XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA
Supervising Deputy Attorney General
GEORGE TORGUN, State Bar No. 222085
MARY S. THARIN, State Bar No. 293335
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1974
Fax: (510) 622-2270
E-mail: Mary.Tharin@doj.ca.gov

Attorneys for the State of California

HECTOR BALDERAS
Attorney General of New Mexico
ARI BIERNOFF, State Bar No. 231818
BILL GRANTHAM (*pro hac vice pending*)
Assistant Attorneys General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
Telephone: (505) 717-3520
E-Mail: wgrantham@nmag.gov

Attorneys for the State of New Mexico

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through XAVIER BECERRA, ATTORNEY GENERAL; and **STATE OF NEW MEXICO, by and through HECTOR BALDERAS, ATTORNEY GENERAL,**

Plaintiffs,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT; KATHARINE S. MACGREGOR, Acting Assistant Secretary for Land and Minerals Management, United States Department of the Interior; and **RYAN ZINKE,** Secretary of the Interior,

Defendants.

Case No. 3:17-cv-03804-EDL

Consolidated with:

Case No. 3:17-cv-03885-EDL

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: September 5, 2017
Time: 9:00 a.m.
Courtroom: Courtroom E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on September 5, 2017, at 9:00 a.m., or as soon thereafter as it may be heard, Plaintiffs, State of California, by and through Xavier Becerra, Attorney General, and State of New Mexico, by and through Hector Balderas, Attorney General ("Plaintiffs"), by and through their undersigned counsel, will, and hereby do, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Civil Local Rule 7. This motion will be made before the Honorable Elizabeth D. Laporte, United States Magistrate Judge, Phillip Burton Federal Building & United States Courthouse, 450 Golden Gate Avenue, Courtroom E, 15th Floor, San Francisco, California 94102.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs hereby move for summary judgment on the ground that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In support of this motion, Plaintiffs submit the accompanying memorandum of points and authorities, request for judicial notice and authenticating declaration, and a proposed order.

Dated: July 26, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA

/s/ George Torgun
GEORGE TORGUN
MARY S. THARIN

Attorneys for the State of California

HECTOR BALDERAS
Attorney General of New Mexico

/s/ Ari Biernoff
ARI BIERNOFF
BILL GRANTHAM (*pro hac vice pending*)

Attorneys for the State of New Mexico

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this action, the States of California and New Mexico ("Plaintiffs") challenge an action by the U.S. Bureau of Land Management, *et al*. (the "Bureau") to "postpone" certain compliance dates of the Waste Prevention, Production Subject to Royalties and Resource Conservation rule ("Waste Prevention Rule" or "Rule"). The Waste Prevention Rule was promulgated by the Bureau in November 2016 and became effective on January 17, 2017. Yet almost five months after the Rule's effective date, the Bureau published a notice in the Federal Register to indefinitely "postpone" the January 2018 compliance dates for many of the Rule's key provisions. 82 Fed. Reg. 27,430 (June 15, 2017) ("Postponement Notice").[1] The Bureau erroneously claims that this action was authorized by Section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, which provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."

The Bureau's reliance on Section 705 is unlawful for several reasons. First, by its plain language, Section 705 does not provide the Bureau with authority to postpone a rule that has already gone into effect. There is no merit to the Bureau's assertion that a "compliance date" is "within the meaning of the term 'effective date'" for purposes of Section 705. Second, the Bureau's postponement of certain compliance dates in the Rule after it became effective constitutes an improper end-run around the APA's notice-and-comment requirements for amending or repealing a rule. Third, the Bureau's justification for the Postponement Notice was arbitrary and capricious because the postponement did not, as the Bureau claims, "preserve the regulatory status quo while the litigation is pending." The entire Rule was in effect prior to the Postponement Notice, and contrary to the purpose of Section 705—providing a stay pending judicial review—the Bureau has moved to delay judicial review, making it clear that the purpose

[1] The Bureau's Federal Register notices cited herein have been submitted to the Court as part of Plaintiffs' Request for Judicial Notice, filed herewith. *See* Declaration of George Torgun in Support of Plaintiffs' Request for Judicial Notice in Support of Motion for Summary Judgment ("Torgun Decl."), Exh. A-C. "[F]ederal courts are required to take judicial notice of the Federal Register." *Biodiversity Legal Fdn. v. Badgley*, 309 F.3d 1166, 1179 (9th Cir. 2002); *see also* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed.").

of the stay is solely to render the rule inoperative during an indefinite period of reconsideration. Finally, the Bureau has failed to address the four-part preliminary injunction test required to show that "justice so requires" the postponement of a rule pursuant to Section 705.

Pursuant to Federal Rule of Civil Procedure 56(b), Plaintiffs are entitled to "file a motion for summary judgment at any time until 30 days after the close of all discovery." Given that the January 2018 compliance dates affected by the Postponement Notice are rapidly approaching and the material facts in this matter are not in dispute, Plaintiffs' claims are appropriate for summary judgment at this time. Therefore, this Court should find that Plaintiffs are entitled to judgment as a matter of law on their claims that the Bureau violated the APA, vacate the Postponement Notice, and issue a mandatory injunction compelling the Bureau to reinstate the Rule in its entirety.

BACKGROUND

I. THE ADMINISTRATIVE PROCEDURE ACT.

The APA governs the procedural requirements for agency decision-making. 5 U.S.C. § 551 *et seq*. Prior to formulating, amending, or repealing a rule, agencies must engage in a notice-and-comment process. *Id*. §§ 551(5), 553. Notice must include a summary of the public rule making proceedings, reference to the legal authority under which the rule is proposed, and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id*. § 553(b). The public may then submit comments which the agency must consider before promulgating a final rule. *Id*. § 553(c). This process is designed to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id*. "It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992), *cert. denied* 506 U.S. 999 (1992).

The APA contains a provision that allows an agency to postpone the effectiveness of a rule while a legal challenge to that rule is pending, in order to preserve the status quo and prevent irreparable harm. The provision, entitled "Relief Pending Review," reads in pertinent part:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. Section 705 allows for the issuance of "a temporary stay . . . to preserve the status quo." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 27 (D.D.C. 2010). When invoking Section 705, an agency must make the determination that "justice so requires" by applying the four-part preliminary injunction test. *Id*. at 30; *see Winter v. NRDC*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

II. THE WASTE PREVENTION RULE.

Pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287, the Bureau is responsible for managing the federal onshore oil and gas program and is required by statute to ensure that federal lessees "safeguard the public welfare" and "use all reasonable precautions to prevent waste of oil or gas developed in the land." *Id.* §§ 187, 225. The Bureau oversees more than 245 million acres of land and 700 million subsurface acres of federal mineral estate across the United States. 81 Fed. Reg. 83,008, 83,014 (Nov. 18, 2016). Domestic production from almost 100,000 federal onshore oil and gas wells accounts for 11 percent of the nation's natural gas supply and 5 percent of its oil supply. *Id.* In fiscal year 2015, the production value of this oil and gas exceeded $20 billion and generated over $2.3 billion in royalties, approximately half of which was allocated to the states. *Id*.; *see* 30 U.S.C. § 191(a).

In recent years, the United States has experienced a boom in oil and gas production accelerated by technological advances such as hydraulic fracturing and directional drilling. 81 Fed. Reg. at 83,009. However, as of 2016, the Bureau's requirements to minimize waste of these resources had not been updated in over three decades. *Id*. at 83,008. As a result, large amounts of our nation's natural gas reserves were being wasted because of outdated industry practices including venting (direct release of gas into the atmosphere), flaring (controlled burning of gas) and equipment leaks. *Id*. at 83,014. For example, between 2009 and 2015, nearly 100,000 oil and gas wells on federal land released approximately 462 billion cubic feet of natural

gas through venting and flaring—enough gas to serve about 6.2 million households for a year. *Id*. at 83,009.

Several oversight reviews, including those by the Government Accountability Office ("GAO") and the Department of the Interior's Office of the Inspector General, specifically called on the Bureau to update its "insufficient and outdated" regulations regarding waste and royalties. *Id*. at 83,009-10. The reviews recommended that the Bureau require operators to augment their waste prevention efforts, afford the agency greater flexibility in rate setting, and clarify policies regarding royalty-free, on-site use of oil and gas. *Id*. at 83,010.

In 2014, the Bureau responded to these reviews by initiating the development of a proposed rule that would update its existing regulations on these issues. *Id*. After soliciting and reviewing input from stakeholders and the public, the Bureau released its proposal in February 2016. 81 Fed. Reg. 6,616 (Feb. 8, 2016) ("Proposed Rule"). The Proposed Rule required regulated entities to (1) limit venting and flaring; (2) identify and repair equipment leaks; (3) replace high-bleed equipment with no- or low-bleed equipment; and (4) minimize losses of gas from storage vessels, well maintenance, and production activities. 81 Fed. Reg. at 6,619-24. The Bureau received approximately 330,000 public comments, including approximately 1,000 unique comments, on the Proposed Rule. 81 Fed. Reg. at 83,021. The agency also hosted stakeholder meetings and met with regulators from states with significant federal oil and gas production. *Id*.

The Bureau issued the final Waste Prevention Rule in November 2016. 81 Fed. Reg. 83,008. In the final Rule, the Bureau refined many of the provisions of the Proposed Rule based on comments to ensure both that compliance was feasible for operators and that the Rule achieved its waste prevention objectives. The Rule is designed to force considerable reductions in waste from flaring (49 percent) and venting (35 percent), saving and putting to use up to 41 billion cubic feet of gas per year. *Id*. at 83,014.

In brief, the Rule regulates four main areas of oil and gas production: venting, flaring, leak detection, and royalties on waste. *Id*. at 83,010-13. The Rule reduces the waste of natural gas by prohibiting venting except under specified conditions, and requires updates to existing equipment. The Rule's flaring regulations reduce waste by requiring gas capture percentages that increase

over time, providing exemptions that are scaled down over time, and requiring operators to submit Waste Minimization Plans. Leak detection provisions require semi-annual inspections for well-sites and quarterly inspections for compressor stations. Finally, the Rule incentivizes compliance by imposing royalties on any gas lost in situations where the loss is not unavoidable, including when gas is flared in excess of capture requirements.

III. LEGAL CHALLENGES AND POSTPONEMENT OF THE RULE.

Soon after the Rule was finalized, two industry groups and the States of Wyoming and Montana (later joined by North Dakota and Texas) (collectively, "Petitioners") challenged the Rule in federal district court in Wyoming, on the alleged basis that the Bureau did not have statutory authority to regulate air pollution and that the Rule was arbitrary and capricious. *Western Energy Alliance v. Jewell*, No. 2:16-cv-00280-SWS (D. Wyo. petition filed Nov. 16, 2016); *State of Wyoming v. Jewell*, No. 2:16-cv-00285-SWS (D. Wyo. petition filed Nov. 18, 2016) (collectively, the "Wyoming Litigation"). The States of California and New Mexico, along with several environmental organizations, intervened in defense of the Rule. On January 16, 2017, following briefing and oral argument on the Petitioners' motions for a preliminary injunction, the Wyoming district court denied the motions, finding that the Petitioners had failed to establish a likelihood of success on the merits or irreparable harm in the absence of an injunction. Wyoming Litigation, Order on Motions for Preliminary Injunction, 2017 WL 161428 (D. Wyo. Jan. 16, 2017).

On January 17, 2017, the Waste Prevention Rule went into effect. 81 Fed. Reg. at 83,008. Nearly five months later, on June 15, 2017, the Bureau published a notice in the Federal Register postponing the effectiveness of certain provisions of the Rule. 82 Fed. Reg. 27,430 (June 15, 2017) ("Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates"). Citing "the existence and potential consequences of the pending litigation," the Bureau stated that it "has concluded that justice requires it to postpone the compliance dates for certain sections of the Rule pursuant to the Administrative Procedure Act, pending judicial review." *Id*. In particular, the Bureau indefinitely postponed the January 17, 2018 compliance date that applied to "new requirements that operators capture a

certain percentage of the gas they produce (43 CFR 3179.7), measure flared volumes (43 CFR 3179.9), upgrade or replace pneumatic equipment (43 CFR 3179.201–179.202), capture or combust storage tank vapors (43 CFR 3179.203), and implement leak detection and repair (LDAR) programs (43 CFR 3179.301–.305)." *Id.*

While acknowledging that Section 705 of the APA only provides an agency with authority to "postpone the effective date of action taken by it, pending judicial review," the Bureau claimed that the January 17, 2018 "compliance date" for these requirements is "within the meaning of the term 'effective date' as that term is used in Section 705 of the APA." 82 Fed. Reg. at 27,431. The Bureau also indicated its intent to conduct an administrative review of the Rule, stating that "[p]ostponing these compliance dates will help preserve the regulatory status quo while the litigation is pending and the [Bureau] reviews and reconsiders the Rule." *Id.*

On June 20, 2017, the Bureau filed a motion in the Wyoming Litigation requesting that the Court extend the briefing schedule for a period of 90 days, citing the Postponement Notice and future administrative review as justifications for the extension. Wyoming Litigation, Federal Respondents' Motion to Extend the Briefing Deadlines, Dkt. No. 129, at 3-4 (June 20, 2017).[2] The Wyoming district court granted the extension on June 27, 2017. Wyoming Litigation, Order Granting Motion for Extension of Time, Dkt. No. 133 (June 27, 2017).[3] The Bureau has yet to issue any formal notices regarding its administrative review of the Rule.

STANDARD OF REVIEW

Summary judgment is appropriate when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where, as here, the questions are purely legal in nature, a court can resolve a challenge to a federal agency's action on a motion for summary judgment. *See, e.g., Gordon v. U.S.*, 1995 WL 429248, *2 (N.D. Cal. July 3, 1995) ("It is beyond peradventure that summary judgment is appropriate where the issue before the court is purely legal in nature"). Further, a court need not wait for an agency to compile an administrative record before deciding a pure question of law.

[2] *See* Torgun Decl., Exh. D.
[3] *See* Torgun Decl., Exh. E.

Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1224 n.13 (11th Cir. 2015) ("Because there is no factual dispute . . . the district court had no reason to examine the administrative record."); *People for the Ethical Treatment of Animals, Inc. v. U.S. Dept. of Agric*., 194 F. Supp. 3d 404, 409 (E.D.N.C. 2016) ("In APA cases, … a court need not wait for an administrative record to be compiled to decide a pure question of law").

Judicial review of administrative decisions is governed by Section 706 of the APA. Agency actions are subject to judicial reversal where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," or "without observance of procedure required by law." *See* 5 U.S.C. § 706(2)(A), (C), (D). In contrast to the deferential standard applied to substantive agency decision-making, "review of an agency's procedural compliance with statutory norms is an exacting one." *NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). Courts have found it appropriate to "scrutinize the procedures employed by the agency all the more closely where the agency has acted, within a compressed time frame, to reverse itself by the procedure under challenge." *NRDC v. EPA*, 683 F.2d 752, 760 (3d Cir. 1982).

When an agency's decision turns upon the construction of a statute, the court must consider whether the agency correctly interpreted and applied the relevant legal standards. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Only if "the statute is silent or ambiguous" must the court "decide how much weight to accord an agency's interpretation." *McMaster v. United States*, 731 F.3d 881, 889 (9th Cir. 2013) (internal quotations and citation omitted). An agency's interpretation of a statute that it does not administer, such as the APA in this case, is not entitled to deference. *See Dept. of Treasury-I.R.S. v. Federal Labor Relations Authority*, 521 F.3d 1148, 1152 (9th Cir. 2008); *Air North America v. Dep't of Transp*., 937 F.2d 1427, 1436 (9th Cir. 1991).

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ARGUMENT

I. THE BUREAU'S ACTION VIOLATED THE PLAIN LANGUAGE OF SECTION 705.

A. Section 705 of the APA Does Not Apply to a Rule Already in Effect.

The Bureau contradicted the plain language of APA Section 705 when it postponed certain compliance dates of a rule that had already gone into effect. Section 705 provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. Based on the plain language of this section, the Bureau's authority to postpone the Waste Prevention Rule expired when the Rule became effective on January 17, 2017. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citation and internal quotation marks omitted).

The only court to have spoken on a similar misapplication of the APA found that Section 705 "permits an agency to postpone the effective date of a not yet effective rule…[but] does not permit the agency to suspend without notice and comment a promulgated rule." *Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324, *2 (D.C. Cir. Jan 19, 1996). In a similar rulemaking context, the U.S. Environmental Protection Agency has denied requests for a Section 705 stay when those requests were submitted on the same day a rule became effective. *See* 76 Fed. Reg. 4,780, 4,788 (Jan. 26, 2011) (finding that "[p]ostponing an effective date implies action *before* the effective date arrives") (emphasis added).

Here, there is no question that the Rule went into effect on January 17, 2017. The Bureau admits that many of the Rule's provisions are in force, including the requirement that operators submit a "waste minimization plan," new regulatory definitions of "unavoidably lost" and "avoidably lost" oil and gas, and limits on venting and flaring during drilling and production operations. 82 Fed. Reg. at 27,431. The Bureau had no authority under Section 705 to postpone the requirements of the Rule after its effective date, and the Postponement Notice should therefore be held unlawful and set aside. *See* 5 U.S.C. § 706(2)(A), (D).

B. "Compliance Dates" Do Not Fall Within the Meaning of "Effective Date."

While the Bureau appears to recognize that Section 705 applies to a rule's effective date, it claims that certain compliance dates in the Rule which have not yet passed are "within the meaning of the term 'effective date' as that term is used in Section 705 of the APA." 82 Fed. Reg. at 27,431. There is no merit to the Bureau's assertion that a "compliance date" is within the meaning of the term "effective date," and the Bureau cites no authority for this position. Section 705 makes no mention of compliance dates, as they are irrelevant to when a rule becomes effective under the APA. *See* 5 U.S.C. § 553(d) (APA requirement that "publication or service of a substantive rule shall be made not less than 30 days before its effective date").

Courts should "presume that a legislature says in a statute what it means." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Here, both Congress and the Bureau have clearly distinguished the meanings of "effective date" and "compliance date." Black's Law Dictionary ("Black's") defines "effective date" as "the date on which a statute…becomes enforceable or otherwise takes effect."[4] *Effective Date*, Black's Law Dictionary (10th ed. 2014); *see Yokeno v. Sekiguchi*, 754 F.3d 649, 653 (9th Cir. 2014) (using dictionary definitions is an appropriate way to determine "plain language meaning"). As such, a rule's effective date is understood as an instruction to regulated entities as to when adherence to the rule is required. *NRDC v. EPA*, 683 F.2d at 762. A compliance date, on the other hand, is the deadline by which a specific requirement of a regulation must be accomplished. Countless regulations, including the Waste Prevention Rule, make clear that agencies treat "effective date" and "compliance date" as distinct terms. *See Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995) (a regulation's "compliance date should not be misconstrued as the effective date."). For example, the Bureau has described the Rule's "capture percentage" provision as follows: "beginning one year from the effective date of the final rule, operators must capture 85 percent of their adjusted total volume of gas produced each month." 81 Fed. Reg. at 83,011.

[4] Although "effective date" was not defined in Black's at the time the APA was drafted, the definition for "effect" noted that "[t]he phrases 'take effect,' 'be in force,' 'go into operation,' etc., are used interchangeably." *Effect*, Black's Law Dictionary (3d ed. 1933).

The fact that a rule becomes operative in its final form on its effective date is necessary to ensure regulatory predictability, consistency, and compliance. It is "inconceivable" that Congress intended to allow an agency unfettered discretion to amend or revoke standards up until the date by which regulated entities are required to come into compliance with such standards. *NRDC v. Abraham*, 355 F.3d 179, 197 (2d Cir. 2004). Indeed, "such a result would completely undermine any sense of certainty" on the part of regulated entities as to the required standards at a given time. *Id*. Thus, both plain language and real-world implications dictate that a "compliance date" does not fall within the meaning of "effective date" as that term is used in Section 705. The Bureau's action was therefore in excess of its statutory authority and should be held unlawful and set aside. *See* 5 U.S.C. § 706(2)(A), (D).

II. THE BUREAU'S ISSUANCE OF THE POSTPONEMENT NOTICE VIOLATED THE APA'S NOTICE-AND-COMMENT REQUIREMENTS.

By indefinitely postponing certain compliance deadlines within an already-effective rule, the Bureau effectively repealed specific regulatory provisions without engaging in the APA's mandatory notice-and-comment process. 5 U.S.C. § 553. These notice-and-comment requirements apply to an agency's repeal or amendment of a rule. 5 U.S.C. § 551(5) (defining "rule making" to mean "agency process for formulating, amending, or repealing a rule").

Courts have recognized that the indefinite suspension of a regulatory requirement equates to a repeal of that requirement. *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) ("[A]n 'indefinite suspension' does not differ from a revocation simply because the agency chooses to label it a suspension."). Where, as here, an agency decision retracts duly-promulgated obligations on regulated entities, the APA's notice-and-comment procedures apply. *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 817 (D.C. Cir. 1983); *Clean Air Council v. Pruitt*, -- F.3d -- , 2017 WL 2838112, *11 (D.C. Cir. Jul. 3, 2017) (while "[a]gencies obviously have broad discretion to reconsider a regulation at any time, they must comply with the Administrative Procedure Act (APA), including its requirements for notice and comment"); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1206 (2015) (APA requires that "agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"); *F.C.C. v. Fox*

Television Stations, Inc., 556 U.S. 502, 515 (2009) (APA "make[s] no distinction…between initial agency action and subsequent agency action undoing or revising that action"); *NRDC v. EPA*, 683 F.2d at 761 ("EPA's action in indefinitely postponing the effective date of the amendments fit the definition of 'rule' in the APA, and, as such, was subject to the APA's rulemaking requirements"). The APA's notice-and-comment requirements are designed, in circumstances like these, to ensure that "an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982).

The Bureau cannot use Section 705 as an end-run around the APA's notice-and-comment requirements.[5] Under the "exacting" standard applied to an agency's adherence to procedural standards, the Bureau's action was clearly "without observance of procedure required by law" and should be held unlawful and set aside. *See* 5 U.S.C. § 706(2)(D).

III. THE BUREAU'S JUSTIFICATION FOR THE POSTPONEMENT NOTICE WAS ARBITRARY AND CAPRICIOUS.

A. Postponement of the Rule's Compliance Dates Does Not Preserve the Status Quo or the Rights of Parties Pending Judicial Review.

Section 705 of the APA authorizes an agency to postpone the effective date of a rule "pending judicial review." 5 U.S.C. § 705. Courts have interpreted this to mean that a stay under Section 705 is a temporary procedural device designed to "preserve the status quo." *Sierra Club*, 833 F. Supp. 2d at 27. Here, the Bureau's action did not preserve the status quo given that the entire Rule was in effect prior to its issuance of the Postponement Notice. Rather, the Bureau reversed course by nullifying certain provisions of a rule that had already become effective.

Regulated parties were required to have shifted their practices in order to adhere to the new regulatory status quo by the time the Rule became effective. The APA is designed to ensure this outcome: Section 553(d) provides a 30-day delay between the date of publication and the

[5] This case differs in a vital respect from the *Sierra Club* case, cited above, where the court held that the public notice provisions of Section 553 were not applicable to an otherwise valid postponement of a rule's effective date pursuant to Section 705, because there EPA invoked Section 705 *before* the rule became effective. 833 F. Supp. 2d at 28.

effective date of a rule in order "to give affected parties a reasonable time to adjust their behavior before the final rule takes effect." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996); *see also Administrative Procedure Hearing before the H. Comm. on the Judiciary*, 79th Cong. 76 (1945) (statement by Rep. Ernest McFarland) (explaining that APA Section 553(d) ensures that "the parties have a chance to adjust themselves"). In this case, regulated entities were given two months to prepare for the parts of the Rule that went into effect on the effective date, and fourteen months to prepare themselves for the 2018 compliance dates that were postponed by the Bureau.

Moreover, the Bureau is clearly unconcerned with resolving the judicial challenges to the Rule, as it has cited the Postponement Notice as a justification for requesting a 90-day delay in the briefing schedule in that litigation. *See* Wyoming Litigation, Dkt. No. 129. Thus, the Bureau's indefinite postponement of certain compliance dates in the Waste Prevention Rule was arbitrary and capricious and otherwise not in accordance with law, in violation of the APA. *See* 5 U.S.C. § 706(2)(A).

B. Section 705 Does Not Allow an Agency to Postpone an Effective Rule for the Purpose of Reconsidering that Rule.

Another stated justification for the Bureau's Postponement Notice was to delay compliance while the agency "reviews and reconsiders the Rule." 82 Fed. Reg. 27,431. This, however, is not a permissible use of Section 705. Courts have made it clear that Section 705 is not applicable where "[t]he purpose and effect of the [Postponement] Notice plainly are to stay the rules pending reconsideration, not litigation." *Sierra Club*, 833 F. Supp. 2d at 33. Here, invoking Section 705 in order to buy time for the Bureau's reconsideration was arbitrary and capricious and otherwise not in accordance with law, in violation of the APA. *See* 5 U.S.C. § 706(2)(A).

C. The Bureau Failed to Satisfy the Four-Part Preliminary Injunction Test to Show that "Justice So Requires" a Stay Pursuant to Section 705.

Pursuant to Section 705 of the APA, an agency may only "postpone the effective date" of a rule if it "finds that justice so requires." 5 U.S.C. § 705. Under Section 705, "the standard for a stay at the agency level is the same as the standard for a stay at the judicial level; each is governed by the four-part preliminary injunction test." *Sierra Club*, 833 F. Supp. 2d at 30. Thus, the postponement of a rule under Section 705 must be based on specific findings that legal

challenges are likely to succeed on the merits, that there will be irreparable harm absent a stay, that the balance of equities favors a stay, and that a stay is in the public interest. *See Winter*, 555 U.S. at 20.

Here, in issuing the Postponement Notice, the Bureau failed to even mention the four-part preliminary injunction test, let alone make findings under each of the four factors. The only justification provided by the Bureau referenced "the substantial cost that complying with these requirements poses to operators," and a statement that the Petitioners in the Wyoming Litigation "have raised serious questions concerning the validity of certain provisions of the Rule." 82 Fed. Reg. at 27,431. Nowhere did the Bureau consider the many substantial benefits of the Rule, such as preventing the waste of natural resources, reducing air pollution and greenhouse gas emissions, or increasing royalty payments to the states. *See* 81 Fed. Reg. at 83,014. The Bureau also stated that the Waste Prevention Rule was "properly promulgated." 82 Fed. Reg. at 27,431.

Therefore, the Bureau's issuance of the Postponement Notice without demonstrating that "justice so requires" was arbitrary and capricious and otherwise not in accordance with law, in violation of the APA. *See* 5 U.S.C. § 706(2)(A).

CONCLUSION

For the reasons given above, the States of California and New Mexico respectfully request that this Court grant their motion for summary judgment, declare that the Postponement Notice is unlawful, and reinstate the Waste Prevention Rule in its entirety.

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Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA

/s/ George Torgun
GEORGE TORGUN
MARY S. THARIN

Attorneys for the State of California

HECTOR BALDERAS
Attorney General of New Mexico

/s/ Ari Biernoff
ARI BIERNOFF
BILL GRANTHAM (*pro hac vice pending*)

Attorneys for the State of New Mexico