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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE 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

NOTICE OF MOTION AND MOTION OF THE STATES OF WASHINGTON, OREGON, MARYLAND, AND NEW YORK TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS

Judge: Hon. Elizabeth D. Laporte

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT the States of Washington, Oregon, Maryland, and New York (*amici* states) hereby move the Court for leave to file a brief *amicus curiae* in the above-captioned case in support of Plaintiffs. A copy of the proposed *amicus* brief is attached as an exhibit to this motion.

I. LEGAL STANDARD

District courts have wide discretion in granting leave to participate as *amicus curiae*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). While there is no specific rule on when such leave is proper, this discretion is liberally applied when the legal issues in a case "have

potential ramifications beyond the parties directly involved." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005). Indeed, the "classic role" of *amicus curiae* is filled in cases that involve the general public interest, including the interpretation and status of the law. *Funbus Systems, Inc. v. State of Cal. Pub. Util.s Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (referencing *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982)); *Cmty. Ass'n for Restoration of the Env't. (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

II. STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The current case involves allegations that the United States Department of Interior, Bureau of Land Management (BLM), engaged in an expansive and illegal interpretation of the federal Administrative Procedure Act (APA) to suspend a duly adopted and effective rule. The ramifications of this action go well beyond the parties to the case and are well within matters of general public interest. As a result, the States are well-positioned to file a brief *amicus curiae.* Amici states have proprietary interests in receiving the maximum share of royalty payments from capturable gas on federal and tribal lands within the State. Each State also has a strong interest in ensuring that federal agencies comply with the APA and refrain from engaging in arbitrary and capricious decision-making. The States and their businesses and residents depend on a stable and predictable federal regulatory environment. Furthermore, the States have particular insights to share because they already have suffered concrete harms following expansionary applications of § 705 of the APA.

III. *AMICI CURIAE'S* EXPERTISE WILL BENEFIT THE COURT

The *amici* States have "unique information" and a "perspective that can help the [C]ourt" by demonstrating the broad implications flowing from BLM's actions and other expansionary applications of § 705 by the new administration. *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003). The ramifications of this case directly affect the States, which will be negatively impacted if federal agencies engage in questionable

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and expansive interpretations of the APA to postpone regulations already in effect that are important for the economic and environmental health of the state. States depend upon a stable and predictable regulatory environment. It is especially important for the Court to consider the States' view that the regulatory instability and administrative whim embodied by the government's broad interpretation of § 705 of the APA imperils regulated entities and businesses within the States. A favorable ruling from the Court in this challenge will make it more difficult for federal agencies to engage in ad-hoc indefinite postponement of duly adopted regulations.

IV. CONCLUSION

For the foregoing reasons, the *amici* States respectfully request this Court's leave to file the attached *amicus* brief.

RESPECTFULLY SUBMITTED this 22nd day of August 2017.

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Plaintiffs,

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AMICUS CURIAE BRIEF OF THE STATES OF WASHINGTON, OREGON, MARYLAND, AND NEW YORK

Judge: Hon. Elizabeth D. Laporte

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I. INTRODUCTION

States have fundamental interests in ensuring the proper execution of federal law by federal agencies. States are directly impacted by the federal government's regulatory actions and have a duty to protect the legal rights of their citizens and ensure that federal actions impacting state interests are lawful. Just two months ago, *amici curiae* states filed a brief urging this Court to prevent the United States Department of Interior and its Office of Natural Resource Revenue (ONRR) from violating these interests in its efforts to roll back duly-promulgated regulations. *See* Amicus Curiae Brief of The State of Washington; The State of Oregon; The State of Maryland; and The State of New York, *California v. Zinke*, No. 3:17-cv-02376-EDL (N.D. Cal. June 14, 2017) (ECF No. 20). In doing so, *amici* highlighted similar efforts by multiple federal agencies and warned that sanctioning ONRR's broad reading of Section 705 of the Administrative Procedures Act (APA) would foster regulatory whiplashes throughout the federal government that violate both the spirit and the letter of the APA. The current case represents yet another example of that overreach.

In 2014, after determining that "insufficient and outdated" regulations allowed billions of cubic feet of natural gas to be wasted, and thus millions of dollars of revenue to be lost every year from oil and gas leases on federal lands, the Department of Interior's Bureau of Land Management (BLM) initiated an extensive rulemaking to update its regulations to minimize these losses and maximize royalties. After a three-year process, BLM finalized its efforts in the "Waste Prevention Rule" (the Rule), which is anticipated to save up to 41 billion cubic feet of gas and increase royalty payments by up to $14 million dollars every year. The final Rule was

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published in November 2016 and became effective on January 17, 2017. 81 Fed. Reg. 83,008 (Nov. 18, 2016)

Nearly five months later—after industry groups and four states challenged the Rule in federal district court in Wyoming but were denied a preliminary injunction preventing the rule from taking effect—BLM invoked Section 705 of the APA to suspend the Rule's compliance dates pending the litigation and so that BLM could "review[] and reconsider[]" the Rule. BLM then sought—and received—a delay in litigation dates so that it could conduct that administrative review. This action is an impermissible expansion of Section 705, violates the APA, and effectively amends or repeals the Rule without notice and comment. *Amici* states urge this Court to invalidate BLM's action and re-instate the Rule until BLM follows proper procedure.

II. FACTUAL AND PROCEDURAL BACKGROUND

The BLM is charged with managing the federal onshore oil and gas lease program on federal lands. *See, generally,* Mineral Leasing Act of 1920, 30 U.S.C. §§ 181–287. Oil and gas production from lands overseen by BLM amounts to approximately 11 percent of the nation's natural gas supply and 5 percent of its oil supply. 81 Fed. Reg. 83,008, 83,014 (Nov. 18, 2016). Technological advances in the last decade have led to significantly increased oil and gas production on these lands, and royalty revenues from these resources are in the billions of dollars per year.

However, BLM regulations failed to keep up with these advances, particularly with respect to preventing waste of natural gas that escapes during oil and gas production. In 2010, the Office of the Inspector General (OIG) of the Department of the Interior, along with the

Government Accountability Office (GAO), conducted reviews raising concerns that BLM's existing requirements allowed excessive flaring (burning) and direct venting of gas into the atmosphere. 81 Fed. Reg. 83,008, 83,010 (Nov. 18, 2016). The GAO noted that "around 40 percent of natural gas estimated to be vented and flared on onshore Federal leases could be economically captured with currently available control technologies." *Id*. at 83,010. The failure to capture that gas deprived taxpayers of royalty revenues. *Id*. at 83,009. In addition, "vented or leaked gas contributes to climate change, because the primary constituent of natural gas is methane, an especially powerful greenhouse gas." *Id*. The OIG and GAO recommended that BLM "update its regulations to require operators to augment their waste prevention efforts, afford the BLM greater flexibility in rate setting, and clarify BLM policies regarding royalty-free, on-site use of oil and gas." *Id*. at 83,010.

Starting in 2014, BLM conducted a process to engage stakeholders and solicit input regarding the development of regulations to address the findings and recommendations in the OIG and GAO reviews. *Id*. After multiple public meetings and extensive outreach to impacted entities, trade associations, and state and tribal governments, BLM issued a proposed rule on January 21, 2016. Following months of public comments, BLM issued its final rule on November 18, 2016. Among other things, the Rule reduces the waste of natural gas by prohibiting venting except under specified conditions. *Id.* at 83,011. The Rule requires updates to existing equipment to reduce flaring, ratcheting down the amount of allowed waste escape over time, requires operators to produce waste minimization plans, and requires semi-annual inspections for leak detection. *Id.* The Rule also modifies the definition of "unavoidable losses" in a manner that increases the amount of escaped gas deemed subject to royalties. The Rule is

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1 estimated to produce additional royalties of approximately $14 million, avoid up to 180,000 tons
2 of methane emissions per year, and reduce emissions of volatile organic compounds by
3 approximately 250,000 tons per year. *Id.* at 83,014.
4
5 Shortly after the final Rule was issued, two industry groups and a group of states
6 (Wyoming, Montana, North Dakota, and Texas) challenged the Rule in the District of Wyoming.
7 The Petitioners immediately moved for a preliminary injunction to prevent the Rule from taking
8 effect. On January 16, 2017, the district court denied the motion for preliminary injunction
9 finding that petitioners failed to show a likelihood of success on the merits or irreparable harm
10 in the absence of an injunction. *Wyoming v. Dep't of the Interior* 2017 WL 161428 (D. Wyo.
11 Jan. 16, 2017) (slip op). The Rule took effect the following day, January 17, 2017.
12
13 Almost five months later, on June 15, 2017, BLM published a "Postponement Notice"
14 related to the Rule. 82 Fed. Reg. 27,430 (June 15, 2017) (Waste Prevention, Production Subject
15 to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates). Despite
16 the fact that the Wyoming district court had already determined that the challenge to the Rule
17 was not likely to succeed on the merits and thus declined to suspend the Rule's January 17, 2017,
18 effective date, BLM postponed the January 17, 2018, compliance date for several requirements
19 of the Rule, including reductions in how much gas may be allowed to escape and updates to
20 equipment, BLM postponed those dates under APA Section 705, which only permits an agency
21 to "postpone the *effective date* of action taken by it, pending judicial review." 5 U.S.C. § 705
22 (emphasis added). BLM stated that it was doing so because of "the existence and potential
23 consequences of the pending litigation." 82 Fed. Reg. at 27,430. BLM also stated that the
24 postponement was necessary so that the agency could "review[] and reconsider[] the Rule." *Id.*
25
26

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at 27,431. BLM subsequently sought (and received) a 90-day extension of briefing deadlines in the underlying Rule challenge so that it could pursue "future administrative review." BLM has also stated that it ultimately plans to eliminate or extend the Rule's compliance dates, at some unnamed point in the future, through notice-and-comment rulemaking. 82 Fed. Reg. 27,430, 27,431 (June 15, 2017) .

On July 5, 2017, the States of California and New Mexico filed the current lawsuit, challenging BLM's suspension of the Rule.

III. ISSUE ADDRESSED

Whether BLM violated the APA when it suspended the compliance dates of a rule that was already in effect and effectively amended or repealed the rule without notice and comment rulemaking.

IV. ARGUMENT

A. BLM's Suspension of the Waste Prevention Rule's Compliance Dates Violates the APA

The plain language of Section 705 is clear: Section 705 is narrowly crafted only to permit an agency to "postpone the effective date" of a rule pending judicial review. 5 U.S.C. § 705. It does not allow the retroactive suspension of a rule, or any part thereof, that has already gone into effect.

Attempting to get around this limitation, BLM couches its suspension as a postponement of the Rule's future "compliance dates," claiming that such dates are encompassed within the meaning of "effective date" as used in Section 705. But, future compliance dates in a regulation are not the regulation's effective date, and BLM's strained construction of Section 705 would constitute a significant expansion of its plain language. The operative language of Section 705

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1 is "postpone the effective date … pending judicial review." While the APA makes no mention
2 of "compliance dates," an "effective date" is a specific term of art within the APA. For example,
3 substantive rules must be published at least 30 days before their effective dates, and future
4 compliance dates are often timed in reference to a rule's effective date. *See* 5 U.S.C. § 553(d).
5 While a rule may have many components, including multiple future deadlines for compliance,
6 rules only have *one* "effective date." *See Silverman v. Eastrich Multiple Inv'r Fund, L.P.*, 51
7 F.3d 28, 31 (3rd Cir. 1995) (warning that a regulation's "compliance date should not be
8 misconstrued as the effective date.").
9
10 BLM's reliance on Section 705 to suspend the Rule's compliance dates also violate the
11 APA's notice and comment requirements because such suspensions are deemed an amendment
12 or repeal that is invalid without following notice and comment requirements. Section 553 of the
13 APA requires an agency to provide notice and an opportunity to comment in a "rule making."
14 Section 551(5) defines a rule making to include "amending" and "repealing" a regulation.
15 Because suspending—and effectively modifying—a regulation's compliance dates constitutes
16 amending or repealing the regulation, it requires notice and comment. *See Clean Air Council v.*
17 *Pruitt*, 862 F.3d 1, 6 (2017) (finding jurisdiction to review a suspension of compliance deadlines
18 for requirements for methane leaks in oil and gas production because the suspension is
19 "tantamount to amending or revoking" the regulation); *Environmental Defense Fund, Inc. v.*
20 *Gorsuch*, 713 F.2d 802 (1983) (*EDF*); *Natural Resources Defense Council v. EPA*, 683 F.2d
21 752, 761–62 (D.C. Cir. 1982) (*NRDC*); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*
22 *Auto. Ins. Co.*, 463 U.S. 29 (1983) (rescissions or modifications of substantive rules require a
23 new rulemaking proceeding).
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For example, in *NRDC*, the Court of Appeals ruled that the indefinite postponement of the effective date of a regulation regarding sewage treatment plants pending reconsideration of the regulation effectively repealed the regulation and thus constituted a rulemaking for which notice and comment was required. 683 F.2d at 761–62. In *EDF*, EPA announced that it would conduct a notice and comment rulemaking regarding suspension of the effective dates of the performance standards for two categories of hazardous waste facilities but that it would suspend the submission of permit applications for those facilities pending the rulemaking. 713 F.2d at 808. The court ruled that EPA's the suspension of permit applications "constitute[d] rulemaking subject to notice and comment requirements of 5 U.S.C. § 553." *Id.* at 816.

Indeed, BLM itself conceded that it was required to conduct a rulemaking regarding the suspension of the Rule's compliance dates when it announced its intent to "conduct notice-and-comment rulemaking" regarding the extension or elimination of those dates. *See* 82 Fed. Reg. 27,430, 27,431. BLM is half right—it can extend or eliminate the Rule's compliance dates but only *after* developing an adequate record to do so and following notice and comment requirements. It cannot, however, perform ad-hoc amendment to the dates by suspending them in the interim.

BLM's action violates the APA and should be invalidated.

B. BLM's Actions Undermine the APA's Goal of Creating Stability and Predictability With Regard to Federal Regulatory Efforts With Potential for Impacts Well Beyond the Current Dispute

As noted above, States have a fundamental interest in ensuring the proper execution of federal law by federal agencies, both as impacted parties and pursuant to their duties to protect the legal rights of their citizens. When it comes to regulatory actions, both States and the citizens and businesses within their borders frequently undertake substantial efforts to prepare for, and

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1 comply with, regulatory actions. And, in many instances—including here—States and their
2 citizens are the direct beneficiaries of federal regulatory efforts.[1]
3
4 These significant interests are backstopped by two bedrock principles of the APA:
5 (1) advance notice of potential agency action and (2) an opportunity to meaningfully comment
6 on proposed actions before they are final. *See* 5 U.S.C. § 553. These requirements ensure that
7 interested parties are involved early in the rulemaking process and provide a mechanism to
8 substantively engage with the regulating agency on proposed rules. *See, e.g., N.L.R.B. v. Wyman-*
9 *Gordon Co.*, 394 U.S. 759, 764 (1969) (APA "designed to assure fairness and mature
10 consideration" when adopting regulations); *Brown Express, Inc. v. U.S.*, 607 F.2d 695, 701 (5th
11 Cir. 1979) (APA ensures that the broadest base of information is provided to agencies by those
12 most impacted and, thus, perhaps best informed); *Nat'l Retired Teachers Ass'n v. U.S. Postal*
13 *Service*, 430 F. Supp. 141, 147 (D.D.C. 1977) (APA's rulemaking provisions were enacted for
14 the central purpose of allowing public participation in the promulgation of rules that have a
15 substantial impact on those regulated).
16
17 The consequences of failing to follow these procedures are clear. Shifting policies and
18 regulatory instability "imperils" regulated entities and "muddles the regulatory landscape."
19 *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 541 (2009) (Stevens, J.,
20 dissenting) (discussing undisputed APA policy rather than matters specific to the majority
21 decision). As a result, both the APA and the rule of law "favor stability over administrative
22 whim." *Id at 542*.
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[1] In this case, Plaintiff States impacted by the Rule stand to lose significant revenues from BLM's suspension. *See* Complaint ¶ 14 (ECF No. 1).

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Allowing BLM to effectively repeal large portions of a rule without notice and comment rulemaking flips this paradigm on its head and encourages policy whiplashes to the detriment of stability and predictability. This is the opposite of what the APA requires. Under the APA, agencies must engage in notice and comment rulemaking when adopting, modifying, or repealing any substantive rules.[2] *See* 5 U.S.C. §§ 551(5), 553. As with adoption, repeal or modification of a rule must be supported by a "reasoned analysis for the change." *State Farm*, 463 U.S. at 42. Once an agency finalizes a rule, it "embodies the agency's informed judgment" that the rule discharges its duty to "carry out the policies committed to it by Congress." *Id* at 41–42. As a result, adopted rules create "a presumption that those policies will be carried out best if the [existing] rule is adhered to" and a "presumption . . . . *against* changes in current policy that are not justified by the rulemaking record." *Id.* at 42 (emphasis original); *see also AFGE, Local 3090 v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("an agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal and to provide a reasoned explanation for the change addressing with some precision any concerns voiced in the comments received" (citation omitted)). Ad-hoc modifications or rescissions of existing rules with no record to justify and without following the APA's mandated procedures for doing so destroys these presumptions and violates both the letter and the spirit of the APA.

The impacts of allowing actions like BLM's are not limited to the Waste Prevention Rule. As noted above, *amici* states have already submitted an *amicus* brief to this Court in a lawsuit

[2] An agency also may not "simply disregard rules that are still on the books." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

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over similar use of Section 705 by DOI's Office of Natural Resource Revenue. Notice of Motion and Motion of the States of Washington, Oregon, Maryland, and New York to File an Amicus Curiae Brief in Support of Plaintiffs, *California v. Zinke*, No. 3:17-cv-02376-EDL, ECF No. 20 (N. D. Cal. June 14, 2017). And, as *amici* set out in that brief, similar expansive readings of Section 705 and disregard for other APA requirements are occurring across multiple federal agencies. Last month, the D.C. Circuit Court of Appeals invalidated an attempt by the Environmental Protection Agency (EPA) to illegally suspend compliance dates contained in the "methane rule" (establishing new source performance standards for fugitive emissions of methane and other pollutants). *Clean Air Council v. Pruitt*¸ 862 F.3d 1, 5 (D.C. Cir. 2017). In doing so, the Court reiterated what should be axiomatic to any administrative agency: "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter such a rule without notice and comment." *Id*. at 9 (internal quotations and citation omitted). Because EPA's suspension was tantamount to amending the rule, and because neither the APA nor the Clean Air Act granted authority for the suspension, the Court found that EPA's action was arbitrary, capricious, and in excess of its statutory authority. *Id*. at 14.

As noted in *amici*'s prior brief to this Court, EPA has also invoked Section 705 to stay an EPA regulation regarding new water effluent limits for steam power plants. This action suspended and indefinitely postponed remaining compliance deadlines for covered power plants, effectively grinding the rule to a halt. 82 Fed. Reg. 19,005 (April 25, 2017). EPA then sought an immediate stay of the underlying judicial challenge to the rule and has since asked the Fifth Circuit to hold judicial review in abeyance pending completion of "further rulemaking." *See*

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Southwestern Electric Power Co., v. EPA, No. 15-60821 (Document No. 00514115266) (August 14, 2017) *available at* https://www.eenews.net/assets/2017/08/15/document_gw_06.pdf.

The universe of other rules with future compliance dates that are potentially subject to similar action is significant and spans a broad spectrum of federal regulatory programs. A small fraction of such rules include: 81 Fed. Reg. 90,416 (December 14, 2016) (2017 effective date with 2019 full compliance date for minimum sound requirements for electric vehicles); 81 Fed. Reg. 67,438 (September 30, 2016) (2016 effective date with 2018 compliance date associated with state standards required for Child Care and Development Fund block grants); 81 Fed. Reg. 33,742 (May 27, 2016) (2016 effective date with 2018 and 2019 compliance dates for food and dietary supplement labeling requirements); 81 Fed. Reg. 20,092 (April 6, 2016) (2016 effective date with 2018 compliance date for sanitary transportation of food for human and animal consumption).

These actions subvert the rule of law and the very policies the APA was enacted to foster. This Court should invalidate BLM's actions.

V. CONCLUSION

BLM's suspension of the Waste Prevention Rule's compliance dates contravenes the plain language of Section 705 of the APA and should be invalidated. That action has the potential for far-reaching consequences that impact the very stability and predictability the APA seeks to

foster in regulatory systems. This Court should reverse this expansive and illegal interpretation of APA authority by granting Plaintiffs' Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 22nd day of August 2017.

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