IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 18-8027 and 18-8029

STATE OF WYOMING, ET AL.
Petitioner-Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Intervenors-Appellees,

WYOMING OUTDOOR COUNCIL, ET AL.,
Intervenors-Appellees.

STATE OF WYOMING, ET AL.
Petitioner-Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Intervenors-Appellees,

STATE OF CALIFORNIA, ET AL.,
Intervenors-Appellees.

On Appeal from the
United States District Court
for the District of Wyoming

The Honorable Scott W. Skavdahl

District Court Nos. 2:16-cv-00280-SWS, 2:16-cv-00285

APPELLEES WESTERN ENERGY ALLIANCE AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA'S RESPONSE TO APPELLANTS' JOINT OPENING BRIEF

ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellant Procedure 26.1, we, the undersigned counsel of record for Industry Appellees, Western Energy Alliance and the Independent Petroleum Association of America, certify that neither Industry Appellee has any parent corporation or any publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF RELATED CASES

The Court consolidated this case, Case No. 18-8027, which is an appeal by Respondent-Intervenor-Appellants Wyoming Outdoor Council, et al., with Case No. 18-8029, which is an appeal by Respondent-Intervenor-Appellants the State of New Mexico and the State of California. Order (April 23, 2018), Doc. No. 01019980237.

REASONS A SEPARATE BRIEF IS NECESSARY

A separate brief filed by Western Energy Alliance and the Independent Petroleum Association of America ("Industry Appellees") is warranted in this case. As the sole representatives of the regulated industry, Industry Appellees have interests separate from the states of Wyoming, Montana, North Dakota, and Texas that cannot be adequately addressed by these parties or in a joint response. If the Waste Prevention Rule is fully in effect, oil and gas operators that comprise Industry Appellees' members will face approximately $115 million in costs to fully comply with the rule. Oil and gas operators that cannot comply with the rule may be required to temporarily cease production from wells. No other Appellee may address the nature and extent of these harms. In addition, the District Court order at issue did not adopt Industry Appellees' preferred and requested relief. Accordingly, Industry Appellees' defense of that order and requested relief from

this Court in the event the order is struck down differ in material respects from other Appellees.

STATEMENT OF THE CASE

Appellants challenge an order that reflects the District Court's attempt to craft a pragmatic, reasonable solution to avoid unnecessary compliance costs and exercise of judicial resources. Appellants contend that the District Court improperly stayed certain implementation deadlines associated with the Bureau of Land Management's (BLM) Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Waste Prevention Rule"). Appellees Western Energy Alliance and the Independent Petroleum Association of America ("Industry Appellees") had challenged the Waste Prevention Rule primarily because it is a comprehensive air quality regulation that exceeds BLM's statutory authority. Because of the case's lengthy and complex history, the District Court has not yet decided the merits of Industry Appellees' challenge.

The order Appellants challenge stays certain provisions of the Waste Prevention Rule that sprang into effect after the Northern District of California temporarily enjoined a separate BLM rule that delayed implementation of provisions of that rule. Absent the District Court's order at issue, Industry Appellees' members would be forced to expend approximately $115 million to comply with a rule that BLM has proposed to revise and expects to finalize in the

next several weeks. The District Court appropriately concluded such expenditures and waste of judicial resources warranted a stay. This Court should uphold the stay order as a proper exercise of that court's equitable discretion under these circumstances.

I. The Waste Prevention Rule is BLM's Unlawful Attempt to Regulate Air Quality, An Authority Exclusively Vested with States and EPA.

The Waste Prevention Rule is BLM's attempt to regulate emissions of methane from existing operations on federal and Indian oil and gas leases—even though methane emissions from oil and gas facilities have been steadily declining despite gains in production,[1] and even though the United States Environmental Protection Agency (EPA) and the states, and not BLM, have the exclusive authority to regulate air quality under the Clean Air Act. *See* 42 U.S.C. §§ 7401-7671q (the "Clean Air Act"). Hastily finalized one week after the 2016 presidential election, the Waste Prevention Rule took effect on January 17, 2017, three days before the presidential inauguration. 81 Fed. Reg. 83,008. The Waste Prevention Rule, however, did not require compliance with its most burdensome and expensive provisions until one year later on January 17, 2018. *See* 43 C.F.R.

[1] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2014* 2-3 (2016).

§§ 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, 3179.301–305 (the "phase-in provisions"). These phase-in provisions also comprise virtually all the air quality provisions of the rule, which BLM has no statutory authority to promulgate.

II. Judge Skavdahl's Stay Order is a Reasonable Solution to Problems of the Appellants' Own Making.

This action is the latest in a series of legal entanglements surrounding the Waste Prevention Rule. In November 2016, Industry Appellees petitioned the District Court for review of the Waste Prevention Rule,[2] and Appellants later intervened in the litigation to defend the Waste Prevention Rule. Although BLM initially maintained that the Waste Prevention Rule principally regulates waste of oil and natural gas rather than air quality, 81 Fed. Reg. at 83,019–21, Appellants primarily asserted global climate change and other air quality interests as the basis for their participation. *See, e.g.*, Mem. in Supp. of Citizen Groups' Mot. to Intervene as Resp'ts, Dkt. No. 27-1, at 5–6 (Dec. 2, 2016), attached as Ex. 1.[3] Federal Appellees have since recognized concerns with the air quality aspects of

[2] Industry Appellees' case (docketed as 2:16-cv-000280) was consolidated with another case brought by the states of Wyoming and Montana (2:16-cv-00285).

[3] Pleadings filed with the District Court are referenced first by the pleading name, docket number (filed under Docket No. 2:16-cv-00285), page with the pinpoint citation, and date of the filing. Copies of these pleadings are attached.

the Waste Prevention Rule not conforming to statutory authority. *See* 83 Fed. Reg. 7,924, 7,927 (Feb. 22, 2018).

Alongside the states of Wyoming, Montana, North Dakota, and Texas, Industry Appellees sought a preliminary injunction in late 2016 to halt the Waste Prevention Rule from taking effect. When resolving the motions for preliminary injunction, the District Court observed that the rule "conflicts with the statutory scheme under the [Clean Air Act] for regulating air emissions from oil and natural gas sources" and "upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under the [Clean Air Act] to the EPA, states, and tribes to manage air quality." Order on Mots. for Prelim. Inj., Dkt. No. 92, at 17, 18 (Jan. 16, 2017), attached as Ex. 2. Ultimately, however, the District Court denied the preliminary injunction partly because the deadline to comply with the phase-in provisions was one year away. *See id.* at 25, 28.

Although the Waste Prevention Rule expressly provided operators with a full year to come into compliance with the phase-in provisions, these provisions were not in effect for almost half of 2017. Instead, these provisions were suspended, or their deadlines postponed, while BLM reconsidered and ultimately proposed to rewrite the Waste Prevention Rule. BLM first postponed the compliance deadlines for the phase-in provisions on June 15, 2017. *See* 82 Fed.

Reg. 27,430 (June 15, 2017). Even though the litigation over the rule had been pending before the Wyoming District Court since November 2016, the Appellants challenged this postponement in the Northern District of California. *See California v. Bureau of Land Mgmt.*, No. 3:17-cv-03804-EDL (N.D. Cal. filed July 5, 2017); *Sierra Club v. Zinke*, No. 3:17-cv-03885 (N.D. Cal. filed July 10, 2017). On October 4, 2017, a magistrate judge in the Northern District of California invalidated BLM's postponement, putting the original January 17, 2018 deadline for the phase-in provisions back into effect. *See California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017). At this point, the compliance deadline for the phase-in provisions had been postponed for nearly four months.

Then, on December 8, 2017, BLM announced it was suspending certain provisions of the Waste Prevention Rule, including the phase-in provisions, to allow BLM to consider revisions. 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Suspension Rule"). The Suspension Rule remained in effect until February 22, 2018, when the District Court for the Northern District of California preliminarily enjoined it. *See California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018).

Coincidentally, on the same day the Northern District of California enjoined the Suspension Rule, BLM published a proposed rule that, if finalized, would

substantially revise the Waste Prevention Rule. 83 Fed. Reg. 7,924 ("Revision Rule"). Critically, the proposed Revision Rule would eliminate all of the phase-in provisions and modify other provisions of the Waste Prevention Rule to conform to BLM's statutory authority. *See id*. BLM estimated it may finalize the Revision Rule as early as August 2018. Federal Resp'ts' Resp. to Pet'rs' and Intervenor-Pet'rs' Mots. to Lift the Stay and for Other Relief, Dkt. 207, at 4 (Mar. 14, 2018), attached as Ex. 3. Accordingly, a final Revision Rule is expected imminently.

The pending but not yet final Revision Rule, however, did not blunt the effect of the February 22 decision from the Northern District of California enjoining BLM's Suspension Rule. This decision thrust the Waste Prevention Rule into full force and effect. Without relief, oil and gas operators, including Industry Appellees' members, were obligated to be in immediate compliance with all of the rule's provisions, including the phase-in provisions. Yet because the Waste Prevention Rule had been suspended for nearly five months of 2017 and the first seven weeks of 2018, Industry Appellees' members were not afforded the full time BLM deemed necessary to comply with the rule's phase-in provisions. Even if immediate compliance was possible, which it was and is not, Industry Appellees estimate that oil and gas producers would be required to expend $115 million to fully comply with the phase-in provisions. Sgamma Decl., Dkt. No. 197-3 ¶ 10

(Feb. 28, 2018) (accompanying Mem. in Supp. of Mot. for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review), Dkt. 197 attached as Ex. 4.

Furthermore, oil and gas operators are not the only entities unable to comply with the full Waste Prevention Rule. BLM has admitted it has "limited resources" to administer the rule while it completes the ongoing rulemaking. *See* Ex. 3, Federal Resp'ts' Resp. to Pet'rs' and Intervenor-Pet'rs' Mots. to Lift the Stay and for Other Relief, Dkt. 207, at 13 (Mar. 14, 2018). Oil and gas operators have witnessed that BLM is not prepared to administer or enforce the rule. BLM and the Office of Natural Resources Revenue have not coordinated or set up the necessary systems to allow royalty to be reported as required by the Waste Prevention Rule. Sgamma Decl., Dkt. No. 212-1 ¶ 12 (Mar. 23, 2018) (accompanying Reply Supp. of Mot. for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review), attached as Ex. 5. BLM has not conducted staff training or issued written guidance on how to implement the rule. *Id.* ¶ 13. When Industry Appellees' members have sought compliance guidance BLM has not been able to advise operators on expectations for compliance and has provided conflicting or confusing information. *Id.* Therefore,

both the regulators and the regulated community are unprepared for the Waste Prevention Rule to take full effect.

Due to the absurdity of forcing oil and gas operators to spend millions of dollars to comply with a rule that exceeded BLM's statutory authority, is being substantially revised, and that BLM is unprepared to administer, Industry Appellees again asked the District Court to preliminarily enjoin the Waste Prevention Rule. *See* Mot. to Lift Litigation Stay and for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review, Dkt. No. 196 (Feb. 28, 2018), attached as Ex. 6. Industry Appellees, however, were one of a chorus of parties seeking relief from the District Court. Appellee States Wyoming and Montana asked the court to suspend certain implementation deadlines under the Waste Prevention Rule by utilizing its authority under 5 U.S.C. § 705. *See* Mot. to Lift Stay & Suspend Implementation Deadlines, Dkt. No. 195 (Feb. 28, 2018), attached as Ex. 7. And, Appellee States North Dakota and Texas asked the District Court to expedite consideration of the merits of the case. Joint Mot. by States of North Dakota and Texas to Lift Stay Entered Dec. 29, 2017 and to Establish Expedited Schedule for Further Proceedings, Dkt. No. 194 (Feb. 26, 2018), attached as Ex. 8.

Recognizing "[t]he waste, inefficiency, and futility associated with a ping-ponging regulatory regime," on April 4, 2018, the District Court partially granted the relief sought by Wyoming and Montana, issuing an order staying the phase-in provisions of the Waste Prevention Rule. Order Staying Implementation of Rule Provisions & Staying Action Pending Finalization of Revision Rule, Dkt. No. 215, at 11 (April 4, 2018), attached as Ex. 9 ("Stay Order").

The District Court justified its Stay Order based on a smattering of considerations "symbolic of the dysfunction in the current state of administrative law." Stay Order at 2. The District Court explained:

> [I]n order to preserve the status quo, and in consideration of judicial economy and prudential ripeness and mootness concerns, the Court finds the most appropriate and sensible approach is to exercise its equitable discretion to stay implementation of the Waste Prevention Rule's phase-in provisions and further stay these cases until the BLM finalizes the Revision Rule, so that this Court can meaningfully and finally engage in a merits analysis of the issues raised by the parties.

Stay Order at 10. The District Court also observed that "[t]here is simply nothing to be gained by 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." *Id.* The District Court found the Industry Appellees would be irreparably harmed by implementation of the Waste Prevention Rule. *Id.* at 9. This appeal of the Stay Order ensued.

Industry Appellees support the Stay Order as a valid exercise of the District Court's discretion. Because Industry Appellees did not champion the legal theory upon which the Stay Order is premised, however, and maintain their requested relief was and is appropriate, including preliminarily enjoining the phase-in provisions pending review on the merits, this brief only addresses the Appellants' erroneous argument that the District Court should have dismissed this case.

SUMMARY OF THE ARGUMENT

This case should not be dismissed as prudentially unripe or prudentially moot. The Appellants argue that the District Court erred in the Stay Order by finding this case is prudentially unripe and prudentially moot but not dismissing it. This argument mischaracterizes the Stay Order. The District Court did not conclude that this case is prudentially unripe or prudentially moot. Instead, the District Court merely cited prudential "concerns" as one of many considerations justifying the use of its equitable discretion to issue the stay.

Similarly, this Court should not find this case to be prudentially unripe or prudentially moot. This case is not prudentially unripe because withholding judicial review of the Waste Prevention Rule would impose actual and immediate harm on Industry Appellees, including $115 million in compliance costs. These same harms also preclude a finding this case is not prudentially moot. And, even if

this Court determined that this case was prudentially moot, it must vacate the Waste Prevention Rule itself, in addition to this litigation.

The significant compliance costs and burdens imposed by the Waste Prevention Rule make this case and controversy justiciable and appropriate for review. Therefore, should this Court determine that the Stay Order was improperly issued, the only proper remedy would be to remand the Stay Order to the District Court for further consideration of the other motions unresolved in the Stay Order, including Industry Appellees' motion for preliminary injunction.

ARGUMENT

I. The District Court Did Not Determine this Case is Prudentially Unripe or Prudentially Moot.

Appellants incorrectly contend that the District Court should have dismissed this case after "determining the case is prudentially unripe and prudentially moot[.]" Appellants' Joint Opening Br. at 32. This characterization is incorrect. The District Court did not "determine" the case is prudentially unripe or prudentially moot in the Stay Order. Rather, when exercising its discretion to stay the phase-in provisions, the District Court simply cited prudential ripeness and mootness as one of several "concerns" that would be implicated if it reviewed the merits of the rule. Stay Order at 7 ("going forward on the merits at this point remains a waste of judicial resources and disregards prudential ripeness

concerns"), 8 ("[a]lso implicated here is the related doctrine of prudential mootness"), 10 ("in consideration of judicial economy and prudential ripeness and mootness concerns"). The District Court appeared to be more concerned about the inefficiencies of litigating a rule that BLM is revising and appears very close to finalizing, the waste of judicial resources, and the costs to Industry Appellees of compliance, than with concluding, as a matter of law, that either the litigation or the rule were or were not prudentially unripe or moot. *See id.* at 11. Accordingly, Appellants' characterization of the Stay Order as "determin[ative]" of whether the litigation over the Waste Prevention Rule is prudentially unripe and prudentially moot is incorrect.

II. This Case Cannot be Dismissed as Prudentially Unripe.

This case is not prudentially unripe because dismissal of the litigation without vacatur of the Waste Prevention Rule would inflict real and immediate harms on Industry Appellees' members. When considering whether a case is prudentially unripe, this Court considers "the hardship to the parties of withholding court consideration," among other factors. *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). In assessing the hardship to parties, this Court has considered "significant costs, financial or otherwise." *Id.* at 1143. It has also "held that a party seeking judicial

review suffers adverse effects if, absent judicial review and while the appeal is pending, it would need to comply with the challenged agency regulation." *Id.* Here, a decision that the Waste Prevention Rule does not warrant judicial review will impose significant harms, costs, and burdens on Industry Appellees—costs borne only by the regulated industry and not Appellants.[4]

Withholding judicial review of the Waste Prevention Rule and dismissing this litigation will cause real, immediate, and irreparable harm to the Industry Appellees' members. Most significant, the Waste Prevention Rule will compel Industry Appellees to expend over $115 million dollars to come into compliance with the phase-in provisions. *See* 82 Fed. Reg. at 58,056; Ex. 4, Sgamma Decl.,

[4] In evaluating the hardship to the parties of withholding judicial review of the Waste Prevention Rule, the Court must consider the hardship to the Appellees rather than the Appellants. No hardship can result to Appellants by withholding review of the Waste Prevention Rule because Appellants' objective in this litigation is to preserve the Waste Prevention Rule. In *Wyoming v. Zinke*, however, this Court considered "the hardship to the parties of withholding court consideration" of the rule at issue to mean the hardship to the parties seeking appellate review. *Wyoming v. Zinke*, 871 F.3d at 1143 ("Withholding review of the Fracking Regulation will not impose a hardship on the two parties seeking judicial review: the Citizen Group Intervenors and the BLM."). Applying the rationale from *Wyoming v. Zinke* to the present case would conflate two very distinct issues: harm to the Appellees of withholding judicial review of the Waste Prevention Rule, and harm to the Appellants of withholding judicial review of the Stay Order. Here, because Appellees sought review of the Waste Prevention Rule, this Court must consider the hardship to them when determining whether to withhold judicial review of that rule.

Dkt. No. 197-3 ¶ 10 (Feb. 28, 2018). Specifically, BLM estimates that each year operators must: (1) conduct Leak Detection and Repair inspections at 36,700 well locations, VF_0000537;[5] (2) control or replace 7,950 existing diaphragm pumps, VF_0000507; (3) replace 5,040 existing highbleed pneumatic controllers, VF_0000502; and (4) install controls on approximately 300 storage tanks, VF_0000520. Each of these obligations immediately springs into effect if this Court were to grant Appellants' requested relief.

Furthermore, the phase-in provisions form the heart of the Waste Prevention Rule and comprise, by far, its most substantial costs. BLM estimates the costs associated with these requirements constitute 86 percent of the estimated $110–279 million annual cost of the Waste Prevention Rule, excluding gas capture limit costs over time. VF_0000451. In light of these actual and substantial compliance costs facing Industry Appellees' members, the litigation over the Waste Prevention Rule cannot be prudentially unripe and, therefore, should not be dismissed.

[5] All record citations to VF_xxxxxxx are attached as Ex. 10 and will be replaced with references to the Deferred Joint Appendix when the Deferred Joint Appendix is filed.

III. This Case Cannot be Dismissed as Prudentially Moot.

This case also cannot be dismissed as prudentially moot. Just as the significant compliance costs facing Industry Appellees' members render the rule and this action very much ripe, they also prevent it from being moot. When determining whether a case is prudentially moot, the Court weighs "the anticipated benefits of a remedial decree" against "the trouble of deciding the case on the merits." *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012).

Here, the anticipated benefits of the Industry Appellees' requested relief (preliminary and eventual permanent invalidation of the Waste Prevention Rule) are significant. This relief avoids the substantial costs of complying with a rule Industry Appellees have challenged as unlawful. These anticipated benefits dramatically outweigh the "trouble" of continuing to litigate the case until either the merits are heard, or the Waste Prevention Rule is overtaken by a final Revision Rule. The extreme prejudice to Industry Appellees should the Court grant Appellants their requested relief counsels for continuing the litigation in this case whether or not the District Court's order is upheld.

Furthermore, this case is not moot because a possibility exists that the Waste Prevention Rule will take effect even after the Revision Rule is finalized. This

Court has stated a case is not moot "[i]f the party seeking relief can show that 'there exists some cognizable danger of recurrent violation,' some cognizable danger that the coordinate branch will fail and [it] will be left without a complete remedy . . . ." *See Winzler*, 681 F.3d at 1211–12 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Unfortunately, a real possibility exists that the Waste Prevention Rule will be back in effect even after the Revision Rule is finalized. Once BLM finalizes the Revision Rule, the Appellants inevitably will challenge it, presumably in their favored forum of the Northern District of California. That court has already set aside two BLM actions staying and postponing elements of the Waste Prevention Rule. *See California v. Bureau of Land Mgmt.*, 286 F. Supp.3d 1054 (N.D. Cal. 2018) (setting aside BLM rule postponing certain compliance dates for the Waste Prevention Rule); *California v. Bureau of Land Mgmt.*, 277 F. Supp.3d 1106 (N.D. Cal. 2017) (administratively staying certain provisions of the Waste Prevention Rule). If that court sets aside the Revision Rule, the Waste Prevention Rule could again be in effect.[6] Thus, the

[6] Moreover, briefing on the merits before the District Court is nearly complete, with only Petitioners' reply briefs due. *See* Order Granting Joint Mtn. to Stay, Dkt. No. 189 at 5, attached as Ex. 11. Accordingly, principles of judicial economy strongly counsel against dismissing the litigation.

fact that BLM has proposed to revise the Waste Prevention Rule and will likely soon finalize it does not render this litigation moot.

Even if this Court finds that the Waste Prevention Rule is prudentially moot, however, it may not simply vacate the Stay Order and dismiss this litigation, as Appellants argue. Rather, the proper remedy is vacatur of the Waste Prevention Rule itself. The Supreme Court has held that when an agency action is rendered moot by subsequent events, the appropriate remedy is to vacate the agency action. *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329–31 (1961); *see also Bd. of Governors of Fed. Reserve Sys. v. Sec. Bancorp & Sec. Nat'l Bank*, 454 U.S. 1118, 1118 (1981) (vacating judgment with instructions to remand case to agency to vacate the administrative decision). In *A.L. Mechling Barge Lines, Inc. v. United States*, the Supreme Court extended the holding of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which directed courts to vacate judgments rendered moot while on appeal, to administrative orders.[7] *Mechling*, 368 U.S. at 329 ("the principle enunciated in *Munsingwear* [is] at least equally applicable to unreviewed administrative orders"). A host of circuit courts have applied the

[7] In *Wyoming v. Zinke*, this Court cited *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950), for support of vacating the underlying litigation when an agency action becomes moot. 871 F.3d at 1145.

holding of *Mechling* to vacate agency actions. *See Am. Family Life Ass. Co. of Columbus v. Fed. Commc'n Comm'n*, 129 F.3d 625, 630 (D.C. Cir. 1997) ("Since *Mechling* we have, as a matter of course, vacated agency orders in cases that have become moot by the time of judicial review."); *Oregon v. Fed. Energy Regulatory Comm'n*, 636 F.3d 1203, 1206 (9th Cir. 2011) ("In cases where intervening events moot a petition for review of an agency order, the proper course is to vacate the underlying order."); *accord Atlanta Gas Light Co. v. Fed. Energy Regulatory Comm'n*, 140 F.3d 1392, 1402–03 (11th Cir. 1998); *Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60, 62 (6th Cir. 1993); *Reich v. Contractors Welding of W. New York, Inc.*, 996 F.2d 1409, 1413–14 (2d Cir. 1993); *N. Dakota Rural Dev. Corp. v. U.S. Dep't of Labor*, 819 F.2d 199, 200-201 (8th Cir. 1987). If this Court finds the litigation over the Waste Prevention Rule to be prudentially moot and dismisses the litigation, established precedent also requires vacatur of the Waste Prevention Rule.

IV. If the Court Determines the Stay Order was Improperly Issued, the Proper Remedy is to Remand the Stay Order to the District Court.

Should this Court determine that the District Court improperly issued the Stay Order, Industry Appellees respectfully request a remand to the District Court. In the Stay Order, the District Court denied Industry Appellees' motion for a preliminary injunction to prevent BLM from enforcing the Waste Prevention Rule

or, in the alternative, motion to vacate certain provisions of the Waste Prevention Rule. Stay Order at 11; Ex. 4, Mem. in Supp. of Mot. for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review, Dkt. No. 197, at 11-18 (Feb. 28, 2018). The District Court, however, offered no substantive reason for this action, only stating that "none of the proposed solutions is comprehensively satisfying." Stay Order at 10. In light of the imminent, actual, and permanent irreparable harms that would be imposed on the industry should this Court grant Appellants' requested relief, at a minimum the District Court should fully address the merits of Industry Appellees' renewed request for preliminary injunction or vacatur of certain provisions of the rule.

Appellants also incorrectly imply that the District Court cannot review its initial preliminary injunction decision, which occurred over nineteen months ago. Appellants' Joint Opening Br. at 11. A court, however, is not bound by its original decision on preliminary injunction and may reach a different conclusion based on additional evidence or changed circumstances. *See, e.g.*, 18A Charles Alan Wright *et al*., Fed. Prac. & Proc. Juris. § 4445 (2d ed.) ("Grant or denial of interlocutory injunctions clearly does not foreclose further litigation in the same proceeding, so long as decision rested on mere preliminary estimates of the merits or discretionary remedial grounds.").

Here, the core provisions of the Waste Prevention Rule were not in effect for nearly six months during 2017, seven weeks at the beginning of 2018, and since April 4, 2018. Industry has reasonably delayed spending millions of unrecoverable dollars until the regulatory uncertainty has lifted. If Appellants' relief is granted, industry would immediately face actual and irreparable harm. Thus, the circumstances guiding the District Court's prior decision—namely that the rule's phase-in provisions did not present imminent harm—have materially changed. Therefore, should this Court determine that the Stay Order was wrongly decided, Industry Appellees respectfully request a remand to the District Court for full consideration of Industry Appellees' proposed relief.

CONCLUSION

This case should not be dismissed as prudentially unripe or prudentially moot. Rather, the significant compliance costs imposed by the Waste Prevention Rule on Industry Appellees' members render the Waste Prevention Rule justiciable. Therefore, this Court should not dismiss this litigation.

Dated: September 12, 2018 Holland & Hart LLP

s/ Eric Waeckerlin

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of F.R.A.P. 27(d)(2)(A) because, according to the word count feature of Microsoft Word 2016, the response contains 4,686 words.

This motion complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman type style.

s/ Eric Waeckerlin

CERTIFICATE OF SERVICE

The undersigned certified that the foregoing Western Energy Alliance and Independent Petroleum Association of America's RESPONSE to APPELLANTS' JOINT OPENING BRIEF was electronically filed on this 12th day of September, 2018, with the Clerk of the Tenth Circuit Court of Appeals using CM/ECF and was served upon all attorneys of record.

Privacy Redaction Certification: No privacy redactions were required.

Hard Copy Certification: No paper copies.

Virus Scan Certification: The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Sophos Product Version 10.8, last updated August 28, 2018), and, according to the program is free of viruses.

s/ Eric Waeckerlin