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**UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING**

STATE OF WYOMING, et al.,)	
)	
Petitioners,)	
)	
v.)	
)	
UNITED STATES DEPARTMENT OF THE INTERIOR,)	
et al.,)	
)	
Respondents,)	No. 2:16-cv-00285-SWS [Lead]
)	
and)	[Consolidated with 2:16-cv-00280-SWS]
)	
WYOMING OUTDOOR COUNCIL, CENTER FOR)	Assigned: Hon. Scott W. Skavdahl
BIOLOGICAL DIVERSITY, CITIZENS FOR A)	
HEALTHY COMMUNITY, DINÉ CITIZENS AGAINST)	RESPONDENT-INTERVENOR
RUINING OUR ENVIRONMENT, EARTHWORKS,)	CITIZEN GROUPS' AND STATES'
ENVIRONMENTAL DEFENSE FUND,)	JOINT REPLY IN SUPPORT OF
ENVIRONMENTAL LAW AND POLICY CENTER,)	MOTION FOR A STAY PENDING
MONTANA ENVIRONMENTAL INFORMATION)	APPEAL
CENTER, NATIONAL WILDLIFE FEDERATION,)	
NATURAL RESOURCES DEFENSE COUNCIL, SAN)	
JUAN CITIZENS ALLIANCE, SIERRA CLUB, THE)	
WILDERNESS SOCIETY, WESTERN ORGANIZATION)	
OF RESOURCE COUNCILS, WILDERNESS)	
WORKSHOP, AND WILDEARTH GUARDIANS,)	
)	
and)	
)	
STATE OF CALIFORNIA and STATE OF NEW)	
MEXICO,)	
)	
Respondent-Intervenors.)	

Respondent-Intervenors offer the following joint reply in support of their request for a stay of this Court’s Order Staying Implementation of Rule Provisions and Staying Action Pending Finalization of Revision Rule (Apr. 4, 2018), ECF No. 215 (“Order”), which enjoined certain provisions of the Waste Prevention Rule. As discussed in Respondent-Intervenors’ Joint Motion for a Stay Pending Appeal and in prior briefing before this Court, Respondent-Intervenors meet the requirements for a stay pending review: they are likely to succeed on appeal and will be irreparably injured in the meantime; the other parties will not be harmed by complying with a final regulation; and a stay is in the public interest. *See, e.g.*, Resp’t-Intervenors’ Joint Mot. for a Stay Pending Appeal (Apr. 6, 2018), ECF No. 222.

In the Order, this Court held that it did not have to apply the traditional four-factor preliminary injunction test to stay the Waste Prevention Rule under 5 U.S.C. § 705 (“section 705”). Order at 9 n.10. However, courts do not have authority under the Administrative Procedure Act (“APA”) to stay final agency regulations unless the movants have satisfied the four prerequisites to such relief. Citizen Groups’ Resp. to Pending Mots. 19–22 (Mar. 16, 2018), ECF No. 209 (“Citizens’ Resp.”); State Resp’ts’ Consolidated Opp’n to Pet’rs’ Mots. 17–18 (Mar. 16, 2018), ECF No. 208 (“States’ Resp.”). The Order, which granted preliminary relief without finding that the Rule’s challengers established the required four factors, exceeded this Court’s authority under the APA.

Federal Respondents argue that this Court’s Order was an “exercise of its equitable discretion” untethered to section 705. Fed. Resp’ts Resp. to Resp’t-Intervenors’ Mot. for a Stay Pending Appeal 4 (Apr. 16, 2018), ECF No. 227; *see also* Industry Pet’rs’ Resp. to Resp’t-Intervenors Mot. for a Stay Pending Appeal 2, 4 (Apr. 16, 2018), ECF No. 226 (“The Order reflects a proper exercise of this Court’s equitable discretion.”). This ignores that the Order

“GRANTED IN PART” State Petitioners’ motion for a stay, requested under section 705, and specifically cited section 705 as authority for doing so. Order at 9, 11. More fundamentally, while a court has “equitable discretion” to grant injunctive relief, regardless of the source of authority, the availability of such relief turns on establishing the same four factors. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 32 (2008); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009).

In interpreting section 10(d) of the APA—now codified as 5 U.S.C. § 705—more than 50 years ago, the Tenth Circuit held that the “four conditions which must be met before a stay may be granted of an order of an administrative agency” are: “(1) A likelihood that the petitioner will prevail on the merits of the appeal; (2) Irreparable injury to the petitioner unless the stay is granted; (3) No substantial harm to other interested persons; and (4) No harm to the public interest.” *Assoc. Sec. Corp. v. Sec. & Exchange Comm’n*, 283 F.2d 773, 774–75 (10th Cir. 1960). The Supreme Court has likewise explained that the legislative history of section 705 demonstrates that the provision “was primarily intended to reflect existing law,” which recognized the courts’ traditional power to afford injunctive relief in challenges to agency action, “not to fashion new rules of intervention for District Courts.” *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974); *see also Midlantic Nat. Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 501 (1986) (“The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.”); S. Rep. No. 79-752, at 230 (1945) (clarifying that the “second sentence” of section 705, governing judicial process, was not intended to “change existing law”).

Wyoming and Montana suggest that this Court implicitly found all four required preliminary injunction factors, including a likelihood of success on the merits, because of “all

that [the Court] knew about the case already.” Resp. in Opp’n to to Resp’t-Intervenors’ Mot. for a Stay Pending Appeal 3 (Apr. 16, 2018), ECF No. 225. This assertion runs counter to both the text of the Order, which is entirely silent on the merits, and the record in this litigation, in which this Court explicitly held that Petitioners have not demonstrated a likelihood of success on the merits. *Wyoming v. U.S. Dep’t of the Interior*, No. 2:16-CV-0285-SWS, 2017 WL 161428, at *9–*12 (D. Wyo. Jan. 16, 2017). Finally, this Court has repeatedly declined to consider the merits of this case based on prudential ripeness and mootness concerns. *E.g.*, Order at 8; Order Granting Mot. to Extend Briefing Deadlines 3 (June 27, 2017), ECF No. 133.

As explained in detail in prior briefing, Respondent-Intervenors are irreparably harmed by the additional waste of publicly-owned natural gas and associated air pollution allowed while the Waste Prevention Rule’s provisions are enjoined. *See* Citizens’ Resp. 16–19; States’ Resp. 14–16. The enjoined provisions, meanwhile, have limited impact on Petitioners. *See* Citizens’ Resp. 12–16; States’ Resp. 9–13. For these reasons, and to promote regulatory certainty by ensuring that final regulations remain in effect until they are lawfully rescinded or revised, the public interest also weighs in favor of a stay of the Order pending appeal. *See* Citizens’ Resp. 16–19; States’ Resp. 13–16.

Respondent-Intervenors respectfully request that this Court issue a stay of its Order pending resolution of their appeal. Because Respondent-Intervenors are harmed every day that the Waste Prevention Rule’s requirements are enjoined, Respondent-Intervenors respectfully request that this Court grant such relief expeditiously.

Respectfully submitted on April 17, 2018,

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CERTIFICATE OF SERVICE

I certify that on April 17, 2018, I filed the foregoing **RESPONDENT-INTERVENOR CITIZEN GROUPS' AND STATES' JOINT REPLY IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL** using the United States District Court CM/ECF which caused all counsel of record to be served by electronically.

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