounds, BLM argues, instead, for a continued stay of these proceedings, while not opposing a partial stay of the Venting and Flaring Rule.

Continuing to stay these proceedings is not appropriate. Doing so would directly contradict recent Supreme Court precedent holding that, regardless of an agency's proposal to rescind or revise a challenged rule, plaintiffs maintain their "concrete interest" in the outcome of the litigation so long as the challenged rule remains "on the books," which is the case here. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. __, n. 5 (2018). Upon remand of *National Association of Manufacturers* to the District of North Dakota, the United States asked the court to stay North Dakota's challenge to the Environment Protection Agency's ("EPA") Waters of the United States ("WOTUS") Rule, in a nearly identical factual scenario and based on the same prudential mootness arguments it recycles here, because the EPA had published a proposed rule recodifying a previous WOTUS definition and was working on a further revision to the WOTUS Rule. *See*

Def. Mot. to Stay, WOTUS Litigation, *supra,* Doc. No. 175 (Feb. 8, 2018). These arguments failed in the WOTUS Litigation, as the first court to interpret the *National Association of Manufacturers* decision denied the United States' request and ordered the remanded case to proceed on the merits. In so holding, the North Dakota District Court cited the Supreme Court's previous denial of EPA's motion to stay on similar grounds, and explained that "[t]his case *may* in fact become moot at some point in the future, but whether that will occur, and when that might occur, cannot be known. Recodification or replacement of the WOTUS Rule cannot be considered a foregone conclusion. Though defendants have an inherent authority to reconsider past decisions, their capacity to do so is constrained by the Administrative Procedure Act." Order Lifting Stay, WOTUS Litigation, Doc. No. 185 at 15 (Mar. 23, 2018). Here, BLM's request to stay these proceedings must likewise be denied. This Court's review of the merits of these challenges must continue.

Further, deciding the merits of the other options presented to the Court, such as a partial stay of the Venting and Flaring Rule under Section 705 of the Administrative Procedure Act ("Partial Section 705 Stay"), or a partial preliminary injunction would each require at least the same expenditure of this Court's and the parties' resources as would resolving this case on the merits. Merits briefing is nearly complete and therefore can be completed and a decision reached at least as quickly, and probably more quickly, than addressing the requests for partial relief. Further, expending judicial resources on partial relief would, even if granted, still leave this litigation on the docket and the subject of further expenditure of judicial resources. By definition, none of those partial, interim relief measures would bring finality to this dispute. Only a merits decision can do that.

The timing and outcome of BLM's rulemaking process is unknown: BLM is unable to state with any particularity what the final revised rule will look like, whether it will fully address the issues and concerns raised in this litigation, or even when the rule will ever be finalized, *see* ECF No. 207 at 4, 10. For example, the Proposed Revision Rule does not explicitly address the scope of BLM's statutory authority, an issue of particular concern for North Dakota and Texas, as the crux of their argument in this case is that BLM has exceeded its statutory authority through the Venting and Flaring Rule, causing great harm to their state sovereignty. *See* ECF No. 143 at 24-34. Therefore, staying this litigation while awaiting further action by BLM provides not even a hint that North Dakota's and Texas' concerns will be addressed. The fact that BLM plans to issue a revised rule in the future does not negate the fact that the Venting and Flaring Rule remains "on the books" today and the States' "concrete interest" entitles them to a decision on the merits. *Nat'l Ass'n of Mfrs.*, 583 U.S. at n. 5.

Moreover, the half measures suggested by Petitioner States and Industry Petitioners will not address concerns voiced by others parties regarding the "chaos and uncertainty" caused by BLM's attempts to revise the Venting and Flaring Rule. ECF No. 195 at 1; *see also* ECF No. 196 at 2, ECF No. 208 at 5, ECF No. 209 at 2. Instead, by asking the Court to forgo a final decision on the merits, those proposed half measures create the possibility of continued regulatory and judicial unpredictability. Citizen Group Intervenors will certainly challenge any final revision rule replacing the Venting and Flaring Rule in the Northern District of California, where they have already successfully challenged BLM's previous interim measures—an administrative stay of the Rule and a rule delaying certain Venting and Flaring Rule compliance deadlines, 82 Fed. Reg. 58,050. Unless a decision on the merits is issued in this case, a possible successful future challenge to the revision rule would mean the parties will suffer yet another round of regulatory

and judicial "ping-pong," *see* ECF No. 195 at 2, as the Venting and Flaring Rule in its current form would again be reinstated. These circumstances make clear that the regulatory certainty due to state regulators, industry, and the public can only be established by proceeding to the merits of this dispute, as is being advocated not only by North Dakota and Texas, but also by State Respondents and Citizen Group Intervenors as well.

II. Should This Court Choose to Grant a Section 705 Stay, Preliminary Injunction, or Vacatur of the Rule, It Should Also Promptly Proceed to the Merits.

Should this Court consider the options of preliminarily enjoining the Venting and Flaring Rule, or staying the Rule under Section 705 of the APA, it should enjoin or stay the entire Rule. A partial injunction or stay that leaves in place the fundamentally flawed assertion of jurisdiction by BLM over state and private mineral interests would be little relief to North Dakota or Texas, as it would not address the central issues upon which they challenge the Venting and Flaring Rule. However, even if the Court were to issue such a complete stay or injunction of the Venting and Flaring Rule, it can, and should, still set a schedule to complete merits briefing and proceed to a hearing on the merits.

Granting interim relief without proceeding to the merits would be improper, as the purpose of any of the requested interim measures is to "maintain the parties' positions *pending a decision on the merits* of the underlying challenge." ECF No. 208 at 20; *see also* ECF No. 197 ("[t]he purpose of a preliminary injunction is to 'preserve the relative position of the parties *until a trial on the merits can be held*'") (emphasis added) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)); ECF No. 22. Furthermore, even if the Court determines to grant a Section 705 stay or preliminary injunction of the Venting and Flaring Rule in its entirety until BLM finalizes its Proposed Revision Rule, the inevitability of future challenges threatens the validity of that future rule and the reinstatement of the Venting and Flaring Rule in its current form. The

Court can, and should, prevent the resulting regulatory uncertainty and provide Petitioners with a decision on the merits in light of their "concrete interest" in challenging a Venting and Flaring Rule that remains "on the books." *Nat'l Ass'n of Mfrs.*, 583 U.S. at n. 5.

CONCLUSION

For the foregoing reasons, North Dakota and Texas respectfully request that this Court deny the motions submitted by Petitioner States and Industry Petitioners, and grant North Dakota and Texas's Motion to Lift the Stay Entered December 29, 2017 and to Establish Expedited Schedule for Further Proceedings.

Respectfully submitted this 23rd day of March, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of March, 2018, a true and correct copy of **REPLY IN SUPPORT OF JOINT MOTION BY THE STATES OF NORTH DAKOTA AND TEXAS TO LIFT THE STAY ENTERED DECEMBER 29, 2017 AND TO ESTABLISH EXPEDITED SCHEDULE FOR FURTHER PROCEEDINGS** was filed with the Clerk of the Court using CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ *Paul M. Seby*