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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' MERITS BRIEFS AND MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR A STAY OF PROCEEDINGS**

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INTRODUCTION

On December 8, 2017, the U.S. Bureau of Land Management ("BLM") published in the Federal Register a final rule suspending and delaying until January 17, 2019 the requirements of the Waste Prevention Rule that are at the heart of this litigation ("Suspension Rule"). 82 Fed. Reg. 58,050 (Dec. 8, 2017). At the same time, BLM is preparing to publish in the Federal Register a proposed rule that would substantially revise the Waste Prevention Rule ("Revision Rule"). Because the agency is in the midst of reconsidering the Waste Prevention Rule and has taken steps to prevent any harms that could flow from implementation of the Rule during its reconsideration process, Petitioners' claims are prudentially unripe and prudentially moot.

Judicial review of the merits at this stage would interfere with the integrity of the administrative process, and would be a waste of the Court's and the Parties' resources. Where BLM is actively reconsidering the action challenged by Petitioners—on many of the same grounds raised by Petitioners in their claims—the Court and the Parties are best served by the dismissal or stay of these two consolidated cases to allow the agency to complete its reconsideration process without interference.

Petitioners will not be harmed by a dismissal of these cases or stay of proceedings to allow BLM to complete its rulemaking process. The Suspension Rule has suspended the portions of the Rule that would have generated substantial compliance burdens, and which Petitioners have cited as the reason they require expedited review before January 17, 2018. In contrast, proceeding with this litigation would force BLM to divert resources away from its rulemaking process to the defense of a rule that it is currently reconsidering. It would also undermine BLM's ability to proceed with its rulemaking process, as the litigation would generate uncertainties about whether a forthcoming court decision would require the agency to change

tack. Moreover, BLM's defense of the Waste Prevention Rule could constrain the agency's policy choices by forcing the agency to formulate its position on issues under reconsideration before it has completed the administrative process.

Rather than waste the Court's and Parties' time and resources litigating claims that will likely be mooted by forthcoming agency action, this Court should dismiss these two consolidated cases as prudentially unripe and prudentially moot. Petitioners will have the opportunity to challenge the Revision Rule or any other future final agency action in a new lawsuit. In the alternative, the Court should stay all proceedings in these cases to allow BLM the opportunity to complete its rulemaking process.[1]

FACTUAL BACKGROUND

I. The Waste Prevention Rule

On November 18, 2016, BLM issued the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule. 81 Fed. Reg. 83,008 (Nov. 18, 2016). The 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-.7. The 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-.304, 3179.201-.204.

[1] Federal Respondents have conferred with the other parties to this litigation regarding the requested stay in lieu of dismissal. *See* Local Rule 7.1(b)(1)(A) (requiring conferral for nondispositive motions). The States of Wyoming and Montana would like to review Respondents' brief before taking a position. Industry Petitioners oppose the stay and reserve the right to file a response once they have reviewed Respondents' brief. The State of North Dakota opposes the stay and plans to file a written response in opposition. The State of Texas opposes the stay. The States of California and New Mexico and the Citizen Groups take no position on BLM's request to stay the litigation at this time, but reserve the right to file a response.

While the Rule went into effect on January 17, 2017, many of the 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-.203, 3179.301-.305. These phased-in requirements would not 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" the Rule. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, § 7(b) (Mar. 28, 2017). As directed, BLM has 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); Decl. of Timothy Spisak ¶ 4, ECF No. 170-1.

BLM has drafted a proposed Revision Rule that would rescind certain provisions of the Waste Prevention Rule and substantially revise others. Pursuant to Executive Order 12,866, the proposed rule is currently under review by the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget ("OMB") to ensure that it is consistent with applicable law and the President's priorities, and does not conflict with the actions or

policies of other agencies.[2] *See* 58 Fed. Reg. 51,735 (Sept. 30, 1993). BLM has also submitted to OIRA a regulatory impact analysis and draft environmental assessment for the proposed rule. Decl. of James Tichenor ¶ 6, Ex. A. OIRA has circulated the proposed rule for interagency review. *Id.* Once OIRA concludes its review process, BLM will publish the proposed rule in the Federal Register for public comment. *Id.* BLM anticipates publication in the Federal Register early in the first quarter of 2018. *Id.*

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 the Suspension Rule. 82 Fed. Reg. at 58,051. 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 one year." *Id.* For certain provisions of the Rule that had already taken effect, the Suspension Rule "temporarily suspend[s] their effectiveness until January 17, 2019." *Id.* In sum, the Suspension Rule suspends or delays the following provisions of the Waste Prevention Rule: drilling applications and plans (43 C.F.R. § 3162.3-1(j)); gas capture requirements (§ 3179.7); measuring and reporting volumes of gas vented and flared from wells (§ 3179.9); determinations regarding royalty-free flaring (§ 3197.10); well drilling (§ 3179.101); well completion and related operations (§ 3179.102); equipment requirements for pneumatic controllers (§3179.201); requirements for pneumatic diaphragm pumps (§3179.202); requirements for storage vessels (§ 3179.203); downhole well maintenance and liquids unloading (§3179.204); and operator responsibility for leak detection

[2] As of the date of filing, OIRA's website lists the proposed Revision Rule as currently under review. *See* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1004-AE53.

and repair (§§ 3179.301-305). 82 Fed. Reg. at 58,051-56; *see also* Attach. to Ex. A (chart indicating status of each provision of the Waste Provision Rule in light of Suspension Rule).

A limited number of provisions of the Waste Prevention Rule will remain in effect during the one-year suspension period, including definitions clarifying when lost gas is "avoidably lost," and therefore subject to royalties (43 C.F.R. § 3179.4); restrictions on the practice of venting (§ 3179.6); limitations on royalty-free venting and flaring during initial production testing (§ 3179.103); limitations on royalty-free flaring during subsequent well tests (§ 3179.104); and, restrictions on royalty-free venting and flaring during "emergencies" (§ 3179.105).[3] 82 Fed. Reg. at 58,051-52; *see also* Attach. to Ex. A. Although these royalty provisions "may ultimately be revised in the near future" in BLM's rulemaking to revise the Waste Prevention Rule, BLM did not suspend them "because it does not, at this time, believe that suspension is necessary, because the cost and other implications do not pose immediate concerns for operators." 82 Fed. Reg. at 58,051.

STANDARD OF REVIEW

I. Dismissal of a Prudentially Unripe or Moot Action Is Appropriate

Where a court finds that a matter is prudentially unripe or moot, the appropriate course is to dismiss the action "given that there would be nothing for the district court to do upon remand except wait for the BLM to finalize its rule rescinding the [subject regulation]." *Wyoming v.*

[3] In addition to these provisions, the Suspension Rule also does not suspend 43 C.F.R. §§ 3103.3-1 (aligning royalty rate with Mineral Leasing Act); 3160.0-5 (removing definition of "avoidably lost"), 3178.1-.10 (regulating royalty-free use of oil and gas in operation and production), 3179.1-.3 (purpose, scope, and definition sections), 3179.5 (royalties due on "avoidably lost" gas), 3179.8 (allows BLM to approve lower gas capture limit), 3179.11 (acknowledges BLM's existing authority under other laws to limit production to avoid waste), 3179.12 (allows BLM to coordinate with States), 3179.401 (allows States or tribes to apply for variances). These provisions have no significant compliance costs, *see* VF_0000552, and some are inoperative in light of the suspension of other provisions.

Zinke, 871 F.3d 1133, 1146 (10th Cir. 2017); *see also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010) ("[A] court may dismiss the case under the prudential-mootness doctrine if the case is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." (internal quotations and citation omitted)). "[I]t is not the role of Article III courts" to retain jurisdiction of an unripe matter "to supervise or monitor the rulemaking efforts of an Article II agency." *Wyoming*, 871 F.3d at 1144. To that end, courts commonly dismiss an action after concluding that the subject matter of the case is unripe or moot. *See, e.g.*, *id.*; *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 794 F. Supp. 2d 1216, 1230 (D.N.M. 2011), *aff'd*, 692 F.3d 1057 (10th Cir. 2012); *Farrell-Cooper Min. Co. v. U.S. Dep't of Interior*, 728 F.3d 1229, 1238-39 (10th Cir. 2013); *Willow Creek Ecology v. U.S. Forest Serv.*, 225 F. Supp. 2d 1312, 1318-19 (D. Utah 2002); *Families & Youth Inc. v. Maruca*, 156 F. Supp. 2d 1245, 1250-52 (D.N.M. 2001). Here, the proposed wholesale revision and potential rescission of all or a portion of the Waste Prevention Rule supports dismissal of the underlying action as prudentially unripe and/or moot.

II. The Court Has Discretion to Stay a Prudentially Unripe or Moot Case

Even if the Court does not wish to dismiss these cases, it should stay them pending BLM's reconsideration of the Waste Prevention Rule. "[T]he power to stay proceedings is incidental to the power inherent in every court 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 may exercise this discretion to stay when a plaintiff's claims are found to be prudentially unripe or moot. *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 petition for review in abeyance while agency reviews action); *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387, 390 (D.C. Cir. 2012) (holding unripe case in abeyance).

ARGUMENT

BLM's reconsideration of the Waste Prevention Rule, and its suspension of the provisions of the most burdensome and costly provisions of that Rule, render Petitioners' claims prudentially unripe and prudentially moot. BLM is re-evaluating the Waste Prevention Rule via a notice and comment rulemaking process and has provided relief from the Rule in the interim. Because Petitioners have already received the majority of the relief they sought, the Court can no longer provide meaningful relief.

Judicial review of the merits would also force BLM to defend a rule that the agency is in the midst of reconsidering. BLM is evaluating many of the factual and legal issues raised by Petitioners as part of the rulemaking process for the Revision Rule. Thus, many, if not all, of the issues in these cases may have no relevancy once BLM's rulemaking is completed. To avoid the waste of this Court's and the Parties' resources, the Court should dismiss or stay these two cases, and allow BLM to complete its reconsideration of the Waste Prevention Rule unhindered by this litigation.

I. Petitioners' Claims are Prudentially Unripe

Rather than wasting the Court's and Parties' resources addressing the merits of a rule that may soon be rescinded or revised, the doctrine of prudential ripeness counsels this Court to withhold review. Ripeness is rooted "both in the jurisdictional requirement that Article III courts

hear only 'cases and controversies' and in prudential considerations limiting our jurisdiction." *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1173 (10th Cir. 2011). In particular, "the prudential ripeness doctrine contemplates that there will be instances when the exercise of Article III jurisdiction is unwise." *Wyoming*, 871 F.3d at 1141. "[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 "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 Hosp. 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 omitted)). A claim is not ripe when it rests "upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation marks & citation omitted).

To determine if a claim is ripe for review, a court evaluates "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Wyoming*, 871 F.3d at 1141 (quoting *Abbott Labs.*, 387 U.S. at 149). In evaluating the fitness prong, courts may consider "whether the issue is a purely legal one, whether the agency decision

in dispute was final, and whether 'further factual development would significantly advance our ability to deal with the legal issues presented.'"[4] *Id.* (quoting *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812). The hardship prong turns on "whether withholding review would 'create adverse effects of a strictly legal kind' to the party seeking judicial review." *Id.* at 1142 (quoting *Nat'l Park Hosp. Ass'n*, 538 U.S. at 809). Here, the factors weigh heavily in favor of a finding that Petitioners' claims are not ripe for review.

A. Petitioners' Claims Are Unfit For Judicial Review Because They Challenge An Agency Action Currently Under Reconsideration

Due to intervening administrative actions, Petitioners' claims against the Waste Prevention Rule now challenge a rule that is subject to reconsideration, and, as part of that process, could well be rescinded or substantially revised. Thus, while the Waste Prevention Rule is a final agency action and the focus of this dispute is legal in nature, those factors are far outweighed by the fact that allowing the administrative process to proceed could obviate the need for judicial resolution of Petitioners' claims and prevent judicial entanglement in administrative decisionmaking.

The Tenth Circuit recently addressed a very similar situation in its review of this Court's decision regarding BLM's rule regarding hydraulic fracturing on federal and Indian lands ("Fracking Rule"). There, the court held that the appeal was unripe, despite the fact that the

[4] The Tenth Circuit has also articulated a four factor test for ripeness: "(1) whether the issues in the case are purely legal; (2) whether the agency action involved is 'final agency action' within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704; (3) whether the action has or will have a direct and immediate impact upon the plaintiff and (4) whether the resolution of the issues will promote effective enforcement and administration by the agency." *Coal. For Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1250 (10th Cir. 2001). The Circuit considers the three factor test and four factor test "essentially the same." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1158 n.10 (10th Cir. 2013); *see also Coal for Sustainable Res.*, 259 F.3d at 1250 n.11.

Fracking Rule was final and the appeals presented a clear legal issue, because "BLM has clearly expressed its intent to rescind the Fracking Regulation, and whether all or part of the Fracking Regulation will be rescinded is now an open question." *Wyoming*, 871 F.3d at 1142. "[T]he disputed matter that forms the basis for our jurisdiction has thus become a moving target." *Id.* Proceeding with judicial review of the Fracking Rule "when the BLM has now commenced rescinding that same regulation appears to be a very wasteful use of limited judicial resources." *Id.*

The same analysis applies here. Not only has BLM "clearly expressed its intent" to reconsider the Waste Prevention Rule, it has amended the rule through notice and comment rulemaking to provide time for that reconsideration and it has prepared a proposed Revision Rule for publication in the Federal Register. *Id.* What is more, the agency has indicated that it plans to reconsider the Rule in light of the concerns raised by Petitioners in these lawsuits, including their allegations that the Rule (1) "add[s] considerable regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation"; (2) "would pose a particular compliance burden to operators of marginal or low-producing wells" that would "would jeopardize the ability of operators to maintain or economically operate these wells"; (3) "usurp[s] the authority of the Environmental Protection Agency (EPA) and the States under the Clean Air Act"; (4) is "justified based on its environmental and societal benefits, rather than on its resource conservation benefits alone"; and (5) conflicts with state and private mineral rights recognized in "communitization agreements." 82 Fed. Reg. at 58,050-51. BLM also specifically noted that even though it has not suspended the Waste Prevention Rule's royalty provisions, those provisions "may ultimately be revised in the near future." *Id.* Thus, the Waste Prevention Rule, like the Fracking Rule, has "become a moving target." *Wyoming*, 871 F.3d at 1142. As a

practical matter, then, Petitioners' case now "rests upon contingent future events" whose outcome is speculative at best. *Texas*, 523 U.S. at 300 (quotations omitted).

Delaying review of the merits also avoids any Article III case or controversy concerns that could arise from this Court's review of a rule that is likely to change. While the Waste Prevention Rule is a reviewable final agency action within the meaning of the Administrative Procedure Act ("APA"), it is not the end point of the agency's decision-making process given that the Rule is under active reconsideration. *See Am. Petroleum Inst.*, 683 F.3d at 387 (finding concerns regarding an agency action's finality at play when agency has indicated intent to revise that action). Any decision on the merits of the Waste Prevention Rule would therefore be, in effect, an advisory ruling regarding the law and facts that BLM ought to consider in its rulemaking process. In contrast, delaying judicial review until BLM has completed its reconsideration of the Waste Prevention Rule may well obviate the need for review.

Proceeding with judicial review in these circumstances would also interfere in BLM's administrative process, and thereby cause the very problems that the ripeness doctrine is designed to prevent. *See Abbott Labs*, 387 U.S. at 148–49. As the Supreme Court has explained, "immediate judicial review directed at the lawfulness" of agency action "could hinder agency efforts to refine" that action. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998). In *Ohio Forestry*, the Court held that a challenge to a Forest Service Forest Plan was not ripe in light of the "real" possibility that "further consideration will actually occur" which could render judicial review "unnecessary." *Id.* at 735-36. These same concerns apply here. Petitioners, and all other members of the public, will have an opportunity to comment on BLM's proposed rescission or revision of the Waste Prevention Rule through the notice and comment rulemaking process. Withholding review will allow BLM to consider those comments in the first instance,

and "refine" its policies as part of an administrative process—where all comments receive equal footing—rather than in an adversarial forum. *See 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)). Nor will Petitioners be prejudiced by allowing the administrative process to proceed unhampered by this litigation: if they are unhappy with the outcome of BLM's rulemaking process, they will have the opportunity to challenge any final agency action at that time in a new lawsuit.

As the Tenth Circuit has noted, "[j]ust because resolution of a legal question is possible, and may even be straightforward, does not mean it is ripe to decide." *Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*, 861 F.3d 1052, 1060 (10th Cir. 2017). Rather than competing with the agency to consider Petitioners' concerns, this Court should stay its hand and allow BLM to complete its reconsideration of the Waste Prevention Rule. That reconsideration process may well narrow, or even eliminate, the issues involved in this case, and it will "provide a more final and concrete setting for deciding any issues left on the table." *Am. Petroleum Inst.*, 683 F.3d at 388.

B. Petitioners Will Not Suffer Hardship From Dismissal or a Stay of This Court's Proceedings

As to the hardship prong of the ripeness test, the Suspension Rule has ensured that Petitioners will not suffer any harm from this Court's decision not to review the merits at this time. Courts have found hardship stemming from the delayed adjudication of agency action in only limited circumstances: where a challenged regulation or statute imposes substantial costs and requires compliance with numerous regulatory requirements, *see Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1239 (10th Cir. 2004); where it would interfere with

First Amendment rights, *see Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012); where it would create a "forced choice" to participate in administrative proceedings, *see New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1220 (10th Cir. 2017); or where it would have a substantial practical effect on professional licensing, *see Roe No. 2 v. Ogden*, 253 F.3d 1225, 1232 (10th Cir. 2001). A delay in judicial review of an agency action in these limited situations creates a "direct and immediate dilemma for the parties" subject to the challenged regulation. *Skull Valley Band*, 376 F.3d at 1237. None of these circumstances exist here. Instead, the Suspension Rule expressly relieves Petitioners of the burden to comply with all of the most costly provisions of the Waste Prevention Rule, including all of the provisions that would have otherwise become effective on January 17, 2018. 82 Fed. Reg. at 58,051.

While certain provisions of the Waste Prevention Rule remain in effect, those provisions do not "pose an immediate compliance burden to operators." *Id.* Throughout this case, Petitioners have cited the provisions of the Waste Prevention Rule that would have, but for the Suspension Rule, come into effect in January 2018 as the basis for expeditious review of their claims. *See, e.g.*, ECF No. 112 ¶¶ 3, 8 (North Dakota arguing that gas capture requirements impose a "significant compliance deadline"); ECF No. 113 at 3-4 (noting immediate harms to Industry flow from compliance with January 2018 deadlines); ECF No. 123 ¶¶ 18 (noting that Industry, North Dakota, and Texas are adversely impacted by forthcoming January 2018 compliance deadlines). In its January 2017 order denying Petitioners' motion for a preliminary injunction, this Court agreed that any significant harms from the Waste Prevention Rule would flow from the costs of complying with the provisions set to go into effect in January 2018. *Wyoming v. U.S. Dep't of Interior*, No. 2:16-CV-0280-SWS, 2017 WL 161428, at *11 (D. Wyo. Jan. 16, 2017).

This assessment is accurate. As BLM has explained, the provisions of the Waste Prevention Rule that were not suspended by the Suspension Rule do not pose immediate costs or other concerns to operators. 82 Fed. Reg. at 58,051; *see also* Attach. to Ex. A (listing compliance costs of suspended and non-suspended provisions); VF_0000552 (estimation of compliance costs in the Waste Prevention Rule's Regulatory Impact Analysis). Not only are Petitioners unable to demonstrate hardship flowing from the provisions of the Waste Prevention Rule that remain in effect, they are also protected by 43 C.F.R. §§ 3179.12 and 3179.401. These two provisions, which have not been suspended, instruct BLM to coordinate with state regulatory authorities when BLM enforcement of the Waste Prevention Rule could adversely affect non-federal and non-Indian mineral interests, and allow states and tribes to seek a "variance" from the Rule's provisions and enforce their own regulations instead. *See Wyoming*, 2017 WL 161428, at *10 (noting Waste Prevention Rule's coordination provision as part of finding that Petitioners failed to establish irreparable harm).

Because the provisions of the Waste Prevention Rule that remain in effect have de minimis, if any, compliance costs and include protections in the unlikely event these limited remaining provisions cause harm, Petitioners cannot show that the delay of judicial review of their claims will cause any real hardship. Even if they could show some evidence of harm, "[c]onsiderations of hardship that might result from delaying review 'will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions.'" *Am. Petroleum Inst.*, 683 F.3d at 389 (quoting *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 31 (D.C. Cir. 1984)).

In contrast, proceeding with this litigation would force BLM to divert resources away from its rulemaking process to the defense of a rule that it is currently reconsidering. It would

also undermine BLM's ability to proceed with its rulemaking process, as the litigation would generate uncertainties about whether a forthcoming judicial decision would require the agency to alter course. *Wyoming*, 871 F.3d at 1143. Moreover, BLM's defense of the Waste Prevention Rule could constrain the agency's policy choices by forcing the agency to formulate its position on issues under reconsideration before it has completed the administrative process. *See San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1048 (10th Cir. 2011) (observing that premature judicial review "could hinder [the agency's] efforts to refine its policies"); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 713-14 (10th Cir. 2010) (discussing pre-determination of an agency position in the context of environmental analysis).

In sum, this Court should follow *Wyoming v. Zinke* and find that Petitioners' claims against the Waste Prevention Rule are not ripe for review when the Rule is under active reconsideration by BLM.

II. Petitioners' Claims are Prudentially Moot

Given the Suspension Rule and Interior's concrete commitment to undergo a new rulemaking to reconsider the Waste Prevention Rule in its entirety, Petitioners' claims should also be dismissed under the doctrine of prudential mootness because "circumstances [have] changed since the beginning of litigation that forestall any occasion for meaningful relief." *S. Utah Wilderness All. ("SUWA") v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997).

Prudential mootness arises from the doctrine of remedial discretion and is rooted in the court's equitable powers to fashion remedies and to withhold relief. This is especially true with regard to the government of the United States, where considerations of prudence and comity for coordinate branches come into play. *E.g., Rio Grande*, 601 F.3d at 1121 (prudential mootness raises "considerations of prudence and comity for coordinate branches of government" and

counsels "the court to stay its hand, and to withhold relief it has the power to grant").[5] Courts generally 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. & Constr. Dep't*, 7 F.3d at 1492; *see also A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961) (declaratory judgment is discretionary remedy that may be withheld where challenged practice is undergoing significant change). Such is the case here.

Interior has already taken steps that substantially alter the impact of the Waste Prevention Rule and Petitioners' challenge to it. First, Interior has published in the Federal Register the Suspension Rule, which delays for one year the significant impacts of the Rule. 82 Fed. Reg. at 58,051. And, second, as explained in the Suspension Rule, Interior is undertaking a rulemaking that will reconsider the Waste Prevention Rule and may result in the rescission or significant revision of many of the Rule's requirements. As part of that rulemaking process, Interior has already drafted a proposed Revision Rule, and that proposed Revision Rule is currently under review by OMB. Decl. of James Tichenor ¶ 6, Ex. A. It is thus possible that the Revision Rule will fully alleviate Petitioners' concerns about the Waste Prevention Rule; if it does not, Petitioners may choose to bring a new suit to challenge any aspects of the Revision Rule that they oppose.

In light of these developments, circumstances have effectively changed so as to render any relief this Court might grant as speculative and without practical effect. Other courts have dismissed similar challenges on mootness grounds for this same reason. *See, e.g., Colo. Off-*

[5] *See also SUWA*, 110 F.3d at 727 (same); *Bldg. & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993) (prudential mootness usually applies to government actors and arises out of the court's general discretion in formulating prospective equitable remedies).

Highway Vehicle Coal. v. U.S. Forest Serv., 357 F.3d 1130, 1135 (10th Cir. 2004) (finding challenge to 1997 Forest Service decision moot when it had been superseded by 1998 decision, "making Plaintiff's attack on the 1997 Decision Notice futile."); *Camfield v. Okla. City*, 248 F.3d 1214, 1223 (10th Cir. 2001) ("Because parties have no legally cognizable interest in the constitutional validity of an obsolete statute, a statutory amendment moots a case to the extent that it removes challenged features of the prior law [.]" (internal quotation marks and citations omitted)); *SUWA*, 110 F.3d at 730 (ESA claims prudentially moot based on superseding consultation).

Dismissal or a stay of proceedings on prudential mootness grounds is especially appropriate given that Interior has taken two key actions while it undertakes a new rulemaking to rescind or revise the Waste Prevention Rule: (1) suspended most, if not all, of the aspects of the Rule already in effect challenged by Petitioners; and (2) suspended all of the provisions of the Rule set to take effect in January 2018. *See* Attach. to Ex. A. As a functional matter, then, any aspect of the Waste Prevention Rule that diverges significantly from BLM's prior regulations in NTL-4A is stayed. Once the Revision Rule is finalized, the Waste Prevention Rule will be supplanted. At this point, neither the Parties nor the Court knows whether or how the Revision Rule will differ from the Waste Prevention Rule. Petitioners may have a new set of claims challenging the Revision Rule, or may have no claims at all. Judicial review of the Waste Prevention Rule in these circumstances would therefore be hollow. *See Horstkoetter v. Dep't of Public Safety*, 159 F.3d 1265, 1277 (10th Cir. 1998) (dismissing challenge to regulation as moot because "any injunction that we might issue in this case . . . would be meaningless"); *SUWA*, 110 F.3d at 728 ("If an event occurs while a case is pending that heals the injury and only prospective relief has been sought, the case must be dismissed.").

Although a defendant's voluntary cessation of an alleged illegal practice which the defendant is free to resume at any time can be an exception to mootness, that exception does not apply here. Courts view government agencies' voluntary cessation of conduct favorably and as a reflection of the need for agencies to be flexible in their policy choices. *See, e.g.*, *Rio Grande*, 601 F.3d at 1121 (citing 13C Wright, Miller & Cooper § 3533.6, at 311); *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd sub nom* 563 U.S. 277 (2011) ("[C]ourts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity"); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (viewing governmental officials' voluntary conduct "with more solicitude" than that of private actors).

Consistent with this special solicitude for public actors, the Tenth Circuit has recognized that "[w]ithdrawal or alteration of administrative policies can moot an attack on those policies." *Rio Grande*, 601 F.3d at 1121; *see also Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 246 (5th Cir. 2006) ("Corrective action by an agency can moot an issue."). A "mere possibility" or "speculative contingency" that an agency may change course is not sufficient to resuscitate a moot case. *Ala. Hosp. Ass'n v. Beasley*, 702 F.2d 955, 961 (11th Cir. 1983); *Burbank v. Twomey*, 520 F.2d 744, 748 (7th Cir. 1975).

Here, special solicitude should be afforded to Interior's policy choice to issue the Suspension Rule and to undertake a new rulemaking. With this principle in mind, Interior's issuance of the Suspension Rule and its concomitant rulemaking moots this controversy. First, Interior has already suspended the portions of the Waste Prevention Rule that have significant compliance costs and has announced its intention to propose a wholesale revision of the Waste Prevention Rule. And while it is true that the agency does not know what form the final

Revision Rule will take (or whether it will differ at all from the Waste Prevention Rule), the analysis supporting the Revision Rule may well be different. As such, the Court is not "presented with a mere informal promise or assurance on the part of the [governmental] defendants that the challenged practice will cease." *Rio Grande*, 601 F.3d at 1121 (citing *Burbank*, 520 F.2d at 748) (publication of biological opinion rendered moot environmental groups' ESA claim). Second, Interior has suspended for one year the provisions of the Waste Prevention Rule that impose compliance costs, thereby eliminating any alleged adverse impacts flowing from the Waste Prevention Rule.

In sum, "the precise issue that was the subject of the [Petitioners'] action is no longer extant, and it would not be reasonably likely to recur." *Rio Grande*, 601 F.3d at 1121; *see also Unified Sch. Dist. No. 259, Sedgwick Cty., Kan. v. Disability Rights Ctr. of Kan.*, 491 F.3d 1143, 1150 (10th Cir. 2007) ("[T]he 'allegedly wrongful behavior' in this case is highly fact- and context-specific, rather than conduct that is likely to 'recur' on similar facts and in the same context. In such a case, the 'voluntary cessation' doctrine is inapplicable, because our review of future instances of 'wrongful behavior' may be quite different than the complained-of example that already has ceased."); *Wilderness Soc. v. Kane Cty.*, 632 F.3d 1162, 1176 (10th Cir. 2011) ("But the fact that we may lawfully decide the fate of a new and different ordinance raising new and different legal and factual questions in a different lawsuit at some later date doesn't mean we should keep on life support a lawsuit about a defunct ordinance the County itself left for dead years ago.").

Accordingly, the Court should either dismiss or stay proceedings in these two cases under the doctrine of prudential mootness. *See Los Alamos Study Grp.*, 794 F. Supp. 2d at 1230. A dismissal or stay is particularly appropriate here, where (1) BLM is already undertaking actions

that may render any relief this Court could provide meaningless; (2) the agency has suspended the portions of the Waste Prevention Rule that have been alleged to cause harm to Petitioners; and (3) considerations of comity for Interior come into play. *See Chamber of Commerce of U.S. v. U.S. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980).

CONCLUSION

For the reasons discussed above, Respondents do not believe that it is a wise use of the resources of the Parties or, more importantly, this Court to adjudicate the merits of this case. And because BLM is currently in the midst of reconsidering the Waste Prevention Rule, any position taken by Respondents on the merits of that Rule would implicate the ongoing administrative process. It would also divert agency resources from the ongoing rulemaking. Rather than require BLM to take positions on issues that it is currently re-evaluating through a notice and comment rulemaking process, this Court should dismiss these cases to allow the agency to reach a decision on the basis of a careful examination of public comments. In the alternative, the Court should stay all proceedings. Should this Court grant a stay, Federal Respondents propose that they file status reports every 45 days to apprise the Court and the Parties of the status of the ongoing rulemaking. They further propose that they file notices with the Court when the proposed Revision Rule and final Revision Rule are promulgated.

Respectfully submitted this 11th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2017, 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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