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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 RESPONDENT-INTERVENORS' MOTION FOR A STAY PENDING APPEAL**

INTRODUCTION

Animated by concerns about the costs of the Waste Prevention Rule and its potential to hurt smaller companies and marginal wells, the Bureau of Land Management ("BLM") is in the midst of reconsidering the Rule through a notice-and-comment rulemaking and anticipates publishing a final Revision Rule in August 2018. Decl. of James Tichenor ¶ 4, Ex. A. In recognition of the agency's ongoing efforts to revise the Waste Prevention Rule, this Court properly exercised its equitable discretion to stay this litigation and the "phase-in" provisions of the Waste Prevention Rule to prevent the Court and the parties from wasting resources disputing a Rule that is likely to change within four months.

Respondent-Intervenor Citizen Groups and the States of California and New Mexico have appealed the Court's order, and now, in a three-page motion, seek a stay of that order pending appeal. They do not meet the standard for such a stay. They are not likely to succeed on appeal because their motion is premised on a range of unsupported assumptions about this Court's authority under 5 U.S.C. § 705 (despite the fact that this Court stayed the Rule under its equitable discretion). In addition, their alleged harms are minimal: as this Court has recognized, operators could not come into compliance with the Waste Prevention Rule immediately, and any reductions in emissions in the limited time necessary to decide the appeal (let alone before BLM issues its Revision Rule in August) would be infinitesimal. Ex. A ¶ 7. Nor do these alleged harms outweigh the significant harms to Petitioners, Respondents, and the public should the full Waste Prevention Rule suddenly take effect, requiring immediate, costly compliance with a new regulatory regime.

This Court's order properly recognized BLM's inherent authority to reconsider and revise its regulations as well as the many pragmatic reasons that a stay of certain provisions of the

Waste Prevention Rule was necessary given BLM's ongoing reconsideration of the Rule. Requiring compliance with provisions that are likely to change not only wastes millions of dollars, it also brings back into effect a regulation that was previously postponed and suspended—thereby contributing to the "ping-ponging" regulatory regimes that have generated significant uncertainty over the past year. Because its order was a proper exercise of the Court's equitable discretion, the Court should deny Respondent-Intervenors' motion for a stay pending appeal.

STANDARD OF REVIEW

Rule 62(c) of the Federal Rules of Civil Procedure provides that, when "an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction," a court, in its discretion, "may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c); *see also* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court for . . . an order suspending, modifying, restoring, or granting an injunction while an appeal is pending."). In determining whether to stay an order pending appeal, the court considers

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

An injunction pending appeal is an extraordinary remedy. *See, e.g.*, *John Doe Co. v. Consumer Fin. Protection Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017); *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000); *Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685 (5th Cir. 1968). Because the movant is, in essence, requesting that a court grant it the very relief, pending appeal, that the court just decided it is not entitled to receive, "the burden of meeting the standard is a heavy one." 11 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE

AND PROCEDURE § 2904 (3d ed. 2015); *see also Millennium Pipeline Co., LLC v. Certain Permanent & Temp. Easements in (No Number) Thayer Rd.*, 812 F. Supp. 2d 273, 275 (W.D.N.Y. 2011) ("[L]ogic dictates that a court will seldom [issue an order or judgment and] then turn around and grant [a stay] pending appeal, finding, in part, that the party seeking [the stay] is likely to prevail on appeal, *i.e.* that it is likely that the court erred in [issuing the underlying order or judgment]." (quoting *Dayton Christian Sch. v. Ohio Civil Rights Comm'n*, 604 F. Supp. 101, 103 (S.D. Ohio 1984))). A stay pending appeal "is not a matter of right, even if irreparable injury might otherwise result, but is instead 'an exercise of judicial discretion,' and the propriety of its issuance is dependent upon the 'circumstances of the particular case.'" *Nieberding v. Barrette Outdoor Living, Inc.*, No. 12-2353-DDC-TJJ, 2014 WL 5817323, at *2 (D. Kan. Nov. 10, 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

ARGUMENT

I. Respondent-Intervenors Are Not Likely to Succeed on Appeal

Respondent-Intervenors are unlikely to succeed on appeal because this Court acted well within its equitable discretion. *See Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (noting that standard of review for district court's grant or denial of an injunction is abuse of discretion). The Tenth Circuit has recognized that a court's obligation to "hear and decide" cases may give way to pragmatic considerations in light of the facts before the court, particularly in situations in which an agency is the middle of reconsidering a rule. *Wyoming v. Zinke*, 871 F.3d 1133, 1141-43 (10th Cir. 2017). Here, the Court appropriately recognized the problem: proceeding with litigation on the merits when BLM is actively reconsidering the Waste Prevention Rule risks judicial interference in the administrative process, and requiring implementation of a rule that is likely to substantively change by August of this year would waste industry and government resources and contribute to the uncertainty generated by the

"ping-ponging" regulatory regimes. The Court's solution—a temporary stay of the litigation and certain provisions of the Waste Prevention Rule—represents precisely the thoughtful and pragmatic approach encouraged by the Tenth Circuit and by the doctrine of equitable discretion. *See United States v. Criden*, 648 F.2d 814, 818 (3d Cir. 1981) ("[D]iscretion is sometimes committed to the trial judge because of pragmatic considerations."); *Harjo v. Andrus*, 581 F.2d 949, 952 (D.C. Cir. 1978) ("[A] district court's equitable discretion is characterized by flexibility, the need for practicality, and the duty to reconcile the public interest with private needs."). Indeed, under Respondent-Intervenors' theory, the Court must adjudicate a rule that will be soon be moot while simultaneously offering an opinion that could inadvertently interject the Court into an ongoing rulemaking process. This Court appropriately stayed its hand under its ample equitable authority.

What is more, Respondent-Intervenors' challenges to the Court's order rest on assumptions that are either contradicted by the Court's order or unsupported by law. Respondent-Intervenors assume that the Court acted under 5 U.S.C. § 705 even though the Court framed the stay of the Waste Prevention Rule as an exercise of its equitable discretion. *See* Order 10. They assume that Section 705 does not allow for a stay pending an agency's reconsideration of a rule even though Section 705 allows for considerable discretion in the type of relief that a court may issue and the purpose for which a court may issue that relief. *See* 5 U.S.C. § 705 (A court "may issue *all necessary and appropriate process* to postpone the effective date of an agency action or *to preserve status or rights pending conclusion of the review proceedings*." (emphasis added)). They also assume that a court cannot stay a rule after determining that a case is prudentially unripe or moot without providing any law in support—and despite the fact that this Court, while noting that the case "implicate[s]" the "doctrine of

prudential mootness," did not actually find the case prudentially moot. *See* Order 8. And throughout their motion, instead of presenting arguments and law specific to their request for a stay pending appeal, in their haste to bring their claims to the Tenth Circuit, Respondent-Intervenors rely on citations to their prior response briefs that provide no support for their claims in this motion. *See* J. Mot. for Stay Pending Appeal 1-3, ECF No. 222; *see also Wyoming v. USDA*, No. 07-CV-017-B, 2009 WL 10670655, at *3 (D. Wyo. June 15, 2009) (finding party failed to show that it is likely to succeed on appeal where the court has "an ample amount of experience" with the issues in the case and has thoroughly analyzed the administrative record, and the movant made no new arguments and pointed to no new evidence).

Tellingly, Respondent-Intervenors do not even attempt to grapple with the difficult situation before this Court that is the basis of its order: the agency's ongoing reconsideration of the Waste Prevention Rule. Their argument that the Court cannot stay the Waste Prevention Rule would limit the Court's discretion and authority to manage its docket in a manner that accounts for the specific facts, and the practical and pragmatic considerations, before it. As the Tenth Circuit has recognized, "unusual circumstances" sometimes call for a court to take "unusual" actions. *Wyoming*, 871 F.3d at 1142. The Court's efforts to address the complex situation before it are a reasonable exercise of its equitable discretion and, as such, are likely to be upheld on appeal.

II. A Stay of the Court's Order Pending Appeal Would Significantly Harm Petitioners, Federal Respondents, and the Public, and Those Harms Far Outweigh the Harm to Respondent-Intervenors

Respondent-Intervenors allege the same harms that this Court already considered in its decision to stay the Waste Prevention Rule. They also repeat the same argument about the balancing of the equities—that the harms caused by emissions outweigh the harm to industry, the

United States, and the public—despite the Court's explicit finding that "[t]he waste, inefficiency, and futility associated with a ping-ponging regulatory regime is self-evident and in no party's interest." Order 11. Their arguments are no more convincing in the context of the requested stay pending appeal.

As this Court has recognized, "Petitioners, particularly Industry Petitioners, will be irreparably harmed by full and immediate implementation of the 2016 Waste Prevention Rule, magnified by temporary implementation of significant provisions meant to be phased-in over time that will be eliminated in as few as four months." Order 9-10. In addition, BLM will be forced to implement a rule that it is in the midst of reconsidering, requiring the diversion of resources away from the rulemaking process.

In contrast, Respondent-Intervenors point to "the waste of 16.3 billion cubic feet" of natural gas, "over 140,000 tons of methane emissions," and "significant emissions of other dangerous air pollutants." J. Mot. for Stay Pending Appeal 2. Notably, these numbers are derived from BLM's 2016 Regulatory Impact Analysis ("RIA") for the Waste Prevention Rule, a document whose reliability BLM has questioned and the findings of which are currently under reconsideration as part of the Revision Rule rulemaking. 83 Fed. Reg. 7924, 7928 (Feb. 22, 2018); 82 Fed. Reg. 58,050, 58,051 (Dec. 8, 2017). Furthermore, these numbers represent annual estimates that have not been adjusted to reflect the BLM's prior suspension of the "phase-in" provisions of Waste Prevention Rule in 2018. *See* Decl. of Hillary Hull ¶¶ 5-7, ECF No. 209-2. They also do not account for the time-limited nature of the stay. The stay is in place "until the BLM finalizes the Revision Rule" which is anticipated to occur only four months from now in August 2018. Order 10; Ex. A ¶ 4. But the numbers produced by Respondent-Intervenors appear to assume that the stay is indefinite, or at least for an entire year. *See* Decl. of

Hillary Hull ¶¶ 5-7; *cf.* Ex. A ¶ 7 (estimating that stay imposed by Court's order will result in additional methane emissions of less than 0.36 percent of total U.S. emissions in 2015).

Respondent-Intervenors also fail to account for the fact that the alleged benefits of the Waste Prevention Rule would not accrue immediately if the Rule were not stayed because operators cannot immediately comply with it. As this Court has recognized, operators reasonably delayed compliance in reliance on BLM's efforts to postpone, suspend, and reconsider the Rule. Order 9 n.9. It is unclear to what extent operators could come into compliance within the next four months, by August 2018, given that the Rule anticipated a full year for compliance.

In contrast, the harms to Petitioners, Federal Respondents, and the general public—flowing from the expenditure of millions of dollars in unrecoverable compliance costs, the diversion of resources to implement a rule under reconsideration, potential well shut-ins for marginal operators, and "ping-ponging" regulatory regimes—will occur immediately should the Court's order be stayed pending appeal.

Respondent-Intervenors cite to the Northern District of California's decision to enjoin the Suspension Rule in support of their allegations of harm, but this Court was already aware of that decision when it decided to stay the Waste Prevention Rule and that decision addressed the harms arising from a one-year suspension of the Rule, not a four-month stay. *See* Citizen Groups' Resp. ii, ECF No. 209; State Resp'ts' Consolidated Opp'n iv, ECF No. 208. In any event, the California court's balancing of the equities is flawed because it relied on a misreading of the RIA for the Suspension Rule. The court found that BLM's calculations regarding the costs and benefits of a one-year suspension of the Waste Prevention Rule were "flawed" because BLM "assume[d] that compliance costs would never be incurred by industry." *California v.*

BLM, 286 F. Supp. 3d 1054, 1075 (N.D. Cal. 2018). In fact, BLM did account for compliance costs as demonstrated by the RIA. *See* RIA for Suspension Rule at 37-41, *available at* https://www.federalregister.gov/documents/2017/12/08/2017-26389/waste-prevention-production-subject-to-royalties-and-resource-conservation-delay-and-suspension-of.

The California court's decision also relied heavily on declarations that are not before this Court, and the court in that case opted to believe statements made by plaintiffs' declarants even when their data conflicted with BLM's own well-supported findings. *California*, 286 F. Supp. 3d at 1073-74 (citing to Ilissa Ocko and Renee McVay declarations and discounting BLM's statement that the methane emissions resulting from a one year suspension of the Waste Prevention Rule would account for "roughly 0.61 percent of the total U.S. methane emissions in 2015" because "Plaintiffs submit affidavits from scientists who posit otherwise").

Equally important, the California case was decided in the Ninth Circuit, whereas this Court's balancing of the equities is subject to Tenth Circuit law. The Tenth Circuit has held that significant economic harms can outweigh environmental harms. *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 892 (10th Cir. 2013) (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)); *see also Wilderness Workshop v. BLM*, 531 F.3d 1220, 1231 (10th Cir. 2008) (affirming district court finding that environmental harms did not weigh in favor of injunction because they were "equally balanced against the weight of the public interest in gas production, and [the development company's] demonstrated economic interests" (internal quotations omitted)).

Finally, Respondent-Intervenors accuse this Court of "ignor[ing] the public's interest in final agency regulations remaining in effect until they are found unlawful or duly revised or rescinded." J. Mot. for Stay Pending Appeal 3. But this allegation ignores the circumstances of

this case. Due to the Rule's phased-in approach and BLM's efforts to postpone, suspend, and reconsider the Rule, the status quo is *not* the full Waste Prevention Rule in effect. The Court's order maintains the status quo by ensuring that the phased-in provisions of the Rule remain inoperative. The sudden implementation of the full Rule is directly in conflict with the public's strong interest in certainty and stability regarding the regulatory regime governing domestic oil and gas development.

CONCLUSION

The Court should deny Respondent-Intervenors' request for a stay pending appeal. Their three-page motion is a rehash of arguments and issues already considered and decided by this Court. They are unlikely to succeed on appeal and their alleged harms are far outweighed by the harm to Petitioners, Federal Respondents, and the public from requiring the implementation of a rule that is likely to change by August 2018.

Respectfully submitted this 16th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 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*
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