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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and STATE OF MONTANA, *et al.*,	)	
Petitioners,	)	Civil No. 16-285-S (Lead Case)
v.	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	**MOTION TO LIFT STAY AND SUSPEND IMPLEMENTATION DEADLINES**
Respondents,	)	

WESTERN ENERGY ALLIANCE, *et al.*	)	
Petitioners,	)	
v.	)	Civil No. 16-280-S
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
Respondents.	)	

The States of Wyoming and Montana hereby request that the Court lift the stay in these proceedings and immediately suspend the implementation deadlines in the Waste Prevention Rule until either the Bureau of Land Management promulgates the replacement rule or the Court rules on the merits of the Petitions for Review. In support of this motion, the States offer the following:

1. By this motion, the States hope to offer a sensible path for resolving the chaos and uncertainty resulting from the BLM's decision to revise the Waste Prevention Rule. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83008 (Nov. 18, 2016) and Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (Feb. 22, 2018) (publishing proposed revisions and initiating a sixty day public comment period).

2. On February, 22, 2018, the United States District Court for the Northern District of California preliminarily enjoined the rule temporarily suspending or delaying certain requirements of the Waste Prevention Rule. *See* 82 Fed. Reg. 58,050 (Dec. 8, 2017) (Suspension Rule). A copy of the court's order is attached as Exhibit A for the Court's convenience. As a consequence of the ruling in the Northern District of California, the Waste Prevention Rule is no longer suspended and its provisions now appear to be in effect. This is true although the Waste Prevention Rule had never been implemented in full, and neither the regulated community nor the BLM is capable of switching on compliance with the Waste Prevention Rule overnight.

3. When this litigation was stayed on December 29, 2017, the Court authorized the parties to request that the stay be lifted in the event that the Suspension Rule was no longer effective. *See* Doc. 189, p. 5. As the Suspension Rule is no longer effective, these parties request that the Court lift the stay immediately.

4. The Court stayed this case on the motion of multiple Petitioners and the federal Respondents because it was clear that "moving forward to address the merits of the present *Petitions for Review* in these case, in light of the now finalized Suspension Rule and the BLM's continued efforts to revise the Waste Prevention Rule, would be a waste of resources." *Order Granting Joint Motion to Stay*, p. 4 (Doc. 189). And additionally, because "the proposed Revision Rule further raise[d] prudential ripeness concerns." *Id.* These concerns remain, regardless of the preliminary injunction of the Suspension Rule. Nevertheless, the reinstatement of the Waste Prevention Rule returns the ball to this Court for further proceedings.

5. Doing nothing until the Revision Rule is promulgated is untenable for the Petitioners, even though the new rule is imminent. As set forth in the multiple motions and renewed motions for preliminary injunction, the Petitioners will be irreparably harmed by full implementation of the Waste Prevention Rule. Those harms have only been exacerbated since these motions were filed and will be further and exponentially magnified by temporary implementation of a significant regulatory regime that will largely disappear in as few as four months. The waste, inefficiency, and futility associated with a ping ponging regulatory regime is self-evident and in no party's interest. Accordingly, the States request that the Court take action to avoid this result.

6. The States request that the Court suspend implementation of the following the provisions of the Waste Prevention rule pursuant to its inherent equitable powers and its broad authority under 5 U.S.C. § 705 to maintain the status quo that has persisted in this litigation since it began:

a. drilling applications and plans (43 C.F.R. § 3162.3-1(j);

b. gas capture requirements (§ 3179.7);

c. measuring and reporting volumes of gas vented and flared from wells (§ 3179.9);

d. determinations regarding royalty-free flaring (§ 3197.10);

e. well drilling (§3179.101);

f. well completion and related operations (§ 3179.102);

g. equipment requirements for pneumatic controllers (§ 3179.201);

h. requirements for pneumatic diaphragm pumps (§ 3179.202);

i. requirements for storage vessels (§ 3179.203);

j. downhole well maintenance and liquids unloading (§ 3179.204); and

k. operator responsibility for leak detection.

7. Pursuant to 5 U.S.C. § 705, a court reviewing an agency decision "[o]n such conditions as may be required and to the extent necessary to prevent irreparable harm ... may issue all necessary and appropriate process to ... preserve status or rights pending conclusion of review proceedings." A stay of agency action under § 705 is a provisional remedy in the nature of a preliminary injunction. *See Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980). Its availability turns on the same four factors considered under a

traditional Federal Rule of Civil Procedure 65(a) analysis. *See, e.g., Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 524 F. Supp. 2d 5, 8 (D.D.C. 2007). Those factors are: (1) a likelihood of success on the merits, (2) a threat of irreparable harm, which (3) outweighs any harm to the non-moving party, and that (4) the injunction would not adversely affect the public interest. *See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). The issuance of preliminary injunctive relief is within the sound discretion of the district court. *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 354 (10th Cir. 1986).

8. These preliminary injunction factors have been the subject of extensive briefing in this case, and while those arguments and the States' prior motion for preliminary injunction are renewed herein, they will not be repeated. Instead, the States urge the Court to consider the pragmatic approach adopted by the court in *Rochester-Genessee Regional Transportation Authority v. Hynes-Cherin*, 506 F. Supp. 2d 207 (W.D.N.Y. 2007). There the Federal Transit Administration (FTA) issued a cease and desist order to the plaintiff regional transportation authority barring it from providing school bus services on certain routes in the City of Rochester shortly before the school year began. 506 F. Supp. 2d at 209. The plaintiff appealed the administrative decision and asked for a stay under § 705. *Id.* While not convinced that the plaintiff was entitled to a permanent stay during the appeal, the court found a brief stay was warranted "to avoid the potential chaos and disruption in the transportation of students that could ensue should the FTA's decision be given immediate effect." *Id.* The court found "the most important concern ... is the effective and orderly transportation of students to and from school. Thousands of students utilize bus

service, and they and their families need to know *immediately* all of the details of the bus service." *Id.* (emphasis in original).

9. In granting the stay, the court explicitly found that; but for the harm to students and families, plaintiff would not be entitled to a stay. *Id.* at 210. In fact, the court found that the plaintiff was not likely to prevail on the merits such that a permanent stay would be warranted. *Id.* at 213. Moreover, the court concluded the plaintiff had not demonstrated irreparable harm to itself in the absence of a stay. *Id.* Even so, the court found that the public interest compelled a temporary stay. *Id.* The Court found "that these circumstances present precisely the kind of 'irreparable injury' that § 705 of the APA was intended to give courts the power to prevent." *Id.* at 214.

10. The current morass similarly presents precisely the kind of irreparable injury § 705 was designed to prevent. Regardless of the relative merits of the parties' arguments on the likelihood of success on the merits, the fact remains that the Waste Prevention Rule will be replaced in the very near future. Switching back and forth between competing regulatory regimes for a period of perhaps four months presents exactly the kind of chaos and disruption that the Court can and should act to prevent. Similarly, whether the Waste Prevention Rule itself causes irreparable harm to the Petitioners is, at this point, less important than the significant harm and uncertainty that will be borne by all parties by immediate and dramatic flip flops in the regulatory regime. The public interest in certainty and stability simply outweighs all other considerations for the brief period before the Waste Prevention Rule is replaced.

11. If the Court grants the requested stay, then it must decide whether to maintain that stay until the new rule is promulgated or whether it should proceed to the merits. Either course is acceptable to the States. The Court stayed this litigation in December for good reasons and those reasons persist. Accordingly, in the States' view it would be a waste of judicial resources to proceed to the merits only to have that work nullified when the rule is replaced. Nevertheless, § 705 stays are designed to allow the courts to maintain the status quo until the merits can be heard, and therefore a case can be made that granting such a stay necessitates consideration of the merits. If the Court chooses to proceed to the merits during the pendency of the stay, then it should permit the federal respondents the opportunity to respond to the existing merits briefing as they have not yet done so. Then the respondents should be permitted to file their reply briefs.

12. The States are mindful of the precarious position in which the Court finds itself and the comity concerns raised by staying portions of the Waste Prevention Rule. While this Court concluded that the challenges to the Waste Prevention Rule and the Suspension Rule were "inextricably intertwined," the California court disagreed, and found the cases were distinct because they shared no identical legal issues. Ex. A at 6. Regardless of which view is correct, the present reality is that the California court's action necessarily forces some action by this Court on the rule before it. Notably, the California court did not provide for the imminent replacement of the Waste Prevention Rule. These States are not parties to the proceedings in California, and therefore could not have requested that the Court provide either interim relief or a feasible plan to transition from the status quo to full implementation of the Waste Prevention Rule. As the California court either was not asked

to, or chose not to, wrestle with the effects of the reinstatement of the Waste Prevention Rule, these States assert that this Court can do so without injury to the California court. And under the California court's view that the rules and issues presented to each court are distinct, this Court is in fact the proper and only court able to address these concerns.

13. The federal respondents do not oppose the requested relief at this juncture and expect to promptly file a response. The States of North Dakota and Texas take no position on the proposed motion at this time and reserve the right to file a response after reviewing the motion. The States of California and New Mexico oppose the motion. Western Energy Alliance and the Independent Petroleum Association of America do not oppose the motion to lift the litigation stay. They also do not oppose stay of the rule and expect to file their own motion on that issue promptly. The Citizen Groups oppose the motion.

WHEREFORE the States of Wyoming and Montana request that the Court lift the litigation stay and suspend the implementation of the specific provisions of the Waste Prevention Rule set forth herein until such time as the rule is replaced or the Court decides the merits of the Petitions for Review.

DATED this 28th day of February 2018.

FOR THE STATE OF WYOMING

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2018, the foregoing was filed electronically with the Court, using the CM/ECF system, which caused the foregoing to be served electronically upon counsel of record.

/s James Kaste
Deputy Attorney General
Wyoming Attorney General's Office