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

SAN FRANCISCO DIVISION

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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: September 25, 2017
Time: 10:00 a.m.
Courtroom: Courtroom E, 15th Floor
Judge: Hon. Elizabeth D. Laporte

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

FEDERAL REGISTER NOTICES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

In this action, the States of California and New Mexico ("Plaintiffs") have filed a motion for summary judgment (Dkt. No. 11, "Motion") challenging Defendants' decision to "postpone" certain compliance dates of the Waste Prevention, Production Subject to Royalties and Resource Conservation rule ("Waste Prevention Rule" or "Rule"), almost five months after the Rule's January 17, 2017 effective date. *See* 82 Fed. Reg. 27,430 (June 15, 2017) ("Postponement Notice"). The legal issues now before the Court are straightforward: Did Defendants violate Section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, by postponing the requirements of an already-effective rule? Did this indefinite postponement constitute an improper end-run around the APA's notice-and-comment requirements? And did the Postponement Notice itself lack the justification required by law?

This Court has everything it needs to decide these purely legal questions. In fact, this Court recently issued a summary judgment ruling on the first two questions in another case involving a similar misuse of Section 705 by the U.S. Department of the Interior. *See Xavier Becerra, et al. v. U.S. Dept. of the Interior, et al*., 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017) ("Valuation Order"). The Valuation Order is controlling here and, in fact, recognizes that Defendants have used "the same strategy" in this action "to effectively repeal regulations…without statutory authority after their effective date." *Id.* at *5 (citing Case No. 17-cv-3804-EDL). Consequently, this Court should find that Plaintiffs are entitled to judgment as a matter of law and vacate the Postponement Notice.

STANDARD OF REVIEW

Defendants' standard of review section focuses on the narrow standard governing action within the agency's discretion, which is "not applicable to actions short of statutory right or taken in violation of legally required procedures." Valuation Order at *7. As the U.S. Supreme Court has stated, "[r]egardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). And

although agencies are generally entitled to deference in the interpretation of statutes that they administer, "'[i]f 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.'" *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 623 F. Supp. 2d 1044, 1049 (N.D. Cal. 2009) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)). Even if Section 705 of the APA was ambiguous, Defendants' interpretation of the APA, a statute that it does not administer, is not entitled to deference. *See Dep't of Treasury-IRS v. Fed. Labor Relations Auth.*, 521 F.3d 1148, 1152 (9th Cir. 2008); *Air North America v. Dep't of Transp.*, 937 F.2d 1427, 1436 (9th Cir. 1991); Valuation Order at *7 ("Congress has not delegated ONRR authority to administer the APA").

ARGUMENT

I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IS NOT PREMATURE.

There is no merit to Defendants' claim that Plaintiffs' motion for summary judgment is "premature" because it was filed prior to an answer or case management conference or before production of the administrative record. Defendants' Opposition to Plaintiffs' Motions for Summary Judgment (Dkt. No. 52, "Opposition") at 6-9. 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." Fed. R. Civ. P. 56(b); *see Sharma v. BMW of North America LLC*, 2016 WL 9180444, *1 (N.D. Cal. Apr. 1, 2016) (rejecting as "unpersuasive plaintiffs' argument that the MSJ is procedurally improper because it was filed prior to the Court's consideration of an anticipated motion for class certification"). Plaintiffs' Motion was filed in accordance with the rules, is being briefed and heard on a schedule stipulated to by the parties (Dkt. No. 32), and thus is properly before the Court.

Defendants' assertion that this Motion circumvents the APA's record review requirements is unavailing given the purely legal questions presented by Plaintiffs' Motion. *See* Opposition at 7-8. The plain text of the APA makes clear that Defendants' indefinite postponement of an already-effective rule violated Section 705, and that such an action constituted a repeal requiring notice-and-comment rulemaking. The Court can rule on these questions of statutory

interpretation without the need to resort to any additional record documents. *See* Valuation Order at **8-11. An issue is "presumptively reviewable" where, as here, it is a purely legal claim in the context of a facial challenge. *National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005); *see Sierra Club v. EPA*, 762 F.3d 971, 983 (9th Cir. 2014) (holding that once a court determines that an agency has exceeded its authority, based on the clear language of Congress, "[t]he foregoing conclusion ends the inquiry"). Defendants have failed to even hint at the existence of any document, beyond what is already before the Court, that would be relevant to the statutory interpretation questions at hand.

The cases cited by Defendants on this point stand for the unremarkable proposition that APA cases are typically decided based on an administrative record. Opposition at 7. Yet these cases also demonstrate that legal issues can be determined by a court under normal principles of statutory construction, without reference to the administrative record. *See Fla. Power & Light v. Lorion*, 470 U.S. 729, 735-41 (1985) (deciding legal question based on consideration of statutory language and legislative history); *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 768-69 (9th Cir. 1985) (deciding legal issues based on statutory language and agency interpretation of statute it administers); *Gill v. Dep't of Justice*, 2017 WL 1147467, *3-4 (N.D. Cal. Mar. 27, 2017) (determining whether agency action was subject to notice-and-comment rulemaking based on the law and without reference to the record).

Defendants' attempt to distinguish the Eleventh Circuit's decision in *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206 (11th Cir. 2015) because "the court did not address whether an administrative record was required by the APA" (Opposition at 8) is incorrect and misses the point. In that APA case, as here, the court resolved the question of law at issue by applying the statutory interpretation framework in *Chevron*, without any examination of the administrative record. *Id*. at 1215-24. The court specifically rejected the plaintiff's contention that "the district court erred in failing to require production of the administrative record," finding that "examining the record would have been pointless." *Id*. at 1221 n.9, 1224 n.13.

Finally, while Defendants appear to concede that at least part of Plaintiffs' Motion involves "purely legal" issues, they assert that some of the arguments "turn on factual issues that require

review of a complete record." Opposition at 7. This misstates Plaintiffs' "arbitrary and capricious" claims, which are based on Defendants' failure to provide adequate justifications in the Postponement Notice itself. *See* Motion 11-13. As discussed below, Defendants' primary response is that such justifications were not legally required, and Defendants fail to identify any record documents to support their assertions. Consequently, all three legal issues presented in Plaintiffs' Motion—any one of which is dispositive—can be resolved now by the Court without the need to compile an administrative record.[1]

II. AN AGENCY CANNOT INVOKE SECTION 705 AFTER A RULE'S EFFECTIVE DATE.

Contrary to Defendants' assertions, Section 705 does not permit agencies to postpone future compliance dates associated with a rule following that rule's effective date. Opposition at 17-21. This is not a permissible construction of the statute because it runs counter to the plain text and purpose of Section 705, and conflicts with the design of the APA as a whole.

First, the plain language of Section 705 "authorizes postponement of the 'effective date,' not 'compliance dates.'" Valuation Order at *9. Courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997); *see also Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir. 1993) (stating that courts "lack…power" to "read into the statute words not explicitly inserted by Congress"). Further, "compliance date" and "effective date" have distinct meanings. *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."). Defendants argue that Section 705 affords agencies wide latitude to determine whether "justice requires" the postponement. Opposition at 19-20. Defendants ignore, however, that this determination is a

[1] While Defendants further accuse Plaintiffs of cherry picking the record (Opposition at 7), they do not object to Plaintiffs' Request for Judicial Notice (Dkt. No. 12) or otherwise contend that these documents are improperly before this Court. Indeed, Defendants included several additional documents in support of their Opposition. Dkt. Nos. 52-1 – 52-4. There is no dispute that each of these documents would be part of any administrative record compiled for the Postponement Notice. This is consistent with Section 706 of the APA, which provides that "the court shall review the whole record *or those parts of it cited by a party*… ." 5 U.S.C. § 706 (emphasis added). Moreover, if the Court finds for Plaintiffs on the first two issues, it need not decide the remaining claims regarding the inadequate justification provided by Defendants in the Postponement Notice.

precondition to the exercise of the only power granted by Section 705 – to postpone an effective date. 5 U.S.C. § 705. However broad the agency's conception of justice may be, nothing in Section 705 permits it to provide any other relief, such as postponing a "compliance date." [2]

Second, allowing an agency to postpone a rule's compliance date after that rule has gone into effect would contravene Section 705's purpose of maintaining the regulatory status quo. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 28 (D.D.C. 2010). The effective date of a rule is understood to mean the date upon which the rule becomes enforceable and adherence to it is required. *See* Effective Date, Black's Law Dictionary (10th ed. 2014) (defining "effective date" as "the date on which a statute…becomes enforceable or otherwise takes effect"); *Nat. Res. Def. Council v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982) (an effective date serves to "implement, interpret, or prescribe law or policy"). A rule's effective date is the temporal point at which the regulatory status quo changes from old to new, and is thus the only date relevant to the purpose of Section 705.

A compliance date, on the other hand, is the deadline by which a specific requirement of a regulation must be completed. Defendants claim that "[t]he vast majority of the Rule's costs are associated with its gas capture and leak detection and repair requirements which would become operative on January 17, 2018." Opposition at 19 n.9. However, these requirements must be *completed* by that date. 81 Fed. Reg. at 83,033 ("the first round of leak detection inspections must be completed by January 17, 2018"), 83,082 (gas capture requirements must equal 85 percent beginning January 17, 2018). Defendants admit that regulated entities would need to expend resources and make the necessary adjustments to their equipment prior to this compliance date. *See* Opposition at 2, 16; Valuation Order at *8 (compliance obligations do not "abruptly commence" on the compliance date).

[2] That Congress intentionally limited the remedy available to agencies is further illustrated by comparing the first sentence of Section 705, authorizing agencies only to postpone effective dates, with the second sentence, authorizing courts to "issue all necessary and appropriate process to postpone effective dates *or* to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (emphasis added).

Further, Defendants' interpretation of Section 705 would run counter to the purpose of APA Section 553(d), which states: "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date… ."[3] 5 U.S.C. § 553(d); *see Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 903 (9th Cir. 2014) (courts will analyze a statutory provision "in the context of the governing statute as a whole, presuming a congressional intent to create a 'symmetrical and coherent regulatory scheme.'") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 132–33). The definition of "effective date" is not derived from Section 553(d), but from the plain meaning of the phrase itself. Nevertheless, Section 553(d) is relevant to the interpretation of Section 705 because Congress's provision of a gap between a rule's finalization and its effectiveness is clearly premised on the idea that the regulatory status quo shifts on a rule's effective date. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (Section 553(d) designed "to give affected parties a reasonable time to adjust their behavior before the final rule takes effect").

Defendants point to the APA's definition of "agency action" (Opposition at 18), arguing that their approach is valid because this term is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Common sense suggests that when Congress referred to an "action" in Section 705, it did not intend to include every aspect of the statutory definition of "agency action"—it would be nonsensical, for example, to allow an agency to postpone the effective date of a "failure to act." *Id*. Further, Defendants strain to equate "part of an agency rule"—a distinct section or requirement of a rule—with the date upon which that requirement must be completed. This conceptual back bending is not enough to overcome Section 705's clear temporal limit. "While section 705 allows the postponement of the effective date of a broader range of agency actions than a complete rule, such as a part of a rule or a license, that does not alter the plain

[3] While Defendants allege that the term "effective date" has a different meaning in Section 705 than in Section 553(d), there is no reason to think that Congress intended such a disparity, particularly when—as here—an agency invokes Section 705 to delay a substantive rule. *See United States v. Maciel-Alcala*, 612 F.3d 1092, 1098 (9th Cir. 2010) ("We interpret identical phrases used in the same statute to bear the same meaning.").

meaning of 'effective date.'" Valuation Order at *10. Thus, the agency would still need to take such action prior to the effective date of that rule or license, under the plain language of Section 705.[4]

Finally, Defendants' position that Section 705 allows agencies "broad discretion" (Opposition at 18) to suspend any "part" of a rule—as long as someone has challenged the rule in court and the agency determines that justice so requires—is counter to the interest in regulatory predictability and consistency shared by the government, regulated entities, and the public. *See Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012) (emphasizing that formal rulemaking is intended to provide "notice and predictability to regulated parties"); *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 589 (9th Cir. 1998) (noting the importance of an agency achieving the twin goals of "fairness and predictability"); Valuation Order at *9 (finding "no precedent or legislative history to support a Congressional delegation of such broad authority to bypass the APA repeal process for a duly promulgated regulation").

For all of these reasons, the Postponement Notice contravened Section 705's unambiguous language and purpose and should be vacated.

III. THE APA'S NOTICE-AND-COMMENT REQUIREMENTS APPLY TO RULE REPEALS.

This Court need not consider Defendants' irrelevant argument that notice and comment is not required for a properly-invoked Section 705 delay. Indeed, where agencies use Section 705 as a stop-gap measure to maintain the regulatory status quo *before* a rule goes into effect, courts have found such delays not to require Section 553's notice-and-comment procedures. *See Sierra Club*, 833 F. Supp. 2d at 28. However, BLM's action in this case did not maintain the regulatory landscape, but rather upended the status quo by indefinitely postponing—and thus, in effect, suspending—an already-effective rule.[5] *See* Motion at 10-11.

[4] This interpretation would hardly render Section 705 "useless." Opposition at 19. Here, two months elapsed between the initiation of a legal challenge to the Rule and the Rule's effective date.

[5] Defendants' contention that they did not indefinitely postpone the Rule is belied by the fact that they moved to delay proceedings in the underlying litigation. Dkt. No. 11, Exh. D. Indeed, Defendants imply that their Section 705 "postponement" will not expire when the litigation is resolved, but rather when BLM has completed the requisite "notice and comment rulemaking to propose to suspend certain provisions of the Rule already in effect." Opposition at 4.

Defendants offer no support for their statement that "the [Postponement] Notice has not altered the substance of any of the Rule's provisions." Opposition at 22; *see 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."). In fact, numerous provisions of the Rule now lack legal force because of the Postponement Notice. It is well-settled that notice-and-comment requirements apply to a regulatory delay where, as here, that delay has the substantive impact of a repeal. *Envtl. Def. Fund, Inc. (EDF) v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983) ("Although the decision was not expressed as a suspension of the regulations creating the standards, the effect was exactly that."). Contrary to Defendants' contention, the relevant legal principle articulated in *EDF v. Gorsuch* did not turn "on the intricacies" of the Resource Conservation Recovery Act.[6] Opposition at 23. The D.C. Circuit made clear that it was "concerned here with EPA's compliance with the notice-and-comment requirements of APA, 5 U.S.C. § 553" when it ruled that "an agency action which has the effect of suspending a duly promulgated regulation is normally subject to APA rulemaking requirements." *EDF v. Gorsuch*, 713 F.2d at 814, 816.

Because the agency reversed course after the Rule became effective, it was obligated to provide the public with an opportunity to comment on the change. Valuation Order at *11 ("By acting outside its statutory authority to in effect repeal the Rule…without allowing the public to comment, ONRR improperly put the cart before the horse."). In their Opposition, Defendants appear to acknowledge that this is the legally required course of action. *See* Opposition at 4 ("BLM intends to initiate a notice and comment rulemaking to propose to suspend certain provisions of the Rule already in effect and extend the compliance dates of requirements not yet in effect")). This conflict with the APA's notice-and-comment requirements demonstrates that Defendants' action was contrary not only to the plain text of Section 705, but also to the overall scheme and purpose of the APA, and thus was invalid.

[6] Defendants' unsupported assertion that all cases cited by Plaintiffs to support their notice-and-comment requirements are "readily distinguishable" is patently false. Opposition at 23. All of these cases discuss the notice-and-comment procedures required before an agency may revoke, reconsider, or indefinitely postpone provisions of an effective rule.

IV. DEFENDANTS' JUSTIFICATION IN THE POSTPONEMENT NOTICE WAS ARBITRARY AND CAPRICIOUS.

In addition to violating the APA by improperly invoking Section 705 to indefinitely postpone an already effective rule, without notice and comment, Defendants' action was arbitrary and capricious because the Postponement Notice itself failed to provide the justification required by law. *See* Motion at 11-13. Defendants are incorrect that the Postponement Notice "satisfies the only two requirements" of Section 705. Opposition at 9-17. The purpose of the Postponement Notice was not to preserve the status quo pending judicial review, but rather to frustrate judicial review while Defendants administratively reconsider the Rule. Second, Defendants admit that they did not consider the four-part preliminary injunction test in deciding whether "justice so requires" postponing the Rule. As such, the Postponement Notice was arbitrary and capricious and otherwise not in accordance with the APA.

A. The Postponement Notice Does Not Preserve the Status Quo Pending Judicial Review.

While there is no dispute that "pending litigation" exists in the District of Wyoming challenging the Rule (Opposition at 10-11), the purpose of the Postponement Notice was not to "preserve the status quo" pending judicial review. *See Sierra Club*, 833 F. Supp. 2d at 28; Administrative Procedure Act, Pub. L. 1944-46, S. Doc. 248 at 277 (1946) (describing the pre-codified version of Section 705 as allowing agencies to "maintain the status quo" in order to "make judicial review effective"). To the contrary, Defendants admit that they "also issued the Postponement Notice in light of the administration's reconsideration of the Rule," and sought an extension of deadlines in the Wyoming case "in light of the agency's reconsideration of the Rule." Opposition at 10-11.[7]

Defendants contend that "nothing in Section 705 states that an agency may not have other reasons for postponement in addition to the pending litigation." Opposition at 10-11. There are

[7] Defendants have repeatedly attempted to prevent judicial review in this action as well, seeking to transfer the case to Wyoming (Dkt. No. 14), moving to stay the summary judgment briefing pending the Court's ruling on the motion to transfer (Dkt. No. 36), and now contending that Plaintiffs' Motion is premature and that the Court must wait for the preparation of the administrative record to decide these purely legal issues. Opposition at 6-9.

several problems with this assertion. First, as discussed above, if an agency wishes to reconsider an already effective rule, the proper avenue to do so is through notice-and-comment rulemaking, not through the issuance of a Section 705 notice. *See supra* Part III. Courts have made it clear that a Section 705 postponement is improper 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; *see id*. at 35 (where agency issued a Section 705 postponement and "then moved the court of appeals to hold its review in abeyance until the agency finished its reconsideration proceedings," the postponement improperly "operates as a stay pending reconsideration, not litigation").

Defendants' attempt to distinguish the situation in *Sierra Club* because that case involved a rule promulgated under the Clean Air Act, and because the agency failed to express "concern about the substantive merits of the rule," is misplaced. *See* Opposition at 12. Although the rule in *Sierra Club* was issued under the Clean Air Act, the postponement notice reviewed by the Court was issued "under 5 U.S.C. § 705 of the APA, rather than under 42 U.S.C. § 7607(d)(7)(B) of the Clean Air Act." *Sierra Club*, 833 F. Supp. 2d at 15. Second, similar to *Sierra Club*, where the "Notice itself [made] no mention of any concern about the substantive merit of the rules," *id*. at 34, here the only relevant statement in the Postponement Notice is that "petitioners have raised serious questions concerning the validity of certain provisions of the Rule," a proposition contradicted by Defendants' assertion that the Rule "was properly promulgated." 82 Fed. Reg. 27,431. As in *Sierra Club*, Defendants' attempt to pay "lip service to the pending litigation" in Wyoming is not sufficient to justify a postponement under Section 705 to administratively reconsider the Rule. *Sierra Club*, 833 F. Supp. 2d at 34; *see* Valuation Order at *10 ("Defendants' argument that recent questions and complaints raised new issues justifying the postponement does not justify acting outside of statutory authority").

B. Defendants Failed to Consider the Preliminary Injunction Test to Show that "Justice So Requires" Postponement.

In their Opposition, Defendants admit that they did not consider the four-part preliminary injunction test or the benefits of the Rule in determining that "justice so requires" a postponement,

contending that there is no requirement to do so. Opposition at 13-17. With regard to the injunction standard, Defendants claim that the *Sierra Club* decision "is not binding on this court" and "is inconsistent with [ ] Section 705's text and legislative history. *Id*. at 13; *see Sierra Club*, 833 F. Supp. 2d at 30 (finding that the "justice so requires" standard under Section 705 "is governed by the four-part preliminary injunction test"). Although the district court's holding in *Sierra Club* is "not binding on this Court" (Opposition at 13), the fact that it represents one of the only published decisions to interpret the requirements of Section 705, and does not conflict with any opinions in this Circuit, allows this Court to find that it is a "persuasive precedent" entitled to respect and careful consideration. *See Gaudin v. Saxon Mortg. Services, Inc*., 820 F. Supp. 2d 1051, 1052 (N.D. Cal. 2011) (in absence of controlling authority, finding decisions from other circuits to be "persuasive precedent"); *see also* Persuasive Precedent, Black's Law Dictionary (10th ed. 2014) (defining "persuasive precedent" as "precedent that is not binding on a court, but that is entitled to respect and careful consideration"); Valuation Order at *9 (finding the reasoning in *Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS, *2-3 (D.C. Cir. Jan. 19, 1996) to be "persuasive").

Defendants also assert that such a showing "is inconsistent with…Section 705's text and legislative history" because it is not specifically required by either. Opposition at 13-14. However, other than noting that the four-part preliminary injunction test is not discussed in Section 705 or its legislative history, Defendants never explain why such a showing would be inconsistent with the "justice so requires" determination. The *Sierra Club* court considered the same legislative history cited by Defendants in concluding that such a showing was required. *Sierra Club*, 833 F. Supp. 2d at 31 (finding that "the legislative history of Section 705 makes clear the intent of that section: the standard for the issuance of a stay pending judicial review is the same whether a request is made to an agency or to a court"). Considering the four-part injunction test would not require the agency "to find that the opposing party is likely to succeed on the merits" of its lawsuit or "force[] an agency to confess error." Opposition at 15. Rather, it would be entirely reasonable for an agency to determinate that a lawsuit actually has some merit,

rather than being entirely frivolous, in determining whether to postpone an otherwise "properly promulgated" rule.

Defendants next claim that their "justice so requires" finding was based on the "substantial cost" of compliance for regulated entities in the face of uncertainty due to the Rule reconsideration and pending litigation, and that Section 705 does not "require a cost-benefit analysis." Opposition at 13, 16-17. This rationale must be rejected. Under Defendants' theory, the mere existence of any pending litigation would create uncertainty about a rule that would always allow an agency to conclude that "justice so requires" its postponement, effectively rendering this phrase meaningless. And, as discussed above, agency reconsideration is not a legitimate basis for invoking Section 705.

While a properly issued Section 705 postponement is not a rulemaking (Opp. at 16), Defendants are still required to make a determination that "justice so requires" the delay by considering the appropriate factors. It is arbitrary for Defendants to consider the costs and not the benefits of implementing the Rule, especially in light of the preliminary injunction factors. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is "arbitrary and capricious" where agency has "entirely failed to consider an important aspect of the problem"); *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008) (preliminary injunction requires consideration of balance of equities and public interest).

Furthermore, Defendants' claim that such benefits "would not have even begun to accrue until January 2018" (Opposition at 16) is contradicted by their other statements that regulated entities would need to begin compliance work immediately to meet such deadlines. Opposition at 1-2 (rule requirements were "phased in over time to allow operators time to come into compliance."); *id*. at 16 ("in order to meet the [January 2018] deadlines, operators would have had to begin purchasing equipment and preparing for compliance months in advance"); *id*. ("The requirements to replace existing equipment would necessitate immediate expenditures"). Consequently, if the postponement is allowed to continue, the January 2018 compliance deadlines

may not be met and the benefits of the Rule may not be fully achieved.[8] Defendants' complete failure to consider these lost benefits in its issuance of the Postponement Notice was arbitrary and capricious.

V. NO SEPARATE BRIEFING ON REMEDY IS NEEDED.

Vacatur of the Postponement Notice is the appropriate remedy for Defendants' clear contravention of Section 705. The APA unequivocally states that a "reviewing court *shall*…hold unlawful and *set aside* agency action…found to be…not in accordance with law." 5 U.S.C. § 706(2) (emphases added). "When a court finds an agency's decision unlawful under the Administrative Procedure Act, vacatur is the standard remedy." *Klamath-Siskiyou Wildlands Center v. Nat'l Oceanic and Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1241 (N.D. Cal. 2015) (citations omitted); *see also Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (noting that vacatur is typically the proper remedy for a faulty rule).

While courts "in limited circumstances" have opted to remand agency rules without vacatur, such a result would not be appropriate here. *California Communities Against Toxics v. U.S. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (*per curiam*); *see also Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (noting that remand without vacatur only occurs "in rare circumstances"). To determine whether a rule should be remanded without vacatur, courts in the Ninth Circuit consider "(1) the seriousness of the agency's errors and (2) the disruptive consequences that would result from vacatur." *Klamath-Siskiyou*, 109 F. Supp. 3d at 1242. As to the first factor, courts generally remand without vacatur only where an agency's errors are minor and procedural—such as failing to publish certain documents in the electronic docket of a notice-and-comment rulemaking, *Cal. Communities*, 688 F.3d at 992, or failing to provide the public with the opportunity to review a provisional report prior to the close of a comment period, *Idaho*

[8] Defendants' assertion that the Postponement Notice is a "statutorily authorized means of maintaining the status quo" because it only postponed portions of the Rule "that have not yet become operative" (Opposition at 16 n.7) fails for the same reasons. As of January 17, 2017, the entire Rule was in effect, and regulated entities should have immediately begun working to meet the Rule's requirements, including the January 2018 compliance deadlines. Nullifying portions of an already effective Rule does not preserve the status quo, but changes it. *See* Valuation Order at *9 ("ONRR's suspension of the Rule did not merely 'maintain the status quo,' but instead restored a prior regulatory regime").

Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1402-04 (9th Cir. 1995). When evaluating the second factor, courts will only decline to vacate a rule where doing so could lead to serious harms, such as power blackouts or potential extinction of a species. *Cal. Communities*, 688 F.3d at 994; *Idaho Farm Bureau*, 58 F.3d at 1405; *see also Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) ("The Ninth Circuit has only found remand without vacatur warranted by equity considerations in limited circumstances, namely serious irreparable environmental injury.").

Here, by any measure vacatur is the appropriate remedy. The seriousness of Defendants' error could not be greater. Defendants acted under an unsupportable interpretation of the APA, and in so doing effectively repealed a rule without providing the public with any opportunity for notice and comment. *See Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007) ("The agency's errors could not be more serious insofar as it acted unlawfully, which is more than sufficient reason to vacate the rules."). Further, potential harms are minimal as vacatur would simply reinstate a regulatory regime that was in place for over five months earlier this year. Moreover, reinstatement of the Rule would benefit the environment and the public interest by minimizing waste of public resources. *See* 81 Fed. Reg. at 83,014. By Defendants' own estimates, the Rule would produce annually up to 41 billion cubic feet of additional natural gas, eliminate 175,000-180,000 tons of methane emissions, cut emissions of hazardous air pollutants by 250,000-267,000 tons, and generate up to $14 million in additional royalties. *Id.* Since vacatur is clearly the appropriate form of relief, no separate briefing on remedy is necessary.

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 vacate the Postponement Notice.

Dated: September 7, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA
Supervising Deputy Attorney General

/s/ George Torgun
GEORGE TORGUN
MARY S. THARIN
Deputy Attorneys General

Attorneys for the State of California

HECTOR BALDERAS
Attorney General of New Mexico

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

Attorneys for the State of New Mexico