No. 18-8027

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATE OF WYOMING, ET AL.,
Petitioner-Appellees,

and

STATE OF NORTH DAKOTA, ET AL.,
Petitioner-Intervenor-Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondent-Appellees,

&

WYOMING OUTDOOR COUNCIL, ET AL.,
Respondent-Intervenor-Appellants.

On Appeal from the United States District Court for the District of Wyoming
Civil Action Nos. 2:16-CV-00285-SWS & 2:16-CV-00280-SWS
Hon. Scott W. Skavdahl

CITIZEN GROUPS' MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, we, the undersigned counsel of record for Intervenor-Respondent-Appellants Wyoming Outdoor Council, et al., certify that no above-listed Intervenor-Respondent-Appellant has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

INTRODUCTION

The district court committed an unprecedented legal error when it indefinitely enjoined the Bureau of Land Management's ("BLM") Waste Prevention Rule pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, *without* concluding that the regulation's challengers had demonstrated the four prerequisites for this extraordinary remedy. Those prerequisites are: (1) a likelihood of success on the merits, (2) irreparable harm to challengers, (3) harm that is not outweighed by harm to other parties, and (4) promotion of the public interest. The district court's decision conflicts with this Court's longstanding precedent, *Assoc. Sec. Corp. v. SEC*, 283 F.2d 773, 774-75 (10th Cir. 1960), as well as the uniform interpretation of § 705 by numerous other circuit and district courts around the country. Because this error irreparably harms Appellants ("Citizen Groups") every day, Citizen Groups move for a stay of the district court's Order pending appeal.

The district court enjoined provisions of the Waste Prevention Rule despite having earlier rejected a virtually identical request for a preliminary injunction, concluding that the regulations' challengers had failed to meet *any* of the four prerequisites. Section 705 does not provide courts with a previously unrecognized power to stay agency action on some lesser showing; to the contrary, the Supreme Court has held that § 705 "was primarily intended to reflect existing law … and not

to fashion new rules of intervention for District Courts." *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974).

The district court further erred when it invoked its § 705 authority to enjoin the Waste Prevention Rule "pending review," but then effectively ended that review by finding the case prudentially unripe and moot and staying the litigation. Although the district court found that it would not be wise to exercise Article III jurisdiction to review the merits of the Rule, the court nevertheless exercised that very jurisdiction to preliminarily enjoin the Rule. Taking such action is directly contrary to this Court's recent ruling in *Wyoming v. Zinke*, 871 F.3d 1133, 1143 (10th Cir. 2017) ("*Zinke*"), and the basic principle that where a case is prudentially unripe or moot a court should stay its hand.

The district court took this series of unprecedented steps because of its "frustrat[ion] . . . with the current state of administrative law." ECF No. 215 at 2 ("Order").[1] Under that law, final regulations are the law until they are changed by agencies following the proper APA procedures, or set aside by a court after a ruling on the merits (or preliminarily enjoined after consideration of the four factors). These legal requirements provide certainty and protection for the public

[1] District court docket cites are to Case No. 16-cv-285-SWS, unless otherwise noted. All cited documents are attached: Exhibit A includes district court docket entries; Exhibit B includes administrative record documents ("VF_"); Exhibit C includes Citizen Groups' declarations; and Exhibit D is legislative history.

and regulated community alike, ensuring that the work of an agency will not be undone without a deliberative process. In the past year, BLM has twice unlawfully sought to suspend implementation of the Waste Prevention Rule without following the required administrative procedures. When another court rejected both of these efforts, the district court attempted to achieve the same result—also without applying legally required procedures.

Every day the district court's Order remains in effect, the Citizen Groups' members' health is irreparably harmed by the air pollution accompanying the billions of cubic feet of natural gas the Order permits to be wasted into the air in their communities. An immediate stay of the district court's Order is the only effective remedy for the court's unlawful injunction of this important public protection.

BACKGROUND

In 2014, BLM commenced a rulemaking to remedy the pervasive (and preventable) problem of oil and natural gas operators wasting—through venting, flaring, and leaking pipes and equipment—publicly owned natural gas on federal and tribal leases. 81 Fed. Reg. 83,008, 83,009-10, 83,015 (Nov. 18, 2016) (finding 462 billion cubic feet of natural gas was wasted on these leases between 2009 and 2015—enough gas to service over 6.2 million households for a year). The rulemaking was undertaken in response to a series of Government Accountability

Office reports documenting the waste problem, *id.* at 83,017, and was grounded in BLM's Mineral Leasing Act mandate to require lessees to "use all reasonable precautions to prevent waste of oil or gas developed in the land," 30 U.S.C. § 225, and Federal Land Policy and Management Act direction to "protect … air and atmospheric … values," 43 U.S.C. § 1701(a)(8). BLM solicited feedback from states, tribes, companies, trade organizations, non-governmental organizations, and citizens, held four public meetings and tribal outreach sessions, and considered more than 330,000 public comments. 81 Fed. Reg. at 83,010.

On November 18, 2016, BLM finalized the Waste Prevention Rule, which requires operators to capture natural gas that would be wasted, upgrade equipment, and detect and repair leaks of natural gas. *Id.* at 83,010–13. Some of the Rule's provisions required compliance on the Rule's effective date—January 17, 2017—while others required compliance on January 17, 2018, to give operators time to prepare. *Id.* at 83,008, 83,024, 83,033, 83,082. BLM estimated that the Rule would reduce wasteful venting of natural gas by 35% and wasteful flaring by 49%. *Id.* at 83,014. The Rule would also benefit communities by reducing harmful air pollution, increasing royalty revenues, and reducing the visual and noise impacts associated with flaring. *Id.* Based on an extensive record, BLM concluded that the Rule imposes "economical, cost-effective, and reasonable measures … to minimize gas waste." *Id.* at 83,009.

Shortly after BLM finalized the Waste Prevention Rule, Western Energy Alliance and the Independent Petroleum Association of America (collectively "industry groups") and some states requested that the district court preliminarily enjoin the Rule pursuant to § 705 and Federal Rule of Civil Procedure 65. ECF Nos. 21 at 1; 39 at 2; 16-cv-280-SWS, ECF No. 12 at 1-2.[2] After full briefing and a half-day hearing, the district court denied the motions, finding "Petitioners ha[d] failed to establish all four factors required for issuance of a preliminary injunction." *Wyoming v. U.S. Dep't of the Interior*, No. 2:16-cv-0285-SWS, 2017 WL 161428, at *1, *12 (D. Wyo. Jan. 16, 2017) ("*Wyoming*"). Petitioners did not appeal the district court's order, and on January 17, 2017, the Waste Prevention Rule went into effect.

Thereafter, industry groups and the newly appointed Interior Department Secretary Ryan Zinke launched multiple attempts to render the Waste Prevention Rule inoperative. Together, they lobbied members of Congress to repeal the Rule using the Congressional Review Act, but that effort failed. 163 Cong. Rec. S2851, S2853 (May 10, 2017). Secretary Zinke then attempted to "postpone the effective date" for the bulk of the Waste Prevention Rule pursuant to the agency's authority under § 705 without any notice or public comment. *See* 82 Fed. Reg. 27,430,

[2] The Citizen Groups and the States of California and New Mexico intervened to defend the Rule. ECF Nos. 27 & 63.

27,431 (June 15, 2017). The stay was short-lived. California, New Mexico, and the Citizen Groups sued, and the Northern District of California held that the stay violated § 705 and basic tenets of reasoned decision making. *California v. BLM*, 277 F. Supp. 3d 1106, 1119-23 (N.D. Cal. 2017) ("*California I*").

In response, Secretary Zinke adopted another rule suspending for one year all the Waste Prevention Rule's provisions that "generate benefits of gas savings or reductions in methane emissions." 82 Fed. Reg. 58,050, 58,051 (Dec. 8, 2017) ("Suspension Rule"). Once again, California, New Mexico, and the Citizen Groups sued, and the Northern District of California preliminarily enjoined the Suspension Rule and reinstated the Waste Prevention Rule. *California v. BLM*, 286 F. Supp. 3d 1054, 1058 (N.D. Cal. 2018) ("*California II*"). The court held plaintiffs were likely to succeed on the merits because the Suspension Rule was "untethered to evidence," and concluded that plaintiffs' members would be irreparably harmed by increased pollution. *Id.* at 1072-75.

The same day the court issued that injunction, BLM initiated another rulemaking, proposing to largely rescind the Waste Prevention Rule. 83 Fed. Reg. 7924, 7924 (Feb. 22, 2018). BLM is currently accepting public comments on its proposal. *Id.*

While Secretary Zinke pursued these shortcuts to eliminate the Waste Prevention Rule, merits proceedings in the Wyoming district court were on-again-

off-again. When the court enjoined the Suspension Rule, merits briefing in the Wyoming litigation was nearly complete, ECF Nos. 141, 142, 143, 174, 175, 176, BLM had filed a motion to dismiss the case on prudential ripeness grounds, ECF No. 176, and the district court had stayed the litigation based on these same concerns, ECF No. 189 at 4-5.

In response to the Suspension Rule injunction, the Waste Prevention Rule's challengers filed a litany of motions in the district court including requests for: (1) a preliminary injunction, (2) a stay of the Rule pursuant to § 705, (3) vacatur of the rule without reaching the merits, and (4) prompt resolution of the merits of the case. ECF Nos. 194, 195, 196. For its part, BLM argued that the case was prudentially unripe and that the "exercise of Article III jurisdiction [would be] unwise," but also urged the district court to stay the Waste Prevention Rule. ECF No. 207 at 7-8, 11-15.

On April 4, 2018, claiming authority under § 705, the district court indefinitely enjoined implementation of all of the Waste Prevention Rule's provisions with January 2018 compliance dates. Order at 9, 11. It did so without concluding that the Rule's challengers had satisfied the four prerequisites for a preliminary injunction.

The district court's only justification for its decision was its "frustrati[on]" with "the current state of administrative law," and its unsupported assertion that

industry groups would be "irreparably harmed" because "the costs and difficulties of immediate compliance … are undoubtedly substantial and unrecoverable." *Id.* at 2, 9. The court did not address petitioners' likelihood of success on the merits, despite its earlier conclusion that they had *not* satisfied that factor. *Wyoming*, 2017 WL 161428, at *4-10. The court also did not address the irreparable harms to the public from halting the Rule. *See infra* pp. 22-25.

After indefinitely enjoining the Rule pursuant to its authority to grant relief "pending conclusion of the review proceedings," 5 U.S.C. § 705, the district court effectively ended its review by staying the litigation "pending finalization or withdrawal of the proposed Revision Rule." Order at 11. The district court explained its view that the case was both prudentially unripe and prudentially moot, and that these considerations "counsel the court to stay its hand, and to withhold relief it has the power to grant." *Id.* at 8 (quoting *Fletcher v. United States*, 116 F.3d 1315, 1321 (10th Cir. 1997)).

The Citizen Groups and the States of California and New Mexico, Appellants in Case No. 18-8029, immediately filed notices of appeal and jointly moved in the district court for a stay of the Order pending appeal. ECF No. 222. Although Citizen Groups filed their motion two weeks ago and briefing on that motion is complete, the district court has not yet ruled. Because immediate relief is necessary to remedy the irreparable injuries that Citizen Groups' members' face

every day from the Order, the Citizen Groups now move in this court for a stay of the Order pending appeal. *Tape Head Co. v. RCA Corp.*, 452 F.2d 816, 818 (10th Cir. 1971) (concluding that appellees need not await the district court's decision).[3]

LEGAL STANDARD

Federal Rule of Appellate Procedure 8(a) authorizes courts of appeal to stay district court orders pending appeal. Pursuant to Tenth Circuit Rule 8.1, an appellant seeking a stay must address: (A) the basis for the district court's and the court of appeal's jurisdiction; (B) the likelihood of success on appeal; (C) the threat that appellants will be irreparably harmed if the injunction is not granted; (D) the absence of harm to appellees if the injunction is granted; and (E) any risk of harm to the public interest. This Court reviews a district court's decision to enjoin agency action for an abuse of discretion, reviewing factual findings for clear error and legal determinations de novo. *See Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003). A district court abuses its discretion when it grants a preliminary injunction based on an erroneous conclusion of law. *Id.*; *see also Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016).

[3] On April 6, 2018, the Citizen Groups informed the other parties they intended to seek this relief. *See* Fed. R. App. P. 8(a)(2)(C). Petitioners and Federal Respondents oppose this motion. Petitioner-Intervenors North Dakota and Texas take no position.

ARGUMENT

I. This Court Has Jurisdiction Over This Appeal.

The district court had federal question jurisdiction to review challenges to a final agency regulation. 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which grants courts of appeal jurisdiction over "[i]nterlocutory orders of the district courts of the United States … granting … injunctions." *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1121-22 (10th Cir. 2013) (en banc) (exercising jurisdiction pursuant to § 1292(a)(1) to review district court's refusal to enjoin agency regulations).

Prior to the district court's ruling, all of the Waste Prevention Rule's provisions were in effect. But the court "ORDERED that implementation of the Waste Prevention Rule's phase-in provisions (43 C.F.R. 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, and 3179.301-3179.305) is STAYED." Order at 11. The Order has the full force and effect of an injunction: it prohibits BLM from implementing specific provisions of the Rule nationwide. As a result, industry is freed from its compliance obligations, and the public benefits of a final regulation will not be realized. *See Consumers Gas & Oil, Inc. v. Farmland Indus.*, 84 F.3d 367, 370 (10th Cir. 1996) (defining injunctive relief as "all equitable decrees compelling obedience under the threat of contempt"); Black's Law Dictionary (10th ed. 2014) (defining injunction as an "order commanding or preventing an

action"). That the Order is labeled a "stay" is of no consequence. "When determining whether an order expressly grants a request for an injunction, [courts] consider the substance rather than the form of the motion and order." *New Mexico v. Trujillo*, 813 F.3d 1308, 1319-20 (10th Cir. 2016) (exercising jurisdiction under § 1292(a)(1) to review order directing party not to divert water, which was not labeled an injunction).

Even if the Order did not expressly grant an "injunction," this Court has appellate jurisdiction because: (1) the Order has the "practical effect" of an injunction, as just explained, (2) it may have "serious, perhaps irreparable, consequence," *see infra* pp. 22-25, and (3) it "can be effectually challenged only by immediate appeal." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (quotation omitted); *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1999) (recognizing "[i]mmediate review is necessary" where a district court stays the underlying litigation). This Court also has jurisdiction pursuant to 28 U.S.C. § 1291 because the Order indefinitely enjoins a final agency action without any finding on the merits and is effectively unreviewable on appeal from a final judgment. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

II. The Citizen Groups Are Likely To Succeed On The Merits Of The Appeal.

The district court committed three serious legal errors in enjoining the Waste Prevention Rule's key provisions, each sufficient to demonstrate that the Citizen Groups are likely to succeed on the merits of this appeal.

A. The district court erred by enjoining the Waste Prevention Rule without determining the prerequisites for such relief were satisfied.

The district court did not conclude that the four prerequisites to preliminarily halt a final agency regulation were satisfied.[4] In fact, having previously *denied* the challengers' motions for a preliminary injunction as failing to satisfy those prerequisites, it later held that it could grant the same relief without concluding that the prerequisites were met. Order at 9 n.10. The district court's failure to apply the relevant factors, if allowed to stand, would create a new, lower standard for enjoining agency actions based solely upon alleged harm to the moving party.

[4] A district court must clearly "set forth the findings of fact and conclusions of law which constitute the grounds of its action.'" *U.S. ex rel. Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 889 (10th Cir. 1989) (quoting Fed. R. Civ. P. 52(a)). The district court did not meet this requirement; it concluded that industry groups' harm was "undoubtedly substantial" with no discussion of the ample record evidence to the contrary, and failed altogether to address the likelihood of success or the harm to the public from removing the Rule's protections. *See id.* (vacating injunction where order made a "single bare reference" to irreparable harm … but "contain[ed] no fact findings or legal conclusions supporting [that] assertion" and did "not address the balance of hardship, or [the] likelihood of success on the merits").

Such a standard is inconsistent with the uniform decisions of this Court and other courts across the nation that a stay of agency action requires a finding that the four prerequisites have been met.

In interpreting Section 10(d) of the APA—now codified as 5 U.S.C. § 705—more than 50 years ago, this Court held that the "four conditions which must be met before a stay may be granted of an order of an administrative agency" are: "(1) A likelihood that the petitioner will prevail on the merits of the appeal; (2) Irreparable injury to the petitioner unless the stay is granted; (3) No substantial harm to other interested persons; and (4) No harm to the public interest." *Assoc. Sec. Corp.*, 283 F.2d at 774-75. Federal district and appellate courts have universally interpreted § 705 in the same way.[5]

[5] *See, e.g.*, *Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 446 (7th Cir. 1990); *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987); *E. Air Lines v. Civil Aeronautics Bd.*, 261 F.2d 830, 830 (2d Cir. 1958); *Zeppelin v. Fed. Highway Admin.*, No. 17-cv-1661-WJM-MEH, 2018 WL 496840, at *7 (D. Colo. Jan. 22, 2018); *Guam Contractors Ass'n v. Sessions*, No. CV 16-00075, 2017 WL 3447797, at *4-5 (D. Guam Aug. 11, 2017); *Labnet, Inc. v. U.S. Dep't of Labor*, 197 F. Supp. 3d 1159, 1167 n.3 (D. Minn. 2016); *N.H. Hosp. Ass'n v. Burwell*, No. 15-CV-460-LM, 2016 WL 1048023, at *5 n.6 (D.N.H. Mar. 11, 2016); *Native Angels Home Health, Inc. v. Burwell*, No. 5:15-cv-234-FL, 2015 WL 12910710, at *1-2 (E.D.N.C. June 4, 2015); *Texas v. United States*, 95 F. Supp. 3d 965, 973 (N.D. Tex. 2015); *B.A. Wackerli, Co. v. Volkswagen of Am., Inc.*, No. 4:12-CV-00373-BLW, 2012 WL 3308678, at *7 (D. Idaho Aug. 13, 2012); *First Premier Bank v. U.S. Consumer Fin. Prot. Bureau*, 819 F. Supp. 2d 906, 912 (D.S.D. 2011); *Affinity Heathcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010); *Kan. ex rel. Graves v. United States*, No. 00-4153-DES, 2000 WL 1665260, at *4 (D. Kan. Sept. 29, 2000); *Branstad v. Glickman*, 118 F. Supp. 2d

Indeed, just one day before the district court issued the Order, the District of Colorado held that "[a] stay of agency action under APA § 705 is a provisional remedy in the nature of a preliminary injunction," whose "availability turns on the same four factors considered under a traditional Federal Rule of Civil Procedure 65(a) analysis." *Sierra Club v. Fed. Highway Admin.*, No. 1:17-cv-01661-WJM-MEH, 2018 WL 1610304, at *5 (D. Colo. Apr. 3, 2018) (citing *Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980)). That court emphasized that "any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible." *Id*. (quoting *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) ("*Diné CARE*")).

Nor does the district court have "equitable discretion" to enjoin the Waste Prevention Rule without applying the four factors. Order at 10. Regardless of the source of the court's authority, the availability of an injunction or stay of agency action pending review turns on establishing the same four factors. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (describing the four factors that a "plaintiff seeking a preliminary injunction must establish" in case challenging agency action); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (recognizing the "substantial overlap" between the four factors governing preliminary injunctions

925, 934 (N.D. Iowa 2000); *Charter Twp. of Van Buren v. Adamkus*, 965 F. Supp. 959, 963 (E.D. Mich. 1997); *Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 280 (E.D. Ark. 1983).

and stays of agency action pending appeal because "similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined."); *Diné CARE*, 839 F.3d at 1281 (holding, in challenge to agency action, that injunctive relief prior to a ruling on the merits is an "extraordinary remedy" and therefore *all four* factors must be met).

Although the district court "acknowledge[d] that some courts have employed the four-factor preliminary injunction test in determining whether to grant relief under § 705," the court failed to recognize that the test is *required*. Order at 9 n.10. Neither the district court, the Rule's challengers, nor BLM have cited a single instance in which a court has enjoined a final agency action without considering the four prerequisites for such relief.[6]

Although the district court previously applied the four factors in response to requests to enjoin the rule (and concluded they were not met), *Wyoming*, 2017 WL 161428, at *12, the court now claims that such analysis is not required because "nothing in the language of the statute itself, or its legislative history, suggests

[6] The district court cited only the recent decision by the Northern District of California setting aside BLM's first attempt to stay the Waste Prevention Rule, Order at 9 n.10, which considered only the *first* sentence of § 705 regarding an *agency's* authority to "postpone the effective date" of its own regulation pending review, not the *courts'* authority covered by the second sentence of § 705. *California I*, 277 F. Supp. 3d at 1124-25. The court said nothing to suggest that a *court* could enjoin an agency rule without determining that the four prerequisites had been met.

[relief under § 705] is limited to those situations where preliminary injunctive relief would be available." Order at 9 n.10. But that is incorrect. There is ample evidence that Congress' intent in enacting § 705 was to confirm the courts' traditional stay authority in cases challenging agency actions, *not* to substantially broaden their authority in such cases.

Section 705 provides that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court … may issue all necessary and appropriate process to … preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *United States v. Noland*, 517 U.S. 535, 539 (1996). "The four-factor test is the traditional one," and there is thus a "presumption favoring the retention of [this] long-established and familiar principle[], except when a statutory purpose to the contrary is evident." *Nken*, 556 U.S. at 433 (quotations and citations omitted). No contrary purpose is evident here.

Congress adopted § 705 against the backdrop of the Supreme Court's decision in *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 16-17 (1942). In *Scripps-Howard*, the Supreme Court recognized that courts had the power to stay an agency action pending review even without express statutory authority, but that

such stays are "not a matter of right" because they directly implicate the separation of powers between the Executive and Judicial branches. *Id.* at 9-10. Congress codified this right in the APA, and nothing in § 705 or its legislative history indicates an intent to disrupt the long-established requirement to meet the four-factor test.

To the contrary, the Supreme Court long ago concluded that "[t]he relevant legislative history of [§ 705] … indicates that it was primarily intended to reflect existing law under the Scripps-Howard doctrine … and *not* to fashion new rules of intervention for District Courts." *Sampson*, 415 U.S. at 68 n.15 (emphasis added). The Senate Report states that the "second sentence" of § 705—the one at issue here—changed existing law "only to the extent" of a situation not relevant here. S. Rep. No. 79-752, at 230 (1945); *see also* H.R. Rep. No. 79-1980, at 277 (1946) ("[S]tatutes authorizing agency action are to be construed to extend rights pending judicial review and the exclusiveness of the administrative remedy is diminished so far as this section operates."). Moreover, Congress specifically discussed the traditional prerequisites for relief, including the importance of finding "a substantial question for review," and "tak[ing] into account that persons other than parties may be adversely affected." H.R. Rep. No. 79-1980, at 277-78.[7]

[7] The Attorney General's Manual on the APA, to which the Supreme Court has accorded deference because it was issued "contemporaneous[ly]" with passage of the APA and because of the "role played by the Department of Justice in drafting

Additionally, Congress is "presumed to be aware of … [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Because Congress has twice substantively amended the judicial review provisions of the APA without changing § 705, Pub. L. No. 89-554, 80 Stat. 378, 392–93 (1966); Pub. L. No. 94-574, 90 Stat. 2721, 2721 (1976), it has adopted the courts' uniform and longstanding interpretation of the provision.

The Order appealed here, if allowed to stand, would radically change the law, allowing district courts to grant preliminary injunctions of final agency regulations (and other agency actions) without any consideration of the impacts to the public or of whether plaintiffs are likely to succeed on the merits, and must be reversed.

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the legislation," *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546 (1978), provides additional support. That Manual explains that "[t]he provisions of section 10 [the APA's judicial review provisions] constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions," and "generally leave[] the mechanics of judicial review to be governed by other statutes and by judicial rules." U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 93 (1946) ("AG Manual"). With respect to § 705, the Manual emphasizes that the "general procedural provisions governing the issuance of preliminary injunctions … appear to be applicable to the exercise of the power conferred by that subsection." *Id.* at 107.

B. The district court erred by granting "[r]elief *pending* review" and then effectively ending that review.

The plain language of § 705 authorizes relief "pending conclusion of the review proceedings." The legislative history of § 705 likewise makes clear that § 705 was intended to "provide[] intermediate judicial relief ... in order to make *judicial* review effective," and to "afford parties an adequate *judicial* remedy." S. Rep. No. 79-752 at 213 (emphasis added); *see* AG Manual at 107 (explaining that the language "'pending conclusion of the review proceedings' … is conclusive that the stay power conferred by the subsection is only ancillary to review proceedings—proceedings in which the court is reviewing final agency action within the meaning of [the APA]").

Here, after granting an indefinite stay under § 705's "pending judicial review" authority, the district court effectively ended that judicial review. The court did so by staying the litigation over the Rule "pending finalization or withdrawal of the proposed Revision Rule," Order at 11, which is a separate agency rulemaking that may result in a new final regulation. The injunction is in no way tethered to the district court's merits review, and there is no way for supporters of the Rule to reinstate the Rule through a favorable conclusion of merits review. Accordingly, the purpose and effect of the Order are to stay the Rule pending the conclusion of a new rulemaking, not pending the court's review—a purpose that § 705 does not authorize.

As another court recognized in considering Secretary Zinke's attempt to stay a different regulation under § 705, a stay of agency action pending review is impermissible if at the same time judicial review is "block[ed]" though "a stay in the … litigation." *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953, 964 (N.D. Cal. 2017); *see also Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012) (vacating EPA notice under § 705 where the "purpose and effect . . . plainly [was] to stay the rules pending reconsideration, not litigation"). The district court thwarted the purpose of § 705 by granting relief not to afford parties an adequate *judicial* remedy, but to effectively end judicial review and allow an agency to achieve a preferred result before it has complied with required rulemaking procedures.

C. The district court erred by finding this case prudentially unripe and prudentially moot and then exercising jurisdiction to grant substantive relief.

The district court committed a third, related error of law. While concluding that the challenge to the Waste Prevention Rule was prudentially unripe and prudentially moot and therefore the court should "stay its hand," Order at 7-8, the district court did not stay its hand, but instead ordered substantive relief.

This approach is directly conflicts with this Court's ruling in *Zinke*, a completely analogous case in which this Court took the "unusual" step of finding a challenge to a different BLM regulation (the "Fracking Rule") prudentially unripe

because the agency was reconsidering the regulation. 871 F.3d at 1142. In that circumstance, this Court cautioned that courts should "declin[e] to exercise Article III jurisdiction." *Id.* at 1141; *see also Fletcher*, 116 F.3d at 1321 (concluding that if a case is prudentially moot the controversy "is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to *withhold relief it has the power to grant*" (emphasis added)). After so concluding, this Court did not halt the effectiveness of the Fracking Rule. To the contrary, it *vacated* the district court's decision enjoining the Fracking Rule and ordered the district court to *dismiss* the underlying action, concluding that "there would be nothing for the district court to do upon remand." *Zinke*, 871 F.3d at 1145-46. Indeed, relying on *Zinke*, BLM moved to dismiss this case in the district court after it decided to reconsider the Waste Prevention Rule. ECF No. 176, at 5-6 ("Where a court finds that a matter is prudentially unripe or moot, the appropriate course is to dismiss the action.").

Following *Zinke*, once the district court determined that the challenges to the Waste Prevention Rule were prudentially unripe and prudentially moot, it should have concluded that "there [was] nothing for [it] to do," and dismissed the case. But instead, the district court intervened to grant the "extraordinary remedy" of halting implementation of a final regulation while at the same time effectively ending its review. This is reversible error. Indeed, the district court failed to cite a

single case to support the proposition that after finding the case prudentially unripe or moot it could or should exercise Article III jurisdiction to enjoin the Rule.

III. The Citizen Groups' Members Will Be Irreparably Harmed Absent A Stay.

Without a stay pending appeal, the Citizen Groups' members will be irreparably harmed by the waste of publicly-owned natural gas and associated air pollution permitted by the district court's Order. The district court did not even mention the harm to the Citizen Groups' members. But less than two months ago, in an exhaustive opinion, the Northern District of California concluded that suspending many of the same provisions of the Waste Prevention Rule would irreparably harm Citizen Groups' members. *California II*, 286 F. Supp. 3d at 1073-75. The court found that suspending these provisions would cause plaintiffs "injuries with effects statewide, to the general public, and on the personal level, any of which might be sufficient to establish likely irreparable harm." *Id.* at 1075. In particular, that court noted the impact on the Citizen Groups' members living in areas in close proximity to BLM-managed oil and gas development with already-degraded air quality, where additional emissions would "lead[] to and exacerbat[e] impaired lung functioning, serious cardiovascular and pulmonary problems, and cancer and neurological damage." *Id.* at 1073-74.

"[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*,

irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Increased air pollution, even over a limited period, likewise constitutes irreparable harm. *See, e.g., Beame v. Friends of the Earth*, 434 U.S. 1310, 1314 (1977) (Marshall, J., in chambers) (recognizing "the irreparable injury that air pollution may cause during [a two-month] period, particularly for those with respiratory ailments"). Air pollution is irreparable because once it is emitted, the resulting damage cannot be reversed. *See, e.g., Diné Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209, 2015 WL 4997207, at *48 (D.N.M. Aug. 14, 2015) (finding irreparable injury because "fracked wells produce environmental harm … includ[ing] air pollution"), *aff'd*, *Diné CARE*, 839 F.3d at 1276.

BLM's own analysis indicates there will be substantial harm to the public due to additional emissions allowed by the now-enjoined provisions, including: 141,000 additional tons of methane, 129,000 additional tons of volatile organic compounds ("VOCs"), and 637 additional tons of hazardous air pollutants ("HAPs") in 2018. VF_0000675, VF_0000677; McVay & Hull Decl. ¶ 7. These emissions will cause irreparable public health and environmental harm to Citizen Groups' members who live and work on or near public and tribal lands with oil and gas development.

Dr. McVay estimates that approximately 6,182 wells subject to the Waste Prevention Rule and not covered by other standards are located in counties that

already have unhealthy levels of ozone pollution. McVay & Hull Decl. ¶ 19.[8] As a result of the district court Order, leaks from these wells (which are only one of the sources of waste addressed by the Rule) will emit up to an additional 2,089 tons of ozone-forming VOCs in these communities. *Id.* Citizen Groups' members living and recreating in these areas will suffer from this additional pollution. *See* Stith Decl. ¶ 11 (Environmental Defense Fund has over 5,400 members living in these communities). The district court Order will also allow additional emissions of methane, a potent greenhouse gas, as well as hazardous air pollutants such as benzene, which can cause serious illnesses, including cancer and neurological damage. *See* 81 Fed. Reg. at 83,077; Craft Decl. ¶¶ 20-24.[9]

These adverse health effects are especially dangerous to people who live in close proximity to oil and gas facilities. For example, Environmental Defense Fund member Francis Don Schreiber—a rancher who lives on split-estate lands in Rio Arriba County, New Mexico—lives next to more than 120 BLM-managed wells that are either on or immediately adjacent to his ranch. Schreiber Decl. ¶¶ 1-

[8] Ozone exposure impairs lung functioning and leads to asthma, hospital and emergency room visits, and serious cardiovascular and pulmonary problems. Craft Decl. ¶¶ 5-13.

[9] Dr. Ilissa Ocko estimates that the additional methane emissions enabled by the district court's order will have the 20-year climate impact as over 2.5 million passenger vehicles driving for one year or over 13 billion pounds of coal burned. Ocko Decl. ¶ 12. Once in the atmosphere, there is no available mechanism to remove this climate pollution or reverse its disruptive effects. *Id.*

2, 5. Mr. Schreiber had open heart surgery for congestive heart failure, and worries about the impact of the Order on elevated ozone and its implications for his health. *Id.* ¶ 11.

Western Organization of Resource Councils member Quincee Baker is a member of the Three Affiliated Tribes and lives on the Fort Berthold Reservation in North Dakota where her home is "surrounded" by BLM-managed wells. Baker Decl. ¶¶ 1, 5. As oil and gas development has increased on the Reservation over the last decade, Ms. Baker has been hospitalized and placed in a medically-induced coma for pneumonia, and was recently diagnosed with asthma and bronchiecstasis. *Id.* ¶¶ 11-12. She is concerned that the district court Order "deprives me of the protections against air pollution that threatens my health." *Id.* ¶ 18.

Many of the Citizen Groups' members face similar concerns regarding the impacts of the Order on their respiratory and cardiovascular health. *See generally* Exhibit C. Tens of thousands of other Americans are similarly situated and exposed. Health harms sustained as a result of these additional emissions, such as asthma attacks, heart attacks, or missed school or work days, cannot be reversed or undone, and therefore a stay is warranted in this case.

IV. Granting A Stay Will Not Harm Appellees.

Appellees will not be harmed by a stay of the Order pending appeal. BLM's own estimates suggest that average annual compliance costs attributable to the

Waste Prevention Rule would range from $44,600 to $65,800 for each company, the equivalent of approximately 0.15% of a small company's profits. *See* VF_0000575-76; *see also* VF_0000602 (average "small" operator has annual revenue of $521 million). The Rule also contains "several economic exemptions" in the event that compliance with its requirements would force operators to cease production and abandon reserves. *Wyoming*, 2017 WL 161428, at *11. In the Order, the district court ignored this record evidence, and did not provide any support for its contrary conclusion that industry groups would be "irreparably harmed" by implementation of the Rule. Order at 9.

The district court's bare assertion contrasts with the exhaustive analysis of the Northern District of California, which found in reviewing BLM's Suspension Rule that, when viewed in the context of total operator profits, the cost savings from not having to comply with key Waste Prevention Rule provisions are "marginal." *California II*, 286 F. Supp. 3d at 1075-76. That court concluded that "[w]eighed against the likely environmental injury, which cannot be undone, the financial costs of compliance are not as significant as the increased gas emissions, public health harms, and pollution." *Id.* at 1076. This would be similarly true of a stay pending appeal of the Order.

Given the significant irreparable harm the Citizen Groups face if the district court's Order remains in effect, this Court should conclude that any harm to

Appellees from complying with a duly promulgated regulation is marginal in comparison and should stay the Order pending appeal.

V. The Public Interest Demands A Stay.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences" when considering the four injunction factors. *Winter*, 555 U.S. at 24 (quotation omitted). The public benefits of staying the district court Order are clear and significant. When natural gas is released into the atmosphere, burned unused, or leaked through inadequate infrastructure, the American public loses a valuable resource that could have been used productively, royalties that could be used to fund schools and infrastructure are lost, and dangerous air pollution is allowed to escape into the atmosphere. The Order blocks nearly all of the protections of the Waste Prevention Rule that prevent the waste of natural gas and reduce emissions, allowing the waste of this valuable resource to occur largely unmitigated, to the detriment of the general public.

In addition to the serious environmental and health harms to the public, the Order will also cause harm to state, local, and tribal governments, as well as Indian allottees that depend upon royalty revenue from oil and natural gas production. *See, e.g.*, ECF No. 69-3 ¶ 2; Abe Decl. ¶ 11; Walter DeVille Decl. ¶ 3; Theodora Bird Bear Decl. ¶¶ 10, 19-20; Joletta Bird Bear Decl. ¶¶ 1, 11, 14. BLM has projected that the Waste Prevention Rule requirements now enjoined by the district

court would provide an additional $5.4 million in royalties in 2018, *see* VF_0000564, that could be used to fund critical public services such as education and infrastructure, ECF No. 69-3 ¶ 8; Lisa DeVille Decl. ¶ 12.

The district court's Order also harms the public interest in regulatory certainty and the rule of law. The district court expressed its "frustrati[on]" with the "dysfunction in the current state of administrative law." Order at 2. But then it greatly undermined settled law by ignoring clear limits on judicial authority to grant industry groups and BLM the same substantive result they had repeatedly been unable to achieve lawfully through the administrative process based on the district court's view that the Waste Prevention Rule "will be eliminated." *Id.* at 10. Regulatory certainty is advanced through adhering to a regulation that was the product of an extensive record, years of public engagement, and a thorough explanation until an agency has completed a similarly thorough process to rescind it. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (rejecting argument that active reconsideration should affect the status of a regulation) (citing *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.")). The district court noted that the "public may appropriately rely on agency action unless and until it is held unlawful."

Order at 9 n.9. But the court then upended public reliance on the Waste Prevention Rule by enjoining provisions *without* holding them unlawful.

The Waste Prevention Rule was promulgated over *seventeen* months ago, and has not been lawfully suspended since. The only court to evaluate its merits, the district court, concluded that the challengers were *not* likely to succeed on the merits. At the time the district court issued the Order, the Rule was in full effect and operators were gearing up to comply. If the district court's Order is allowed to stand, a lawful final agency regulation—developed after years of analysis and public engagement—will be permitted to go unheeded in substantial part for at least a year and a half simply because a new political administration does not want to administer it and would like to change it in the future.

A stay of the district court Order pending appeal will provide the public with substantial economic, environmental, and public health benefits, and will advance the public interest in regulatory certainty and the rule of law.

CONCLUSION

For the foregoing reasons, this Court should grant the Citizen Groups' motion for a stay pending review.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018 I electronically filed the foregoing **CITIZEN GROUPS' MOTION FOR STAY PENDING APPEAL** using the court's CM/ECF system which will send notification of such filing to all counsel of record.

Date: April 20, 2018

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CERTIFICATE OF DIGITAL SUBMISSION

Further, I hereby certify that:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5; and

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Advanced, Version 10.8.1.1, April 20, 2018 and according to the program are free of viruses.

Date: April 20, 2018

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CERTIFICATE OF COMPLIANCE

I certify with respect to the foregoing that:

(1) This document complies with the type-volume limitation of the Court's April 11, 2018 Order granting the Citizen Groups' Motion for Leave to Exceed Word Count, because it contains 7,155 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

(2) This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font size and Times Roman.

/s/ Robin Cooley