Nos. 18-8027, 18-8029

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, *et al*.,
Petitioners-Appellees,

STATE OF NORTH DAKOTA and STATE OF TEXAS,
Intervenors-Appellees,

v.

U.S. DEPARTMENT OF THE INTERIOR, *et al*.,
Respondents-Appellees,

WYOMING OUTDOOR COUNCIL, *et al*.,
Intervenors-Appellants,

and

STATE OF CALIFORNIA, BY AND THROUGH THE CALIFORNIA AIR RESOURCES BOARD, and STATE OF NEW MEXICO,
Intervenors-Appellants.

On Appeal from the United States District Court for the
District of Wyoming, Nos. 16-cv-080, 16-cv-085 (Hon. Scott W. Skavdahl)

STATE APPELLANTS' REPLY TO APPELLEES' OPPOSITIONS TO MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

This appeal challenges the district court's Order enjoining duly-promulgated regulations without properly considering the requirements for the issuance of injunctive relief. Appellees cite no authority that allows for such an outcome, and the fact that these regulations are being reconsidered or that operators must spend money to comply with the law does not change the analysis. In filing this Motion for Stay Pending Appeal ("Stay Motion"), State Appellants simply request that this Court restore the status quo, which is the continued operation of regulations that benefit the American people and protect against irreparable environmental harm.

ARGUMENT

I. STATE APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The District Court Erred by Failing to Analyze the Preliminary Injunction Factors.

Appellees argue that the district court did not abuse its discretion by enjoining the Waste Prevention Rule without an analysis of the factors required for an award of such relief. Federal Respondents-Appellees' Opposition to Motions for Stay Pending Appeal ("BLM Resp.") at 20; Western Energy Alliance, *et al.*'s Joint Response to Appellants' Motions for Stay Pending Appeal ("WEA Resp.") at 19-21; State of Wyoming, *et al.*'s Response to Appellants' Motions for Stay Pending Appeal ("Wyoming

Resp.") at 8; *see Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). Yet Appellees fail to cite any authority to support their contention that this analysis does not apply to injunctive remedies under section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705. In fact, this position contravenes established precedent. *See, e.g., Assoc. Sec. Corp. v. Sec. & Exchange Comm'n*, 283 F.2d 773, 774–75 (10th Cir. 1960); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012).[1]

The cases cited by Appellees do not support the district court's Order. First, the court in *Rochester-Genesee Reg'l Transp. Auth. v. Brigid Hynes-Cherin*, 506 F. Supp. 2d 207 (W.D.N.Y. 2007) *did* analyze the four factors in evaluating a stay request brought under section 705, but also applied an outdated "sliding scale" approach which the Tenth Circuit eliminated following the Supreme Court's decision in *Winter*. *See Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016). Moreover, *California v. U.S. BLM*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) did not address the question of whether a court can omit analysis of the

[1] Appellees appear to acknowledge that such an analysis was required. *See* Wyoming Resp. at 9 ("[a] stay of agency action under § 705 is a provisional remedy in the nature of a preliminary injunction"); BLM Resp. at 9 (district court could "more fully explain its reasoning and address the four equitable factors").

injunction factors when fashioning a remedy under section 705. The court's discussion was limited to requirements governing agency action under a different part of that section. Further, the pre-*Winter* cases cited by Federal Appellees contradict their contention that the district court properly exercised its equitable discretion. *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) (noting "countervailing considerations that militate against an expansive delegation of discretion to the trial court," and "it is important that the exercise of discretion be accompanied by the trial court's articulation of the factors considered and the weight accorded to them"); *Harjo v. Andrus*, 581 F.2d 949, 951 (D.C. Cir. 1978) ("the district court undertook an extended, studious, and excellent analysis of [the merits]").

The legislative history of section 705 states that this provision "permits either agencies or courts, if the *proper showing be made*, to *maintain the status quo*." H.R. Rep. No. 1980, at 277 (1946) (emphasis added). The Order failed on both counts: it did not maintain the status quo, and it did not make the proper legal showing required for injunctive relief. Rather than maintain the status quo, the Order lifted regulatory obligations that had gone into effect on January 17, 2017 and were binding on regulated entities. *See* 81 Fed. Reg. 83,008 (Nov. 16, 2016). Federal Appellees' two subsequent attempts to postpone or suspend the Rule were struck down by

federal courts. *California v. U.S. BLM*, 277 F. Supp. 3d 1106; *California v. BLM*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018). The Rule unquestionably was *in effect* when the district court issued its Order on April 4, 2018.

Further, the district court altered the status quo without providing the requisite legal analysis. While a district court has equitable discretion to issue injunctive relief, such discretion is not unlimited. *See, e.g., In the Matter of Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 887 (7th Cir. 1989) ("A modern federal equity judge does not have the limitless discretion of a medieval Lord Chancellor to grant or withhold a remedy"). The U.S. Supreme Court has mandated that a party seeking preliminary injunctive relief *must* establish the likelihood of four separate factors. *Winter*, 555 U.S. at 20, 33 (concluding that district court "abused its discretion" by failing to properly consider four factors); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009) ("before we will grant such relief, we require a movant seeking such an injunction to make a heightened showing of the four factors"). Appellees' position that courts have unbridled

discretion to enjoin or modify any effective regulation contains no limiting principle, and would have grave consequences for the rule of law.[2]

Because the district court failed to confine its exercise of discretion to the framework mandated by the Supreme Court, it committed a legal error which merits granting the requested stay.

B. Appellees' Remaining Arguments Fail.

Federal Appellees contend that a court has discretion to determine whether it is appropriate to "hear and decide" cases in light of prudential concerns. BLM Resp. at 20-21. But this argument is irrelevant here, as State Appellants have not appealed the district court's decision to stay the litigation. While prudential concerns may form a basis to decline adjudication of the merits, such concerns do not justify an injunction of already-effective regulations.[3]

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[2] Appellees' contentions that the Order is not appealable are incorrect and are fully addressed in State Appellants' Opposition to Motions to Dismiss for Lack of Subject Matter Jurisdiction, filed on May 3, 2018. Similarly, Federal Appellees' assertion that State Appellants failed to comply with Federal Rule of Appellate Procedure 8 is unavailing given that State Appellants did first move for a stay in the district court on April 6, 2018, and the district court denied that motion on April 30, 2018.

[3] Industry Appellees' argument that the district court was required to vacate the Rule based on a finding of prudential mootness is incorrect. WEA Resp. at 22-23. The cases cited do not apply here, where the district court stayed

Industry Appellees argue that the district court acted "thoughtfully and appropriately" in issuing the Order because many regulated entities have not come into compliance with the Rule. WEA Resp. at 20-21. Whether or not such inaction was reasonable during the pendency of legal challenges to the Rule's postponement and suspension, operators could not continue this inaction once the requirements were reinstated. *See California v. BLM*, 286 F. Supp. 3d 1054. Moreover, the "three principal, competing concerns" that the district court allegedly balanced in exercising its authority (WEA Resp. at 20) are not the factors required for the issuance of such relief. *See Winter*, 555 U.S. at 20.

Finally, Appellees admit that the Order was issued not for purposes of judicial review, but to provide Federal Appellees time to complete the rulemaking process. WEA Resp. at 6; BLM Resp. at 6, 22. As noted in the Stay Motion, section 705 allows a court to issue "necessary and appropriate process" only "pending conclusion of the review proceedings" before the court. Stay Motion at 16. Thus, it was improper for the district court to

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an agency rule (rather than an adjudicatory order) based on concerns regarding prudential mootness. *See A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961) (describing vacatur requirement as an extension of the principle that an appeals court should vacate a lower court's ruling that becomes moot pending appeal).

grant injunctive relief while declining to analyze the merits and staying the litigation. *Id*. at 14. For all of these reasons, State Appellants are likely to succeed on the merits of their appeal.

II. STATE APPELLANTS HAVE DEMONSTRATED THE THREAT OF IRREPARABLE HARM ABSENT A STAY.

Appellees' arguments regarding State Appellants' showing of irreparable harm are unfounded. First, Appellees contend that there will be no harm because the Order simply "maintains emissions at the same level as occurred in 2017." WEA Resp. at 14; BLM Resp. at 12. These statements are irrelevant for purposes of demonstrating harm for a stay pending appeal, which deals with prospective injury, not what has occurred in the past. *See* Tenth Circuit Rule 8.1 (requiring applicant to address "the threat of irreparable harm *if the stay or injunction is not granted*") (emphasis added).

Here, the Order enjoins key provisions of the Waste Prevention Rule that, when implemented, will significantly reduce emissions of volatile organic compounds, hazardous air pollutants, and methane. Order at 11. Appellees admit that the enjoined provisions would have reduced such emissions had they been implemented in January 2018. WEA Resp. at 15-16 ("the phase-in provisions would have reduced methane emission by 176,000 tons during all of 2018"); BLM Resp. at 11. Contrary to Federal

Appellees' assertion, this is nothing like the situation in *Wyoming v. Zinke* 871 F.3d 1133 (10th Cir. 2017), where the fracking regulation at issue had never been in effect prior to this Court's determination that withholding review "represents no departure from the status quo since 2015." *See id.* at 1143.

As described in the Stay Motion, the Order will cause irreparable harm by increasing air pollution and related health impacts in communities already overburdened with pollution, and by exacerbating climate harms. Stay Motion at 17-21. This showing is sufficient to demonstrate irreparable harm. *See, e.g., Diné Citizens Against Ruining Our Env't v. Jewell,* 2015 WL 4997207, *48 (D.N.M. Aug. 14, 2015) (finding irreparable injury because "fracked wells produce environmental harm … includ[ing] air pollution"), *aff'd*, 839 F.3d at 1276; *California v. BLM*, 286 F. Supp. 3d at 1075 (finding that State Appellants had "easily [met] their burden" to demonstrate irreparable harm based on similar harm allegations resulting from the Suspension Rule); *Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (finding that coal plant expansion would "emit substantial quantities of air pollutants that endanger human health and the environment and thereby cause irreparable harm"); *South Camden Citizens in Action v. New Jersey Dept. of Envtl. Prot.*, 145 F. Supp. 2d 446, 499-500

(D.N.J. 2001) (holding that additional air pollution "impose[d] on an already environmentally burdened community" constituted irreparable harm).[4] Appellees' speculation about enforcement of the stayed provisions or that operators "may" delay compliance with the law cannot overcome this showing. BLM Resp. at 13; WEA Resp. at 19, 24; *see RoDa Drilling*, 552 F.3d at 1210 ("[p]urely speculative harm" insufficient for purposes of injunction).

III. THE BALANCING OF HARMS AND PUBLIC INTEREST FAVOR A STAY.

Appellees' contentions regarding the balance of equities and the public interest similarly fail. Contrary to Appellees' suggestions (Wyoming Resp. at 15; WEA Resp. at 1, 5, 9-11; BLM Resp. at 15), it is well-established that ordinary compliance costs do not constitute irreparable harm. *See* Stay Motion at 13. The court in *Portland Cement Ass'n v. EPA*, 665 F.3d 177 (D.C. Cir. 2011) did not find to the contrary (Wyoming Resp. at 15), but rather stayed a specific set of air quality standards after finding them to be

[4] WEA's citation to *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) is inapposite. *See* WEA Resp. at 15. *Center for Biological Diversity* involved standing and specifically distinguished *Massachusetts v. EPA*, 549 U.S. 497 (2007), where the U.S. Supreme Court found that state petitioners had established an injury-in-fact based on climate harms. *Mass. v. EPA*, 549 U.S. at 521-23.

"arbitrary and capricious." *Id*. at 187-89. Contrary to the cases cited by Federal Appellees involving the ripeness doctrine (BLM Resp. at 17), compliance with a duly-promulgated regulation—which no court has found to be invalid—does not constitute "harm" for purposes of a stay.

WEA cites case law regarding "money damages" that cannot be recovered (WEA Resp. at 10), but there are no damages at issue here. Further, the concurring opinion in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) does not provide authority for the proposition that compliance costs provide evidence of irreparable harm, because the majority opinion rejected that claim. *See United States v. Williams*, 468 F. App'x 899, 910 n.15 (10th Cir. 2012) ("[A]bsent a fragmented opinion, a concurring opinion does not create law."). Moreover, WEA misreads the Tenth Circuit's decision in *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742 (10th Cir. 2010), where the court found irreparable harm not based on compliance costs but on the threat of enforcement, "debarment from public contracts," and penalties for violating an unconstitutional state law. *Id*. at 771.

Here, operators have had ample time since the Rule's effective date to prepare to meet the January 2018 deadlines and should have already been

substantially complying with those requirements.[5] Any alleged inability to comply with the Rule is a result of operators' own making and does not provide any basis for finding irreparable harm. *See Salt Lake Tribune Publ'g Co. v. AT&T Corp*., 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable"). Appellees' assertions regarding impacts to "marginal" wells (WEA Resp. at 11; BLM Resp. at 17) also ignore the numerous exemptions from the Rule's requirements where compliance "would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease." *See* 81 Fed. Reg. at 83,011-13.

Finally, Appellees' contentions regarding the public interest support this Court's issuance of a stay pending appeal. The "public interest in certainty and stability" supports the implementation of a duly-promulgated regulation until the proper procedures have been followed to amend or revise that rule. *See* Wyoming Resp. at 13; *NRDC v. Abraham*, 355 F.3d 179, 197 (2d Cir. 2004) (allowing agency unfettered discretion to amend standards

[5] Contrary to WEA's assertion, Federal Appellees did not deem that a "full year" was "necessary" to comply with the "phase-in" provisions (WEA Resp. at 5), but found this to be "ample time" for operators to come into compliance. *See, e.g.*, 81 Fed. Reg. at 83,033.

"would completely undermine any sense of certainty" on the part of the regulated community). As stated by Federal Appellees, the Court should also consider "the public interest in gas production." BLM Resp. at 16, 18 (citing *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1231 (10th Cir. 2008)). Here, the Rule will prevent the waste of a public resource—saving up to 41 billion cubic feet of gas per year—and increase royalty revenues to federal, state, and tribal governments. 81 Fed. Reg. at 83,014. Furthermore, State Appellants agree with Appellees that the current rulemaking process should proceed without "judicial interference." WEA Resp. at 7; Wyoming Resp. at 16. But the district court's Order is exactly that.

CONCLUSION

For these reasons, State Appellants respectfully request this Court grant their Motion for a Stay Pending Appeal.

Dated: May 7, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I electronically filed the foregoing STATE APPELLANTS' REPLY TO APPELLEES' OPPOSITIONS TO MOTION FOR STAY PENDING APPEAL with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system.

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