IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 18-8027 and 18-8029

STATE OF WYOMING, ET AL. Petitioner-Appellees, v. UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., Intervenors-Appellees, WYOMING OUTDOOR COUNCIL, ET AL., Intervenors-Appellees.	On Appeal from the United States District Court for the District of Wyoming The Honorable Scott W. Skavdahl District Court Nos. 2:16-cv-00280-SWS, 2:16-cv-00285
STATE OF WYOMING, ET AL. Petitioner-Appellees, v. UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., Intervenors-Appellees, STATE OF CALIFORNIA, ET AL., Intervenors-Appellees.	

WESTERN ENERGY ALLIANCE AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA'S JOINT RESPONSE TO APPELLANTS' MOTIONS FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellant Procedure 26.1, we, the undersigned counsel of record for Industry Appellees, Western Energy Alliance and the Independent Petroleum Association of America, certify that neither Industry Appellee has any parent corporation or any publicly held corporation that owns 10% or more of its stock.

Western Energy Alliance and the Independent Petroleum Association of America ("Industry Appellees") respectfully submit this joint response in opposition to Appellant Citizen Groups' and the States of New Mexico's and California's Motions for Stay Pending Appeal. Appellants ask this Court to issue extraordinary preliminary relief that it strongly disfavors: a stay that will mandate action, alter the status quo pending appeal, and provide the Appellants the full relief they seek. Appellants ask this Court to stay an April 4, 2018 order ("Order"), attached as Exhibit A,[1] in which the District Court temporarily stayed certain provisions of the Bureau of Land Management's ("BLM") Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Waste Prevention Rule"). Appellants' requested relief, however, would compel operators of oil and natural gas wells producing from federal and Indian leases across the country to expend more than $115 million to comply with a legally invalid rule that the BLM has proposed to substantially revise within just a few months.

[1] All cited documents are attached as individual exhibits, except cited administrative record documents ("VF_"), which are combined in Exhibit B. Pleadings and orders from the proceedings of the District Court are cited with reference to docket numbers in 16cv285.

Appellants have not met the heightened burden to obtain such extraordinary relief. Most significant, Appellants fail to establish irreparable harm from the Order because the Order will not increase emissions from oil and natural gas operations. Appellants also ignore this Court's precedent to argue that oil and natural gas operators will not be irreparably harmed by compliance costs. Finally, Appellants fail to establish that the District Court abused its discretion when issuing the Order. Therefore, this Court should deny Appellants' motions.

BACKGROUND

The tortured history of this litigation sets the stage for the Order under appeal. The Waste Prevention Rule is BLM's improper attempt to regulate air emissions from oil and natural gas operations on federal and Indian oil and gas leases, authority that Congress squarely delegated to the Environmental Protection Agency ("EPA") and not BLM. Industry Appellees initiated this litigation in November 2016 by petitioning the District Court for review of the Waste Prevention Rule. Later, Appellants intervened to defend the rule. Alongside the State Appellees, Industry Appellees sought a preliminary injunction in late 2016 to halt the rule from taking effect.

When resolving the motions for preliminary injunction, the District Court observed that the Waste Prevention Rule "conflicts with the statutory scheme

under the [Clean Air Act] for regulating air emissions from oil and natural gas sources" and "upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under the [Clean Air Act] to the EPA, states, and tribes to manage air quality." Order on Mots. for Prelim. Inj., Dkt. No. 92, at 17, 18 (Jan. 16, 2017) (Exhibit C). On January 16, 2017, the District Court denied the preliminary injunction partly because the deadline to comply with many of the rule's provisions was a year away. *See id.* at 25, 28. The rule went into effect the next day, January 17, 2017. VF_0000360.

Importantly, however, the Waste Prevention Rule did not require compliance with its most burdensome and expensive provisions until one year later on January 17, 2018. *See* 43 C.F.R. §§ 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, 3179.301–305 (the "phase-in provisions"). By January 2018, the rule required oil and natural gas operators to begin capturing, rather than flaring, a certain percentage of natural gas produced (§ 3179.7); conduct initial Leak Detection and Repair ("LDAR") surveys to detect methane leaks from equipment (§§ 3179.301–305); and install emission control equipment on certain storage vessels, pneumatic controllers, and pneumatic diaphragm pumps (§§ 3179.201, 3179.202, 3179.203).

Although the rule expressly provided operators with a full year to come into compliance with the phase-in provisions, these provisions were not in effect for

almost half of 2017. BLM first postponed the compliance deadlines for the phase-in provisions on June 15, 2017. *See* 82 Fed. Reg. 27,430 (June 15, 2017). On October 4, 2017, a magistrate judge in the Northern District of California invalidated BLM's postponement, putting the original January 17, 2018 deadline for the phase-in provisions back into effect. *See California v. Bureau of Land Mgmt.*, 277 F. Supp.3d 1106 (N.D. Cal. 2017). At this point, the compliance deadline for the phase-in provisions had been postponed for nearly four months.

Then, on December 8, 2017, BLM announced it was suspending certain provisions of the Waste Prevention Rule, including the phase-in provisions, to allow BLM to consider revising the rule. 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Suspension Rule"). The Suspension Rule remained in effect until February 22, 2018, when the District Court for the Northern District of California preliminarily enjoined it. *See California v. Bureau of Land Mgmt.*, 286 F. Supp.3d 1054 (N.D. Cal. 2018). This decision is currently on appeal to the Ninth Circuit. Federal Defs.' Notice of Appeal, *California v. Bureau of Land Mgmt.*, No. 3:17-cv-07186-WHO, 3:17-cv-07187-WHO (N.D. Cal. April 23, 2018) (attached as Exhibit D); Federal Defs.' Notice of Appeal, *California v. Bureau of Land Mgmt.*, No. 3:17-cv-07187-WHO (N.D. Cal. April 23, 2018) (attached as Exhibit E).

Coincidentally, also on February 22, 2018, BLM published a proposed rule that, if finalized, would substantially revise the Waste Prevention Rule. 83 Fed. Reg. 7,924 (Feb. 22, 2018) ("Revision Rule"). The public comment period for the Revision Rule closed on April 23, 2018. *Id*. Critically, the Revision Rule would eliminate the phase-in provisions and modify other provisions of the Waste Prevention Rule. *See id.* The BLM estimates it may finalize the Revision Rule as early as August 2018. Federal Resp'ts' Resp. to Pet'rs' and Intervenor-Pet'rs' Mots. to Lift the Stay and for Other Relief, Dkt. 207, at 4 (Mar. 14, 2018) (attached as Exhibit F).

The February 22, 2018, decision from the Northern District of California enjoining BLM's Suspension Rule thrust the Waste Prevention Rule back into full force and effect, obligating oil and gas operators to be in immediate and full compliance with the rule. Yet, because the phase-in provisions had been suspended for nearly five months of 2017 and the first seven weeks of 2018, Industry Appellees' members were not afforded the full year BLM deemed necessary to comply. Further, Industry Appellees estimate that oil and gas producers would be required to expend $115 million over several months just to fully comply with the phase-in provisions. Sgamma Decl., Dkt. No. 197-3 ¶ 10 (Feb. 22, 2018) (attached as Exhibit G).

With the Waste Prevention Rule back in full effect, Industry Appellees and State Appellees sought relief from the rule from the District Court and proposed a variety of procedural options, including a request to preliminarily enjoin portions of or vacate the Waste Prevention Rule. *See* Mot. to Lift Stay and Suspend Implementation Deadlines, Dkt. 190 (D. Wyo. Feb. 28, 2018) (attached as Exhibit H); Memo. in Support of Mot. to Lift Litigation Stay and for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review, Dkt. 197 (D. Wyo. Feb. 28, 2018) (attached as Exhibit I).

The District Court elected to exercise its equitable authority and issued a narrowly tailored, temporary stay of the phase-in provisions to preserve the status quo while BLM completes its rulemaking process. The District Court explained that, in light of the "substantial and unrecoverable" costs to comply with the rule, "[t]o force temporary compliance with those provisions makes little sense and provides minimal public benefit, while significant resources may be unnecessarily expended." Order at 9.

The District Court also elected to stay the litigation while BLM reconsiders the rule. The District Court reasoned that it "should allow the administrative process to run its course and restrain from prematurely conducting a merits analysis." Order at 8 (citing *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir.

2017)). Importantly, the District Court explained that the temporary stay was issued "until the BLM finalizes the Revision Rule so that this Court can meaningfully and finally engage in a merits analysis of the issues raised by the parties." *Id*. at 10. Today, the District Court reaffirmed the Order and denied Appellants' motions for stay pending appeal. *See* Order Denying Motion for Stay Pending Appeal, Dkt. No. 229 (April 30, 2018) (attached as Exhibit J).

The Order reflects a proper exercise of the District Court's discretion. It balances the need to allow BLM to reevaluate the Waste Prevention Rule free from judicial interference, the significant and irreparable harm facing Industry Appellees, and concerns of judicial economy and the public's interest in regulatory certainty. In light of these circumstances, Appellants have not met their heightened burden of showing a stay of the Order is warranted.

ARGUMENT

I. The Court Lacks Jurisdiction Over This Appeal.

The Court lacks jurisdiction over this appeal because the Order is not an injunction. Appellants appealed under 28 U.S.C. § 1292(a)(1), which only grants courts of appeal jurisdiction over "[i]nterlocutory orders . . . granting . . . injunctions." The Order, however, expressly denies Industry Appellees' request for injunctive relief and is not otherwise properly subject to interlocutory appeal, as

detailed in Industry Appellees' Motion to Dismiss for Lack of Appellate Jurisdiction, Doc. No. 01019978713. Appellants, therefore, have failed to establish the first element necessary to obtain a stay. *See* 10th Cir. R. 8.1(A).

II. Appellants Have Not Established a Stay is Warranted.

Not only does this Court lack jurisdiction over this appeal, it should deny the stay because Appellants have not met their heightened burden of demonstrating "a clear and unequivocal right to relief." *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (citing *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1066 (10th Cir. 2001)). In addition to addressing the basis for the district court's and court of appeals' jurisdiction, an appellant seeking a stay must address: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay is not granted; (c) the absence of harm to opposing parties if the stay is granted; and (d) any risk of harm to the public interest. 10th Cir. R. 8.1.

In considering Appellants' request, this Court makes "the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction." *Homans*, 264 F.3d at 1243 (citing *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 n.1 (10th Cir. 1996)). Not only is such preliminary relief extraordinary, but this Court "specifically disfavor[s]" mandatory preliminary injunctions, injunctions that alter the status quo, and "preliminary injunctions that

afford the movant all the relief [they] could recover" through the proceedings. *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012). Yet, Appellants request this very relief. By attempting to force full compliance with the Waste Prevention Rule, Appellants seek preliminary relief that will alter the status quo, mandate action by Industry Appellants, and provide them the ultimate relief they request.

When seeking this disfavored relief, "the movant has a heightened burden of showing that the traditional four factors weigh heavily and compellingly in its favor before obtaining a preliminary injunction." *Id.* (quoting *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154–55 (10th Cir. 2001)) (emphasis added). Appellants have not met this heightened burden.

A. Staying the Order Will Irreparably Harm Industry Appellees.

A stay of the Order pending appeal will severely, concretely, and irreparably harm Industry Appellees in at least three unique respects. First, a stay will compel Industry Appellees' to expend over $115 million dollars to come into compliance with the phase-in provisions. *See* 82 Fed. Reg. at 58,056; Ex. G at ¶ 10. The phase-in provisions form the heart of the Waste Prevention Rule and comprise, by far, its most substantial costs. BLM estimates the LDAR, storage tank, pneumatic controller, and pneumatic pump requirements constitute 86 percent of the

estimated $110–279 million annual cost of the Waste Prevention Rule, excluding gas capture costs over time. VF_0000451.

Once expended, these compliance costs are unrecoverable from the United States because of sovereign immunity. This Court has recognized that "imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Crowe Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (internal citations omitted); *accord Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J., concurring in part) ("complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs"). For example, this Court has found a likelihood of irreparable harm when members of a trade association alleged an annual per-company cost of $1,000 or more to comply with a new law, and sovereign immunity precluded recovery of these compliance costs. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756, 770–71 (10th Cir. 2010). The State Appellants disregard this well-established precedent and conveniently cite holdings from other circuits to argue compliance costs cannot result in irreparable harm. *See* States' Mot. for Stay Pending Appeal at 12–13.

Furthermore, Appellants entirely discount these substantial costs by pointing to BLM's rosy, but meaningless, assessment of the rule's impacts. *See* Citizen

Groups' Mot. for Stay Pending Appeal at 25–26; State Appellants' Mot. for Stay Pending Appeal at 13 (pointing to BLM's estimates that the rule will decrease per-company profits by 0.15 percent and reduce crude oil production by 3.2 million barrels per year). These self-serving statements ignore the voluminous history and record of this case. Industry Appellees have spent the last two years, first in comment, then in litigation, and now in comment on BLM's Revision Rule disputing BLM's use of per-company profits. *See* VF_0033613; VF_0033618; *see also* Reply in Supp. of Pet'rs' Mot. for Prelim. Inj., Dkt. No. 84, at 5 (Dec. 23, 2016) (attached as Exhibit K); Comments of Industry Appellees to Revision Rule, April 23, 2018 at 9–12 (attached as Exhibit L). This metric overlooks the rule's disproportionate impact on the approximately 81,000 low-producing or "marginal" wells on federal and Indian leases[2]; the rule's substantial compliance costs may render these wells uneconomic and would force them to be shut in or abandoned. *See id*. Accordingly, not only would Appellants' relief impose unrecoverable compliance costs, such costs carry severe economic impacts.

[2] Marginal oil wells produce less than 15 barrels of oil per day. VF_0000381. BLM has acknowledged that 85 percent of the 96,000 wells affected by the rule are marginal. VF_0000363.

Second, full and immediate compliance with the Waste Prevention Rule is not possible for certain Industry Appellees' members. Despite Appellants' wishes, operators cannot comply with the phase-in provisions by simply flipping a switch. For example, BLM estimates that each year operators must: (1) conduct LDAR inspections at 36,700 well locations, VF_0000537; (2) control or replace 7,950 existing diaphragm pumps, VF_0000507; (3) replace 5,040 existing highbleed pneumatic controllers, VF_0000502; (4) install meters on as many as 3,680 existing flare stacks, VF_0000497-98; and (5) install controls on approximately 300 storage tanks, VF_0000520. These daunting requirements require lengthy lead time and planning and can require months to accomplish. *See* Ex. G at ¶ 11. For this reason, BLM built a one-year ramp-up period into the rule with the phase-in provisions. Yet, as noted, the phase-in provisions were not in effect for roughly six out of the past thirteen months. Accordingly, certain Alliance members cannot now immediately and fully comply. *See id*.

Compounding these harms to Industry Appellees is the fact BLM and Office of Natural Resources Revenue ("ONRR") cannot enable operators to comply with the rule. BLM acknowledges it has "limited resources" to administer the rule while it completes the ongoing rulemaking. *See* Ex. F at 13. For example, BLM has not conducted staff training or issued written guidance on how to implement the rule,

and BLM has not been able to advise operators on expectations for compliance. *See* Sgamma Dec., Dkt. 212-1 ¶ 12 (Mar. 23, 2018) (attached as Exhibit M). Accordingly, even with operators' best efforts, the BLM itself is incapable of enabling full compliance with the rule.

Finally, to the extent Industry Appellees' members cannot fully and immediately comply, they are immediately harmed through a financial penalty in the form of heightened royalty obligations. The Waste Prevention Rule imposes royalty on all "avoidably lost" gas, which is gas lost due to noncompliance with the rule. *See* 43 C.F.R. §§ 3179.4(a), 3179.5(a). The Supreme Court has recognized such harms. *Abbott Labs. v. Gardner*, 387 U.S. 136, 154, (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977) (finding harm when a rule required an industry "to make significant changes in their everyday business practices" and failure to do so resulted in exposure "to the imposition of strong sanctions"); *Mo. Pac. Ry. Co. v. City of Omaha*, 235 U.S. 121, 132 (1914) (recognizing the need for equitable relief when compliance with a regulation in 26 days was "physically impossible" and noncompliance resulted in penalties). Thus, Appellants' requested stay of the Order pending appeal would severely, immediately, and irreparably harm Industry Appellees, and the Order is necessary to avoid these harms.

B. Appellants Have Not Demonstrated They Are Irreparably Harmed by the Court's Order.

Appellants have also failed to demonstrate they will be irreparably harmed absent a stay. "To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C.Cir.1985)).

Most important, the Order does not result in irreparable harm because, contrary to Appellants' assertions, it does not increase any emissions from oil and gas operations. Rather, the Order maintains emissions at the same level as occurred in 2017, and likely the same or lower levels than occurred during the nearly 40 years before BLM promulgated the Waste Prevention Rule.[3] Thus, Appellants' alleged harms cannot now credibly be characterized as "imminent."

Nonetheless, Appellants argue that a stay is necessary to avoid irreparable harms from climate change and other air pollution. These arguments fail.

[3] Before promulgating the Waste Prevention Rule, BLM managed venting and flaring through a 1979 Notice to Lessees. *See* VF_0000360. The provisions of the Waste Prevention Rule that have been in effect since January 17, 2017, and that remain in effect under the Order, impose similar requirements. *See e.g.*, 83 Fed. Reg. at 7,927. *See also* Ex. J at 7 ("Because the phase-in provisions have never been implemented, [Appellants] are no more harmed by the [Order] than they have been under the status quo for the last several decades.")

1. Alleged Climate Change Impacts.

Appellants allege that absent the phase-in provisions going into effect, they will suffer immediate and irreparable harms from global climate change impacts. Appellants, however, cite no authority that potential future impacts associated with global climate change can constitute irreparable harm warranting extraordinary preliminary relief. They rely solely on an interlocutory decision from the Northern District of California, which has since been appealed. *See California v. Bureau of Land Mgmt.*, 286 F. Supp.3d 1054 (N.D. Cal. 2018); Ex. D; Ex. E. The Court of Appeals for the District of Columbia Circuit, however, has held allegations of global climate change impacts to be insufficient to establish standing, let alone the heightened standard required for irreparable harm. *See Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009). By Appellants' logic, any manmade source of methane, no matter how limited, would necessarily constitute irreparable harm. Such a position enjoys no supporting authority, and Appellants have cited none.

Furthermore, the Order's impacts on climate change are virtually imperceptible. BLM estimates that the phase-in provisions would have reduced

methane emissions by 176,000 tons during all of 2018.[4] *See* VF_0000675. In the global climate change context, this represents an annual methane reduction of approximately 0.061 percent and an overall annual greenhouse emission reduction of approximately 0.0092 percent.[5] Moreover, the annual projected reduction of 176,000 tons may never be realized because the phase-in provisions may not be suspended for a full year; they are only suspended until BLM completes its revisions to the Waste Prevention Rule, which can could occur as early as August. These negligible emissions are far from what this Court requires to demonstrate actual and great harm.

2. Alleged Air Quality and Public Health Impacts.

Perhaps recognizing the flaws with alleged global climate change impacts, Appellants also argue that they, their members, or their constituents will suffer irreparable harm from local or regional effects of air emissions caused by the Order. These arguments also fail.

[4] The Citizen Groups state that there will be 141,000 additional tons of methane as a result of the Order, citing the BLM's Final Environmental Assessment ("EA"). *See* Citizen Groups' Mot. for Stay Pending Appeal at 23. The Final EA, however, estimates methane emissions in 2018 to be 176,000 tons. *See* VF_0000675.

[5] In comments on the Waste Prevention Rule, Industry Appellees outline the basis for comparing the rule's annual methane reductions to overall domestic and global methane emissions. *See* VF_0033543.

Both Appellants argue that a stay is necessary to compel reductions in Volatile Organic Compounds ("VOCs") and other Hazardous Air Pollutants ("HAPs") and avoid irreparable harm to local communities and specific individuals from ozone and other general environmental harms. *See e.g.*, Citizen Groups' Mot. for Stay Pending Appeal at 22–25; State Appellants' Mot. for Stay Pending Appeal at 18–19. These claims are entirely speculative.

Appellants observe that air emissions, which will remain at current levels under the Order, are generally linked to increased health risks. *See* Citizen Groups' Mot. for Stay Pending Appeal at 23–25; State Appellants' Mot. for Stay Pending Appeal at 17–19. The Citizen Groups' declarations similarly present general and wide-ranging statements of health effects, but offer no reliable evidence that such effects will be caused by the Order or will be remedied by a stay. *See generally* Citizen Groups' Exhibit C. Indeed, the degree to which emissions might have any local or regional effect varies depending on the number and density of federal oil and gas wells in a given area, their size, design, and production rate, the presence or absence of pipeline infrastructure, and whether the wells have other emission controls, among many other factors. Appellants ignore this variability. Without more specific evidence, general observations of health risks are insufficient to meet the high standard to show irreparable harm to these Appellants. *See RoDa Drilling*

Co., v. Siegal, 552 F.3d 1203, 1210 (10th Cir. 2009) (holding "[p]urely speculative harm will not suffice" to show irreparable injury).

Appellants also ask this Court to infer irreparable harm from their general observations about highly complex air quality issues. For example, Citizen Groups generally refer to "ozone-forming VOCs" and "elevated ozone." Citizen Groups' Mot. for Stay Pending Appeal at 24-25. But ozone is not created by VOC emissions alone. Rather, it is formed through "complex interactions between precursor emissions [including VOCs], meteorological conditions, and surface characteristics." 80 Fed. Reg. 65,292–99 (Oct. 26, 2015). Due to this complexity and regional variability, photochemical modeling or other rigorous analysis is required to estimate whether and where precursor emissions may form ozone. *See e.g.*, *id.* at 65,311. Appellants provide no photochemical or other analysis, and instead rely solely on speculation about potential ozone formation. *See* Citizen Group's Exhibit C, McKay/Hull Decl. ¶¶ 9, 18 (acknowledging that incremental emissions from the Order "may" have effects on local and regional ozone levels). Without specific evidence, it is impossible to infer whether a stay will reduce ozone levels or mitigate other air quality-related harms. *See Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 93 F. Supp 1083, 1096 (D. Utah

1997) (holding that risks from emissions without a "significant degree of scientific confidence" are "too speculative to qualify as irreparable harm").

Appellants' claims of harms also fail because, as noted above, the emission reductions Appellants claim will result from a stay cannot be realized for months after a stay is issued and possibly not before BLM completes its revisions to the Waste Prevention Rule. Finally, even if Appellants could demonstrate that emission reductions will impact air quality, they cannot establish that such air quality impacts will meaningfully reduce public health risks. For each of these reasons, Appellants have failed to meet the elevated burden to demonstrate irreparable harm.

C. Appellants Are Not Likely to Succeed on the Merits of Their Appeal.

Appellants also cannot succeed on the merits of their appeal because they cannot establish the District Court abused its discretion. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (citing *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 n.1 (10th Cir. 1996)). Rather, the District Court properly exercised its broad discretion to balance competing concerns of public interest, judicial economy, and clear harms to Industry Appellees.

1. A Stay is Within the District Court's Discretion.

In the Order, the District Court balanced three principal, competing concerns: (1) the need to allow BLM to reexamine the Waste Prevention Rule free from judicial interference; (2) concerns that BLM's ongoing rulemaking renders the rule prudentially moot; and (3) recognition that Industry Appellees would be irreparably harmed if compelled to immediately comply with the Waste Prevention Rule, particularly when the rule may be rewritten in months. *See* Order at 7–8.

Appellants incorrectly attempt to cabin the Order as a narrow exercise of the authority granted by 5 U.S.C. § 705. The District Court, however, has broad discretion in these circumstances and properly exercised it in staying the phase-in provisions. "[J]udicial review of administrative action follows equitable principles." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1333 n.5 (10th Cir. 1982). "An appeal to the equity jurisdiction of the federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Id.* (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). The Supreme Court has recognized that "there is no doubt as to the power of a court of equity" to relieve the regulated public "from the infliction of unwarranted penalties" when immediate compliance with a regulation is "physically impossible." *Mo. Pac. Ry. Co. v. City of Omaha,* 235 U.S. 121, 132 (1914). Given the need to provide

"certainty and stability for the regulated community and the general public while BLM completes its rulemaking process" and "prevent the unrecoverable expenditure of millions of dollars in compliance costs," Order at 10–11, the Court thoughtfully and appropriately applied its broad equitable authority to accommodate these real and ongoing concerns. Accordingly, the Court was not obligated to engage in an analysis that otherwise might be necessary under 5 U.S.C. § 705.

Finally, the Citizen Group Appellants mischaracterize the stay as "indefinite." Citizen Groups' Mot. for Stay Pending Appeal at 19. The District Court only stayed the phase-in provisions while BLM reviews the Waste Prevision Rule and acknowledged this review could be complete in four months. Order at 9–10. The stay is thus temporary and an appropriate exercise of the District Court's discretion given its concerns that BLM's ongoing review will render the rule judicially unreviewable.

2. Considerations of Prudential Mootness Allow a Stay of the Waste Prevention Rule.

Appellants argue that the District Court should have dismissed this litigation because the Waste Prevention Rule is prudentially moot.[6] Appellants, however, ignore that when an agency action is prudentially moot, the appropriate remedy is to vacate the agency action. *Bd. of Governors of Fed. Reserve Sys. v. Sec. Bancorp & Sec. Nat'l Bank*, 454 U.S. 1118, 1118 (1981) (vacating judgment with instructions to remand case to agency to vacate the administrative decision); *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329–31 (1961); *Am. Family Life Ass. Co. of Columbus v. Fed. Commc'n Comm'n*, 129 F.3d 625, 630 (D.C. Cir. 1997) ("Since *Mechling* we have, as a matter of course, vacated agency orders in cases that have become moot by the time of judicial review."); *Oregon v. Fed. Energy Regulatory Comm'n*, 636 F.3d 1203, 1206 (9th Cir. 2011) ("In cases where intervening events moot a petition for review of an agency order, the proper course is to vacate the underlying order."); *accord Atlanta Gas Light Co. v. Fed. Energy Regulatory Comm'n*, 140 F.3d 1392, 1402–03 (11th Cir. 1998); *Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60, 62 (6th Cir. 1993); *Reich v. Contractors*

[6] Industry Appellees maintain the Waste Prevention Rule is not prudentially moot because parts of it remain in effect and, absent a stay of the phase-in provisions, it imposes significant, concrete, and irreparable harms on them.

Welding of W. New York, Inc., 996 F.2d 1409, 1413–14 (2d Cir. 1993); *N. Dakota Rural Dev. Corp. v. U.S. Dep't of Labor*, 819 F.2d 199, 201 (8th Cir. 1987). Therefore, if the rule were actually prudentially moot, the District Court could not dismiss this litigation without also vacating the Waste Prevention Rule.[7]

The fact that the District Court refrained from vacating the rule reinforces that the temporary stay of the phase-in provisions is narrowly tailored and appropriately within its discretion. If a district court may vacate a prudentially moot rule, then *a fortiori* the district court has discretion to stay some or all of it.

D. The Order Furthers the Public Interest.

The Order conserves the resources of both the public and the judiciary. The District Court has characterized an evaluation of the merits of the rule to be "a waste of judicial resources" while BLM is revising it. Order at 7. If a review of the rule will waste the judiciary's resources, then forcing industry to expend more than $115 million to comply when the rule is likely to substantially change is a similar waste of public resources. And full implementation of the Waste Prevention Rule

[7] In *Wyoming v. Zinke*, this Court cited *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), for support of vacating the underlying litigation when an agency action becomes moot. 871 F.3d 1133, 1145 (10th Cir. 2017). In *Mechling*, the Supreme Court held that "the principle enunciated in *Munsingwear* [is] at least equally applicable to unreviewed administrative orders . . . ." *Mechling*, 368 U.S. at 329.

would yield just under $10 million in royalties to the United States treasury—less than ten percent of the rule's total cost. *See* VF_0000563.

Finally, staying the phase-in provisions does not appreciably impact the public's interest in a healthy environment. Many operators cannot come into full compliance for many months. *See* section II(A), *supra*. BLM and ONRR also cannot implement the rule. *Id.* In the meantime, effective provisions of the Waste Prevention Rule and state and federal regulations governing venting and flaring will continue to mitigate emissions. *See e.g.*, 82 Fed. Reg. at 58,052.

CONCLUSION

Appellants have failed to demonstrate any of the necessary elements for the extraordinary relief they request. For these reasons, Industry Appellees respectfully request that the Court deny Appellants' Motions to Stay the District Court's Order Pending Appeal.

Dated: April 30, 2018

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of F.R.A.P. 27(d)(2)(A) because, according to the word count feature of Microsoft Word 2016, the response contains **5,167** words. This motion complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman type style.

s/ Eric P. Waeckerlin

CERTIFICATE OF SERVICE

The undersigned certified that the foregoing **Western Energy Alliance and Independent Petroleum Association of America's Joint Response to Appellants' Motions for Stay Pending Appeal** was electronically filed on this 30th day of April, 2018, with the Clerk of the Tenth Circuit Court of Appeals using CM/ECF and was served upon all attorneys of record.

Privacy Redaction Certification: No privacy redactions were required.

Paper Copy Certification: No paper copies.

Virus Scan Certification: The digital form of this document submitted to the Court was scanned for viruses using Sophos Product Version 10.8, last updated April 19, 2018, and according to the program the document is virus-free.

s/ Eric P. Waeckerlin
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