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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al., Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Respondents.	)	Civil Case No. 2:16-cv-00285-SWS [Lead] Consolidated with: Case No. 2:16-cv-00280-SWS Assigned: Hon. Scott W. Skavdahl

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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Industry Petitioners Western Energy Alliance (Alliance) and the Independent Petroleum Association of America (IPAA) (collectively, "Industry Petitioners") respectfully submit this memorandum in support of Industry Petitioners' Motion for Preliminary Injunction. Industry Petitioners request that the Court enjoin the Bureau of Land Management ("BLM") from enforcing the rule related to the reduction of venting and flaring from oil and gas production on federal and Indian lands, Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pt. 3100, subpts. 3160 and 3170), VF_0000360 ("Rule")[1], pending resolution of this litigation. Industry Petitioners are suffering increasingly immediate and irreparable harm because of the Rule's impending January 2018 compliance deadlines. Injunctive relief is also appropriate because the Rule represents unlawful and unconstitutional agency action. Finally, the balance of equities and public interest favor a preliminary injunction. Accordingly, the Court should grant the motion and enjoin enforcement of the Rule or grant other such relief as the Court deems necessary and appropriate.

I. BACKGROUND

As this Court is aware, BLM issued the Rule in November 2016, which had an effective date of January 17, 2017. VF_0000360. Despite the Rule's 2017 effective date, the Rule required compliance with key provisions by January 2018. These provisions include requirements for Leak Detection and Repair ("LDAR"), storage tank controls, pneumatic controller replacement, and pneumatic pump control/replacement, among others. *See* 43 C.F.R. §§ 3179.301(f), 3179.203(c), 3179.201(d) and 3179.202(h). When the Court denied the Industry Petitioners'

[1] *Attached hereto* as Exhibit A.

Motion for Preliminary Injunction in January, the Court observed that the key compliance deadlines were nearly a year away. *See* Order on Mot. for Prelim. Inj., Dkt. No. 92, at 25–26 (Jan. 16, 2017).

Circumstances have changed dramatically since the Court's ruling last January. Industry Petitioners' members face compliance deadlines that are less than three months away, with no immediate certainty as to whether those deadlines will ever come to pass. Merits briefing in this case will not be completed before November 22, 2017, *see* Order Granting Mot. to Extend Briefing Deadlines, Dkt. No. 133 (June 27, 2017), and the Federal Respondents have requested to further delay the briefing schedule, Federal Resp'ts Mot. for an Extension of the Merits Briefing Deadlines, Dkt. No. 155 (Oct. 20, 2017).

Although the Federal Respondents have sought to provide administrative relief from the Rule, these efforts have further heightened the uncertainty surrounding the Rule. In June 2017, BLM postponed the January 2018 compliance deadlines under section 705 of the Administrative Procedure Act. *See* 82 Fed. Reg. 27,430 (June 15, 2017) ("Postponement Notice"). The Postponement Notice provided Industry Petitioners a respite from the Rule, but it was abbreviated. On October 4, 2017, the Postponement Notice was invalidated and the Rule was reinstated. *See* Exhibit "B," Order Granting Plaintiffs' Motions for Summary Judgment, and Judgment *California v. U.S. Bureau of Land Mgmt.*, No. 3:17-cv-03804-EDL, Dkt. Nos. 95, 96 (Oct. 4, 2017). That ruling immediately revived all provisions of the Rule without granting any additional time for operators to come into compliance, despite the fact the core provisions of the Rule had not been in effect since June 15, 2017 (three and a half months). *Id*.

On October 5, 2017, BLM published a proposed rule to suspend or delay for twelve months the majority of the provisions of the Rule, including all the requirements that would take

effect on January 17, 2018. 82 Fed. Reg. 46,458 (Oct. 5, 2017) ("proposed Suspension Rule"). Although BLM aims to finalize the Suspension Rule by December 8, 2017, BLM cannot guarantee it will be final by then, given required review by the Office of Management and Budget ("OMB"). Unfortunately, BLM's track record does not foster confidence in the agency's timing. BLM did not publish the proposed Suspension Rule until nearly six weeks after its target date. *Compare* Federal Resp'ts Mot. to Extend the Briefing Deadlines, Dkt. No. 129 (June 20, 2017) ("BLM intends to publish this proposed rule for public notice and comment before the end of August 2017 . . . .") *with* 82 Fed. Reg. 46,458 (Oct. 5, 2017). Even if BLM meets its December 8, 2017 target date, this timing gives Industry Petitioners little certainty ahead of the looming January 17, 2018 compliance deadlines and still requires compliance until then.

For some operators, compliance with the Rule before January 2018 may be impossible. Other operators are now faced with a dangerous game of regulatory chicken: expend upwards of hundreds of thousands of dollars on a per-company basis (many millions on an industry-wide basis) to comply with a Rule that may never take effect, or defer compliance until a few weeks before the January 2018 deadline—at which point timely compliance will be impossible. Because of these immediate and irreparable harms facing Industry Petitioners caused by the now imminent January 2018 deadlines, Industry Petitioners ask this Court to enjoin BLM from enforcing the Rule.

II. PRELIMINARY INJUNCTION STANDARD

To prevail on a motion for preliminary injunction, a movant must demonstrate: (1) a likelihood of success on the merits; (2) that the movant is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in favor of an injunction; and (4) that an injunction is in the public interest. *Petrella v. Brownback*, 787 F.3d 1242, 1257 (10th Cir. 2015); *see also Winter v. Natural Res. Defense Counsel*, 555 U.S. 7, 20 (2008); *Awad v.*

Ziriax, 670 F.3d 1111, 1125 (10th Cir. 2012). The purpose of a preliminary injunction is to "preserve the relative position of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing[.]" *Id.* (citations omitted); *see also Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). The grant or denial of a preliminary injunction lies within the sound discretion of the district court. *Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 557 (10th Cir. 1984). The Court also has wide latitude and discretion to issue a necessary and appropriate injunctive remedy. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (crafting a preliminary injunction is an exercise of discretion, dependent as much on the equities of a given case as the substance of the legal issues it presents); *Int'l Mfrs. Ass'n v. Norton*, 304 F.Supp.2d 1278, 1286 (D. Wyo. 2004); *Eaton Corp. v. Parker-Hannifin Corp*, 292 F.Supp.2d 555, 582 (D. Del. 2003) (courts are given wide latitude in framing injunctive relief).

III. COMPLIANCE WITH THE RULE WILL IRREPARABLY HARM INDUSTRY PETITIONERS

Petitioners will be immediately and irreparably harmed absent an injunction. To demonstrate irreparable harm, a petitioner "seeking preliminary relief [must] demonstrate that irreparable injury is likely in the absence of an injunction." *Winter* 555 U.S. at 22 (emphasis in original). The movant must show "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)). While economic loss alone is generally insufficient, "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). "Where a plaintiff cannot recover damages from the defendant due to the defendant's sovereign immunity, any economic loss suffered by a plaintiff is irreparable *per se.*" *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, No. CIV. 08-633MV/RLP, 2008 WL 5586316, at *5 (D.N.M. Oct. 3, 2008) (citations omitted). Moreover, "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 200–21 (1994) (Scalia, J., concurring in part). Finally, the court must determine "whether such harm is likely to occur before the district court rules on the merits." *RoDa Drilling Co.*, 552 F.3d at 1210 (citation omitted).

Harms associated with the sections of the Rule that require compliance by January 17, 2018, are imminent, irreparable, and severe in the absence of a preliminary injunction. Moreover, these harms are occurring and will continue before this Court has an opportunity to rule on the merits, particularly if the Defendant's request to extend the merits briefing schedule is granted.

Nearly eleven months ago, this Court recognized "there are undoubtedly certain and significant compliance costs attached to the Rule, which are unrecoverable from the federal government." *See* PI Order at 25. At that time, however, the Court was not convinced these harms were of "such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id*. In arriving at this conclusion, the Court cited to the provisions of the Rule, including equipment replacement, that did not take effect for a year. *Id*.

Much has changed since then. The January 2018 deadlines for LDAR, storage tank controls, pneumatic controller replacement, and pneumatic pump control/replacement, among

others, are now less than three months away. Compliance with each of these provisions requires immediate action and significant expenditures well in advance of January 17, 2018. For example, companies must have completed their initial LDAR inspections, storage tank controls must be ordered and installed, low-bleed pneumatic controllers must be ordered and replaced, and natural gas-driven pneumatic diaphragm pumps must be replaced or controlled no later than January 17, 2018. *See* 43 C.F.R. §§ 3179.301(f), 3179.203(c), 3179.201(d) and 3179.202(h). For some companies with many sites or significant distances between sites, the initial LDAR inspections alone (which do not account for required repairs that may require additional trips to the site) can take multiple months to complete. *See* Sgamma Declaration at ¶ 10. And each of these provisions requires advanced planning and organization. *Id*.

These four provisions form the core of the Rule and comprise, by far, the Rules most substantial costs. *See e.g.,* AR, VF_0000451 (BLM estimates these four provisions constitute 86% of the estimated annual costs of the Rule, excluding gas capture limit costs over time). Industry Petitioners estimate that the cost to the industry associated with just these four core provisions between now and January 17, 2018 will exceed $115.0 million, which is overly conservative. *See* Dunham Declaration at ¶ 6. The costs of conducting initial LDAR inspections and putting on storage tank controls, alone, will exceed $85.0 million. *Id*. The Department of Interior, itself, in a report issued this week acknowledged that the Rule "poses a substantial burden on industry, particularly those requirements that are set to become effective on January 17, 2018." *Final Report: Review of the Department of the Interior Actions that Potentially Burden Domestic Energy*, at 8 (Oct. 24, 2017).[2]

[2] The report is available online at https://www.doi.gov/sites/doi.gov/files/uploads/interior_energy_actions_report_final.pdf (last accessed October 27, 2017).

In addition, these increased costs to comply between now and January 17, 2018, would result in a reduction of 1,800 potential new (or capped) oil wells. *See* Dunham Declaration at ¶ 7. This equates to approximately 16.9 million barrels of oil that would not be produced from the federal and Indian leaseholds over just the next several months. *Id*.

Moreover, these costs assume that it is even possible to fully bring all facilities into compliance before January 17, 2018. "It is arbitrary and capricious to require compliance with a regulation when compliance is impossible." *Messina v. U.S. Citizenship & Immigration Servs.*, No. Civ.A. 05-CV-73409-DT, 2006 WL 374564, at *6 (E.D. Mich. Feb. 16, 2006). On June 15, 2017, BLM published a notice in the Federal Register postponing compliance dates not yet in effect under section 705 of the Administrative Procedure Act (the "Postponement Notice"). 82 Fed. Reg. 27,430 (June 15, 2017). The United States District Court for the Northern District of California overturned the Postponement Notice on October 4, 2017, ordering BLM to "immediately reinstated the [Rule] in its entirety."[3] *Id*. For the three and a half months the Postponement Notice was in place, operators were not obligated to take steps or begin spending resources to ensure compliance with the provisions of the Rule with January 2018 effective dates. *See e.g.*, *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.,* 823 F.2d 608, 614-15 (D.C. Circ. 1987) (a final agency stay has the status of law); *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (a stay that marks the consummation of an agency's decision making process also affects regulated parties "rights or obligations."). As a result of this delay, it is now impossible for certain Alliance members to fully comply with some of the obligations required of them by January 17, 2018—most notably the initial LDAR inspection and storage tank control requirements. *See* Sgamma Declaration at ¶ 10.

[3] *See State of California v. U.S. BLM, et al*., 3:17-cv-03804-EDL, Dkt. Nos. 95 and 96.

Although these irreparable harms are imminent and serious, their severity is not determinative of whether injunctive relief is warranted. It is sufficient that the harms are imminent or ongoing absent injunctive relief. For example, the Tenth Circuit found a likelihood of irreparable harm where the members of a trade association alleged an annual cost of $1,000 or more per company to comply with a new law when the compliance costs could not be recovered due to sovereign immunity. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756, 770–71 (10th Cir. 2010); *see also Direct Mktg. Ass'n v. Huber*, No. 10-CV-001546, 2011 WL 250556, at **6–7 (D. Colo. Jan. 26, 2011) (granting injunctive relief because a trade association's members would spend $3,100 to $7,000 per company to comply with new state requirements). The severe costs and stranded production demonstrated in this case more than meet applicable standards for the Court to grant the injunctive relief requested.

In sum, the nature of the harms has changed drastically since the Court's order of January 16, 2017. The core provisions of the Rule, which include the requirements to conduct initial LDAR inspections and install storage tank controls, require immediate action and expenditures by operators to ensure compliance by January 17, 2018. As Federal Defendant's acknowledge, these requirements impose substantial burdens on industry. In some cases, because of the delay caused by the Postponement Notice and subsequent invalidation, operators cannot fully comply in the time left. Accordingly, injunctive relief is necessary to prevent these irreparable harms.

IV. INDUSTRY PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

Industry Petitioners are likely to succeed on the merits of their petition because the Rule cannot survive judicial review. This Court already has recognized the Rule's fundamental flaws. In its Order on Motions for Preliminary Injunction, this Court determined "[t]he Rule upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly

delegated under the CAA to the Environmental Protection Agency (EPA), states, and tribes to manage air quality." Order on Motions for Preliminary Injunction, No. 2:16-cv-00280-SWS, at 17 (D. Wyo. Jan. 16, 2017) ("PI Order"). The Court also observed that the Rule "conflicts with the statutory scheme under the CAA . . . particularly by extending its application of overlapping air quality provisions to existing facilities . . . ." *Id.* at 18. The Court described BLM as having "hijacked the EPA's authority under the guise of waste management" and stated that "BLM cannot use overlap to justify overreach." *Id.* at 19.

To establish their likelihood of success on the merits, Industry Petitioners incorporate by reference their Brief in Support of Western Energy Alliance and Independent Petroleum Association of America's Petition for Review of Final Agency Action, filed October 2, 2017 (the Brief). (Dkt. No. 142.) That Brief, attached as Exhibit "C" to this Motion, identifies numerous substantive and procedural flaws with the Rule. Notably, it is the January 17, 2018 provisions at issue (LDAR, storage tank, pneumatic controllers, and pneumatic pumps air control requirements) that most clearly and unlawfully impose air quality requirements on existing facilities in excess of BLM's statutory authority. Because of these flaws, Industry Petitioners are likely to succeed on the merits of their claims.

V. THE EQUITIES WEIGH IN FAVOR OF AN INJUNCTION

The equities favor an injunction. For the reasons detailed in Section III, *supra*, Industry Petitioners' interests will be irreparably harmed absent an injunction because they face impending, unrecoverable compliance costs of at least more than $115 million. In contrast, BLM will suffer little if no harm from a preliminary injunction. BLM has attempted to postpone the January 2018 compliance dates once (the Postponement Notice), and it has undertaken a process to administratively delay all major compliance dates under the Rule. *See* 82 Fed. Reg. 46,458

(Oct. 5, 2017). Therefore, a preliminary injunction will be consistent with BLM's regulatory and administrative objectives.

The harms to the Industry Petitioners also outweigh the harms, if any, to the other parties to this litigation. The states of Wyoming, Montana, North Dakota, and Texas all previously sought a preliminary injunction, so the Petitioners' requested relief will satisfy their prior requested relief. A preliminary injunction also will not harm Defendant-Intervenors States of New Mexico and California and the Citizen Groups because the key provisions of the Rule have not yet taken effect. Furthermore, whereas the Rule imposes immediate and severe compliance costs on the Industry Petitioners, the harms alleged by the Defendant-Intervenors are generalized concerns with lost royalty revenue and global methane emissions—concerns that conflict with the overwhelming, substantial evidence on this record demonstrating the Rule's disastrous economic consequences from curtailed or shut-in production and virtually zero global methane emissions benefits. Finally, if BLM decides to finalize the Proposed Suspension, the alleged harms to the Defendant-Intervenors will occur regardless of whether this Court enjoins the Rule; in contrast, injunctive relief is necessary to avoid the harms to the Industry Petitioners regardless of whether BLM proceeds with the Proposed Suspension.

VI. AN INJUNCTION IS IN THE PUBLIC INTEREST

Finally, a preliminary injunction "would not be adverse to the public interest." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012) (citation omitted). First and most significant, a preliminary injunction will avoid the substantial costs of implementing a rule that likely will be delayed and revised. Second, enjoining the Rule would not adversely impact the public's interest in a healthy environment. The Rule has virtually no impact on air quality, delivering a 0.0092 percent reduction of global GHG emissions. Finally, injunctive relief would prevent the lost revenue associated with a decrease or shut down in production, including lost revenues from

non-federal/non-Indian leases. The Rule could render over 300 leases uneconomical, requiring production to be shut down and will strand over 16 million barrels of oil just between now and January 17, 2018. *See* VF_0031676–77 ("Permanent shut-in of wells could have significant consequences on resource conservation, royalty revenue, job loss, and the economic viability of operators."); Dunham Declaration at ¶ 7.[4] These impacts would deliver a financial blow to western states at a time many are still struggling to rebound from recent commodity downturns.

In sum, injunctive relief would serve public interest goals while avoiding unnecessary and unrecoverable compliance costs. The Court's issuance of a preliminary injunction would not harm the environment and would avoid the financial and administrative costs of implementing unlawful and duplicative agency action.

VII. CONCLUSION

Industry Petitioners request that the Court enjoin BLM from enforcing the Rule or grant other injunctive relief as it deems necessary and appropriate until the resolution of this litigation for the reasons set forth herein. The impending compliance deadlines will cause the Industry Petitioners and Industry Petitioners' members irreparable harm. The Rule represents unlawful and unconstitutional agency action, and the balance of equities and public interest favor a preliminary injunction. Accordingly, the Court should grant the Motion for Preliminary Injunction.

[4] *See also* VF_0031676–77 (estimating that as many as 40 percent of wells could be permanently shut-in under the Rule because they would become uneconomical).

Respectfully submitted this 27th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2017, the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was filed electronically with the Court, using the CM/ECF system, which caused automatic electronic notice of such filing to be served upon all counsel of record.

s/ Samuel R. Yemington