

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,  
Plaintiffs,

v.

UNITED STATES BUREAU OF LAND  
MANAGEMENT, et al.,  
Defendants.

SIERRA CLUB, et al.,  
Plaintiffs,

v.

RYAN ZINKE, et al.,  
Defendants.

Related Case Nos.  
17-cv-03804-EDL, 17-cv-3885-EDL

**ORDER GRANTING PLAINTIFFS'  
MOTIONS FOR SUMMARY  
JUDGMENT**

Re: Dkt. Nos. 11, 37

The State of California, together with the State of New Mexico, and a coalition of seventeen conservation and tribal citizens groups, brought suit against the Bureau of Land Management (the “Bureau”), Secretary of the Department of the Interior Ryan Zinke, and Acting Assistant Secretary for Land and Minerals Management, Department of the Interior Katharine S. MacGregor (collectively, “Defendants”), alleging that Defendants violated the Administrative Procedures Act (“APA”) when the Bureau published a notice in the Federal Register postponing the compliance dates for certain sections of the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule after the rule’s effective date had already passed. Before the Court are Plaintiffs’ motions for summary judgment. For the following reasons, the Court GRANTS both motions.

1           **I.       BACKGROUND**

2           On November 18, 2016, the Bureau, an agency within the U.S. Department of the Interior,  
 3 issued the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule  
 4 (the “Rule”). See 81 Fed. Reg. 83,008. The Rule’s purpose was to “reduce waste of natural gas  
 5 from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal  
 6 and Indian (other than Osage Tribe) leases . . . [and] also clarify when produced gas lost through  
 7 venting, flaring, or leaks is subject to royalties, and when oil and gas production may be used  
 8 royalty-free on-site.” Id. The Rule was promulgated to replace the then-existing regulations  
 9 related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and  
 10 Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil  
 11 and Gas Lost (NTL-4A). Id. The Rule’s effective date was January 17, 2017. Id.

12           The Bureau began developing the Rule in 2014 in response to reviews from the  
 13 Government Accountability Office and the Department of the Interior’s Office of the Inspector  
 14 General which concluded that the Bureau’s then-existing regulations regarding waste and royalties  
 15 were “insufficient and outdated.” Id. at 83,009-10. The regulations in place in 2014 had not been  
 16 revisited in at least three decades. Id. at 83,008. After receiving input from various stakeholders  
 17 and the public, the Bureau released its proposed rule in February 2016. See 81 Fed. Reg. 6,616  
 18 (Feb. 8, 2016) (the “Proposed Rule”). To assist in gathering stakeholder comment before  
 19 publishing the Proposed Rule, the Bureau conducted a series of forums in Colorado, New Mexico,  
 20 North Dakota, and Washington, D.C., and held numerous meetings and calls with state  
 21 representatives, individual companies, trade associations, and non-governmental organizations.  
 22 Id. at 6,617. The Bureau received approximately 330,000 public comments on the Proposed Rule.  
 23 See 81 Fed. Reg. 83,021.

24           At the time the Bureau finalized the Rule in November 2016, two industry groups and the  
 25 States of Wyoming and Montana (later joined by North Dakota and Texas as intervenors) filed  
 26 legal challenges to the validity of the Rule in federal court in Wyoming. See Western Energy  
 27 Alliance et al. v. Secretary of the U.S. Dep’t of the Interior et al., Case No. 16-cv-00280-SWS (D.  
 28 Wyo. filed Nov. 15, 2016); State of Wyoming et al. v. United States Dep’t of the Interior et al.,

1 Case No. 16-cv-00285-SWS (D. Wyo. filed Nov. 18, 2016). They alleged that the Bureau did not  
 2 have statutory authority to regulate air pollution and that the Rule was arbitrary and capricious.<sup>1</sup>  
 3 The plaintiffs moved for entry of a preliminary injunction to prevent the Rule from going into  
 4 effect, which the court denied on January 16, 2017. See State of Wyoming et al. v. United States  
 5 Dep't of the Interior et al., 2017 WL 161428 (D. Wyo. Jan. 16, 2017).

6 On January 17, 2017, the Rule went into effect. Approximately two months later, on  
 7 March 28, 2017, the President issued Executive Order No. 13783, which instructed each executive  
 8 agency to review all agency actions to identify those that:

9 potentially burden the development or use of domestically produced  
 10 energy resources and appropriately suspend, revise, or rescind those  
 11 that unduly burden the development of domestic energy resources  
 beyond the degree necessary to protect the public interest or  
 otherwise comply with the law.

12 82 Fed. Reg. 16,093. On March 29, 2017, Secretary Zinke issued Secretarial Order No. 3349 to  
 13 implement the executive order as it pertains to the regulatory actions of the Department of the  
 14 Interior. See Secretarial Order No. 3349, available at  
 15 [https://www.doi.gov/sites/doi.gov/files/uploads/so\\_3349\\_-american\\_energy\\_independence.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_-american_energy_independence.pdf).

16 On June 15, 2017, the Bureau issued a notice in the Federal Register that it was postponing  
 17 the compliance dates for certain sections of the Rule. See Waste Prevention, Production Subject  
 18 to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed.  
 19 Reg. 27,430 (the "Postponement Notice"). The postponed sections of the Rule were subject to a  
 20 compliance date of January 17, 2018. Id. The Postponement Notice invoked Section 705 of the  
 21 APA and concluded that "justice requires [the Bureau] to postpone the future compliance dates for  
 22 [certain] sections of the Rule" in light of "the substantial cost that complying with these  
 23 requirements poses to operators . . . and the uncertain future these requirements face in light of the  
 24 pending litigation and administrative review of the Rule." Id. at 27,431. The "pending litigation"  
 25 referred to the legal challenges in the District of Wyoming. Id. The Postponement Notice stated  
 26 that the Bureau interpreted the January 17, 2018 compliance date for these sections of the Rule to

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 28 <sup>1</sup> All Plaintiffs to this case, with the exception of Fort Berthold Protectors of Water and Earth  
 Rights, intervened in the two cases in the District of Wyoming.

1 be “within the meaning of the term ‘effective date’ as that term is used in Section 705 of the  
 2 APA.” Id. It further explained that the Bureau “believes the [Rule] was properly promulgated,”  
 3 but determined that “[p]ostponing these compliance dates will help preserve the regulatory status  
 4 quo while the litigation is pending and the Department reviews and reconsiders the Rule.” Id.  
 5 The Postponement Notice did not apply to provisions of the Rule with compliance dates that had  
 6 already passed. Id. It concluded by noting that the Bureau “intend[ed] to conduct notice-and-  
 7 comment rulemaking to suspend or extend the compliance dates of those sections affected by the  
 8 Rule.” Id.

9 In a status report filed in the District of Wyoming litigation on September 1, 2017, the  
 10 Bureau stated that it has drafted a proposed rule to suspend certain provisions of the Rule that  
 11 were affected by the Postponement Notice and that proposed notice is currently under review by  
 12 the Office of Information and Regulatory Affairs in the Office of Management and Budget before  
 13 it is published for comment. See Western Energy Alliance et al. v. Secretary of the U.S. Dep’t of  
 14 the Interior et al., Case No. 16-cv-00280-SWS, Dk. No. 131; State of Wyoming et al. v. United  
 15 States Dep’t of the Interior et al., Case No. 16-cv-00285-SWS, Dkt. No. 136. According to the  
 16 same status report, the Bureau is also developing a proposed rule to revise the Rule pursuant to  
 17 Executive Order No. 13783. Id.

## 18 **II. PROCEDURAL HISTORY**

19 Plaintiffs the State of California and the State of New Mexico filed suit on July 5, 2017,  
 20 alleging that the decision by Defendants to postpone certain compliance dates of the Rule violated  
 21 the APA. On July 12, 2017, the Court granted Plaintiffs’ unopposed motion to relate this case to  
 22 another case pending before this Court, Sierra Club et al. v. Zinke et al., Case No. 17-cv-03885-  
 23 EDL, which was filed by seventeen conservation and tribal organizations (the “Conservation and  
 24 Tribal Citizen Groups” or the “Groups”)<sup>2</sup> on July 10, 2017.

25 \_\_\_\_\_  
 26 <sup>2</sup> The organizations that comprise the Conservation and Citizen Tribal Groups are: Sierra Club,  
 27 Center for Biological Diversity, Environmental Defense Fund, National Wildlife Federation,  
 28 Natural Resources Defense Council, The Wilderness Society, Citizens for a Healthy Community,  
 Dine Citizens Against Ruining Our Environment, Earthworks, Environmental Law and Policy  
 Center, Fort Berthold Protectors of Water and Earth Rights, Montana Environmental Information  
 Center, San Juan Citizens Alliance, Western Organization of Resource Councils, Wilderness

1           Since the filing of these lawsuits, the Court has granted motions to intervene by the State  
2 of North Dakota, the Independent Petroleum Association of America, and the Western Energy  
3 Alliance (together, the “Intervenors”). Plaintiffs and Defendants did not oppose the Intervenors’  
4 motions, so long as their intervention was subject to certain conditions. Those conditions were  
5 that Intervenors: (1) file joint briefs and abide by all existing schedules in the litigation, including  
6 the stipulated briefing schedule on the motions for summary judgment; (2) not raise new claims or  
7 otherwise expand the litigation; and (3) abide by the same constraints applicable to parties in any  
8 APA case, in which judicial review of the challenged agency decision is generally limited to the  
9 agency’s administrative record. Intervenors either expressly agreed to these conditions (State of  
10 North Dakota) or expressly agreed to some conditions and did not object to others (Independent  
11 Petroleum Association of America and the Western Energy Alliance). The Court concluded that  
12 the proposed conditions were reasonable and necessary in the interests of judicial economy, sound  
13 case management, and avoiding undue delay, and granted the motions to intervene subject to those  
14 conditions.

15           On July 26, 2017, the State of California and the State of New Mexico filed a motion for  
16 summary judgment in State of California et al. v. U.S. Bureau of Land Management et al., Case  
17 No. 17-cv-03804-EDL. The next day, on July 27, 2017, the Conservation and Tribal Citizen  
18 Groups filed a motion for summary judgment in Sierra Club et al. v. Zinke et al., Case No. 17-cv-  
19 03885-EDL. Defendants opposed the motions, and Intervenors joined in Defendants’ opposition  
20 briefs. Intervenors have not filed separate motions for summary judgment or oppositions to  
21 Plaintiffs’ motions.

22           On July 26, 2017, Defendants filed a motion to transfer these cases to the United States  
23 District Court for the District of Wyoming. As noted above, Defendants are currently defending a  
24 challenge to the validity of the Rule before that court. The States of California and New Mexico  
25 and, separately, the Conservation and Trial Citizens Groups filed opposition briefs to the motion  
26 to transfer on August 9, 2017. The parties agreed that the motion to transfer was suitable for  
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28 Workshop, WildEarth Guardians, and Wyoming Outdoor Council.

1 decision without a hearing. On August 10, 2017, Defendants moved to stay briefing and the  
2 hearing on Plaintiffs’ motions for summary judgment in both cases on the grounds that the Court  
3 should first resolve Defendants’ motion to transfer the cases to the District of Wyoming. Plaintiffs  
4 opposed the motion. The Court denied Defendants’ motion to stay on August 23, 2017,  
5 concluding that a stay would not meaningfully conserve judicial resources and that Plaintiffs had  
6 shown more than a fair possibility of harm due to the proposed stay, while Defendants had not  
7 established “a clear case of hardship or inequity” required for a stay. On September 7, 2017, the  
8 Court denied the motion to transfer, concluding that, among other reasons, there were no  
9 overlapping factual or legal issues that warranted overriding Plaintiffs’ choice of forum. Case No.  
10 17-cv-3804, Dkt. No. 73; Case No. 17-cv-3885, Dkt. No. 62.

11       Upon reviewing inquiries from numerous groups seeking to file amicus briefs regarding  
12 Plaintiffs’ motions for summary judgment, the Court issued an order permitting interested parties  
13 to file administrative motions for leave to file an amicus brief by September 6, 2017.  
14 Subsequently, the Court granted three motions for leave to file amicus briefs by the States of  
15 Washington, Oregon, Maryland, and New York; a coalition of the National Association of Home  
16 Builders, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and  
17 National Mining Association; and the Institute for Policy Integrity at New York University.

### 18 **III. LEGAL STANDARD**

19       Summary judgment shall be granted if “the pleadings, discovery and disclosure materials  
20 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
21 movant is entitled to judgment as a matter of law.” Fed. R. Civ. Pro. 56(c). Material facts are  
22 those which may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S.  
23 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a  
24 reasonable jury to return a verdict for the nonmoving party. Id. The court must view the facts in  
25 the light most favorable to the non-moving party and give it the benefit of all reasonable  
26 inferences to be drawn from those facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475  
27 U.S. 574, 587 (1986). The court must not weigh the evidence or determine the truth of the matter,  
28 but only determine whether there is a genuine issue for trial. Balint v. Carson City, 180 F.3d

1 1047, 1054 (9th Cir. 1999).

2 A party seeking summary judgment bears the initial burden of informing the court of the  
3 basis for its motion, and of identifying those portions of the pleadings and discovery responses  
4 that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477  
5 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must  
6 affirmatively demonstrate that no reasonable trier of fact could find other than for the moving  
7 party. On an issue where the nonmoving party will bear the burden of proof at trial, the moving  
8 party can prevail merely by pointing out to the district court that there is an absence of evidence to  
9 support the nonmoving party's case. Id. If the moving party meets its initial burden, the opposing  
10 party "may not rely merely on allegations or denials in its own pleading;" rather, it must set forth  
11 "specific facts showing a genuine issue for trial." See Fed. R. Civ. P. 56(e)(2); Anderson, 477  
12 U.S. at 250. If the nonmoving party fails to show that there is a genuine issue for trial, "the  
13 moving party is entitled to judgment as a matter of law." Celotex, 477 U.S. at 323.

#### 14 **IV. DISCUSSION**

##### 15 **A. Conservation and Tribal Citizen Groups' Standing**

16 The Conservation and Tribal Citizen Groups briefed their standing to bring their lawsuit  
17 under the doctrine of associational standing. Defendants have not opposed the Conservation and  
18 Tribal Citizens Groups' motion for summary judgment for lack of standing.

19 Under the doctrine of associational standing, "an association has standing to bring suit on  
20 behalf of its members when: (a) its members would otherwise have standing to sue in their own  
21 right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither  
22 the claim asserted nor the relief requested requires the participation of individual members in the  
23 lawsuit." Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

24 The Groups' individual members meet the standing requirements in their own right. To do  
25 so, they must show that the individual members have: "(1) suffered an 'injury in fact' that is (a)  
26 concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the  
27 injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed  
28 to merely speculative, that the injury will be redressed by a favorable decision." Friends of the



1 Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 180-81 (2000) (citation omitted). Many of  
2 their members live in states or are members of tribes that receive royal benefits that fund many  
3 important public services, such as education and infrastructure, and their governments will receive  
4 lower royalty payments due to the Postponement Notice. See Nat'l Wildlife Fed'n v. Burford, 871  
5 F.2d 849, 853-54 (9th Cir. 1989). Other members own tribal mineral rights and will also receive  
6 lower royalty payments. Further, many of their members live and work on or near public and  
7 tribal lands that are impacted by oil and gas drilling and the production and venting, flaring, and  
8 leaking associated with that drilling. As a result of the postponement of the Rule's regulations to  
9 reduce waste and curb emissions, the members' use and enjoyment of these lands will be  
10 diminished, including because of detrimental health impacts that some members have already  
11 experienced and the aesthetic harm that will arise from venting, flaring, and leaking practices. See  
12 Hall v. Norton, 266 F.3d 969, 976 (9th Cir. 2001). Finally, their members suffered a procedural  
13 injury when the Postponement Notice was issued without the opportunity for public comment.  
14 See Wildearth Guardians v. U.S. Dep't of Ag., 795 F.3d 1148, 1154 (9th Cir. 2015); Citizens for  
15 Better Forestry v. U.S. Dep't of Ag., 341 F.3d 961, 970 (9th Cir. 2003). At the same time, their  
16 members' individual participation is not necessary.

17 As to the interests being germane, the Groups have submitted declarations affirming that  
18 "reducing waste and air and climate pollution from oil and gas development on public lands is  
19 central to the Conservation and Tribal Citizen Groups' institutional missions." Groups' Mot. at  
20 20; Ex. 1, Standing Decls. at 1, 75, 90-91, 102, 106, 119, 128, 136. The Groups were also actively  
21 involved in the development of the Rule and defending the Rule's validity in the District of  
22 Wyoming litigation. See Groups' Mot., Ex. 1. As to the third element, as the issues raised here  
23 are purely legal and do not require any involvement of the individual members or their "unique  
24 facts" to resolve the issues raised or grant the relief sought. See Int'l Union, United Auto,  
25 Aerospace & Ag. Implement Workers of Am. v. Brock, 477 U.S. 274, 287-88 (1986).

26 The injuries discussed above are traceable to the postponement of the Rule because the  
27 postponed provisions would have reduced waste of royalty-bearing resources and reduce  
28 emissions of air pollutants and greenhouse gases. A ruling in the Groups' favor vacating the



1 Postponement Notice and directing the Bureau to implement the Rule would redress their  
2 members' injuries.

3 Accordingly, the Groups have associational standing to bring this lawsuit.

4 **B. Timing of Motions**

5 Defendants contend that the Court should not reach the merits of Plaintiffs' motions for  
6 summary judgment because they are premature, having been filed before Defendants have  
7 answered the complaint, before the initial case management conferences, and before Defendants  
8 have filed an administrative record. They argue that Plaintiffs are seeking to evade the APA's  
9 requirement that the court review an agency action based on the administrative record. See 5  
10 U.S.C. § 706 (“[T]he court shall review the whole record or those parts of it cited by a party[.]”).

11 These motions are timely under Rule 56 and the Court is fully able to resolve the motions  
12 at this phase of the litigation because they are limited to legal issues that do not depend on the  
13 administrative record, aside from the few key documents the parties cited in their motions, which  
14 the Defendants do not dispute are subject to judicial notice.<sup>3</sup> See Wagner v. Spire Vision, 2014  
15 WL 889483, at \*4 (N.D. Cal. Mar. 3, 2014) (explaining that motions for summary judgment are  
16 appropriate for deciding purely legal issues); Fed. R. Civ. P. 56 (“a party may file a motion for  
17 summary judgment at any time until 30 days after the close of all discovery”). The administrative  
18 record would not be helpful to decide these issues and is not required. See People for the Ethical  
19 Treatment of Animals, Inc. v. U.S. Dep’t of Ag., 194 F. Supp. 3d 404, 409 (E.D.N.C. 2016);  
20 Animal Legal Def. Fund v. U.S. Dep’t of Ag., 789 F.3d 1206, 1224 n.13 (11th Cir. 2015).  
21 Defendants have not identified any documents that are not currently before the Court that are  
22 required to resolve any purported factual issues. Nor have Defendants asked for relief under Rule  
23 56(d) of the Federal Rules of Civil Procedure allowing nonmoving parties that oppose summary  
24 judgment to request a delay in hearing the motion because they need more time to enable them to  
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27 <sup>3</sup> Specifically, Plaintiffs the State of California and the State of New Mexico have requested  
28 judicial notice of five documents, including the Proposed Rule, the Rule, and the Postponement  
Notice.

1 present facts essential to justify their opposition.<sup>4</sup> In short, there is no reason to wait for the  
2 administrative record to resolve the legal issues that are currently before the Court.

### 3 C. Standard of Review

4 As the parties are aware, this Court recently decided a case against the Department of the  
5 Interior that raised many of the same issues presented in this case. See Becerra v. U.S. Dep't of  
6 Interior, Case No. 17-cv-02376-EDL, 2017 WL 3891678 (N.D. Cal. Aug. 30, 2017). With respect  
7 to the standard of review that the Court must apply to Plaintiffs' challenge, Defendants point out,  
8 as they did in Becerra, that the APA may set aside an agency action only if it is "arbitrary,  
9 capricious, an abuse of discretion, or otherwise not in accordance with law, . . . in excess of  
10 statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance  
11 of procedure required by law," 5 U.S.C. § 706. Yet Defendants focus only on the standard of  
12 review under the first clause regarding arbitrary action and abuse of discretion. Defendants are  
13 correct that in general review under that prong of the statute "is narrow, and a court is not to  
14 substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut.  
15 Auto. Ins., 463 U.S. 29, 43 (1983). In that context, an agency's decision can be set aside "only if  
16 the agency relied on factors Congress did not intend it to consider, entirely failed to consider an  
17 important aspect of the problem, or offered an explanation that runs counter to the evidence before  
18 the agency or is so implausible that it could not be ascribed to a difference in view or the product  
19 of agency expertise." Earth Island Inst. v. U.S. Forest Serv., 697 F.3d 1010, 1013 (9th Cir. 2012)  
20 (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008)).

21 As this Court recognized in Becerra, however, that standard is not applicable to actions  
22 short of statutory right or taken in violation of legally required procedures, which is the threshold  
23 issue that Plaintiffs raise here. To the contrary, section 706 provides that, "[t]he reviewing court  
24 shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in  
25 excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §  
26 706(2)(C). The "arbitrary and capricious" standard forms a separate basis to set aside agency

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28 <sup>4</sup> Indeed, Defendants stipulated to a briefing schedule for the summary judgment motions that did not provide for the filing of an administrative record.

1 action, 5 U.S.C. § 706(2)(A), and it is that standard which Motor Vehicles Mfs. characterized as  
 2 narrow. 463 U.S. at 42-43. Similarly, Defendants rely on a portion of Earth Island Institute in  
 3 which the court cites Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) for exposition  
 4 of the arbitrary and capricious standard. See Earth Island Institute, 697 F.3d at 1013; see also  
 5 Price v. Stevedoring Servs. of Am., Inc., 697 F.3d at 825-26 (holding that litigating position of  
 6 Director of Office of Workers' Compensation Programs in interpreting Longshore Act was not  
 7 entitled to Chevron deference where Director did not adopt his litigating positions through any  
 8 relatively formal administrative procedure, but through internal decision-making not open to  
 9 public comment or determination, and there was no other indication that Congress intended  
 10 Director's litigating positions to carry force of law).

11 As Plaintiffs persuasively argue, the Bureau's decision to postpone the Rule is not entitled  
 12 to deference. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984) held  
 13 that "the court must first give effect to the unambiguously expressed intent of Congress" when  
 14 reviewing an agency's interpretation of a statute. Under United States v. Mead Corp., 533 U.S.  
 15 218, 226-27 (2001) and Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820, 826 (9th Cir.  
 16 2012), Chevron deference is warranted only when an agency is exercising authority delegated to it  
 17 by Congress to administer a particular statute, and that Congress has not delegated the Bureau  
 18 authority to administer the APA. By contrast, Motor Vehicles Mfs. addressed agency action  
 19 delegated to that agency by the Motor Vehicle Safety Act. 463 U.S. 29. Similarly, in Earth Island  
 20 Institute, the Ninth Circuit held that the Forest Service is entitled to deference as to its  
 21 interpretation of its own forest plans unless that interpretation is plainly inconsistent with the plan.  
 22 697 F.3d at 1013.

23 The underlying dispute here, however, centers upon the Bureau's application of section  
 24 705 of the APA. Under Mead Corp., "administrative implementation of a particular statutory  
 25 provision qualifies for Chevron deference when it appears that Congress delegated authority to the  
 26 agency generally to make rules carrying the force of law, and that the agency interpretation  
 27 claiming deference was promulgated in the exercise of that authority." Mead, 533 U.S. at 226-27.

28 Defendants have not pointed to any authority delegating the Bureau authority to interpret

1 section 705 of the APA. As in Becerra, Defendants have failed to show that the Bureau's  
2 interpretation of section 705 of the APA is entitled to deference.

3 **D. The Bureau's Invocation of Section 705 of the APA**

4 On June 15, 2017, the Bureau relied on Section 705 of the APA to postpone the  
5 compliance date for certain sections of the Rule. Section 705 provides:

6 When an agency finds that justice so requires, it may postpone the  
7 effective date of action taken by it, pending judicial review. On such  
8 conditions as may be required and to the extent necessary to prevent  
9 irreparable injury, the reviewing court, including the court to which  
10 a case may be taken on appeal from or on application for certiorari  
or other writ to a reviewing court, may issue all necessary and  
appropriate process to postpone the effective date of an agency  
action or to preserve status or rights pending conclusion of the  
review proceedings.

11 Plaintiffs argue that postponing implementation of the Rule after it has already gone into effect  
12 runs afoul of the plain language of Section 705. Plaintiffs point to the only decision on this issue,  
13 Safety-Kleen Corp. v. Env'tl. Prot. Agency, 1996 U.S. App. LEXIS, at \*2 (D.C. Cir. Jan. 19,  
14 1996), which held that Section 705 does not permit an agency to suspend a promulgated rule  
15 without notice and comment.

16 In Becerra, as in this case, Defendants contended that the term "effective date" in Section  
17 705 encompasses effective dates *and* compliance dates. This is also the reasoning set forth in the  
18 Postponement Notice itself. See 82 Fed. Reg. 27,430. To support their position, Defendants raise  
19 several arguments. Defendants argue that in many instances, an agency will not have time to  
20 exercise its Section 705 authority after a lawsuit is filed and before the challenged rule's stated  
21 effective date, thus rendering the authority provided by the statute of little use. Defendants also  
22 argue that "compliance dates" are the "dates with teeth," and Section 705 is meant to allow an  
23 agency to maintain the status quo pending judicial review.

24 In Becerra, the Court rejected all of Defendants' arguments. See Becerra, 2017 WL  
25 3891678, at \*8-11. The plain language of the statute authorizes postponement of the "effective  
26 date," not "compliance dates." 5 U.S.C. § 705. As the Court of Appeals for the District of  
27 Columbia explained when confronting a similar argument about Section 705:

28 Upon consideration of the motion of intervenors to vacate  
administrative stay, the responses thereto and the reply, it is

1 ORDERED that the motion be granted. Respondent improperly  
 2 justified the stay based on 5 U.S.C. § 705 (1994). That statute  
 3 permits an agency to postpone the effective date of a not yet  
 4 effective rule, pending judicial review. It does not permit the agency  
 to suspend without notice and comment a promulgated rule, as  
 respondent has attempted to do here. If the agency determines the  
 rule is invalid, it may be able to take advantage of the good cause  
 exception, 5 U.S.C. § 553(b).

5 Safety-Kleen Corp., 1996 U.S. App. LEXIS, at \*2-3.

6 This reasoning is equally applicable here. Effective and compliance dates have distinct  
 7 meanings. See Silverman v. Eastrich Multiple Inv’r Fund, L.P., 51 F.3d 28, 31 (3d Cir. 1995)  
 8 (“The mandatory compliance date should not be misconstrued as the effective date of the  
 9 revisions.”); Nat. Res. Def. Council, Inc. v. U.S. Env’tl. Prot. Agency, 683 F.2d 752, 762 (3d Cir.  
 10 1982) (stating that an effective date is “an essential part of any rule: without an effective date, the  
 11 agency statement could have no future effect, and could not serve to implement, interpret, or  
 12 prescribe law or policy”) (internal quotation marks omitted).

13 Defendants argue that this case is distinguishable from Becerra for two main reasons.  
 14 First, they contend that the Bureau did not postpone the entire Rule at issue here, whereas the  
 15 Department of the Interior had postponed the entire rule that was the subject of the litigation in  
 16 Becerra. Defendant argue that this distinction is important because the Postponement Notice  
 17 preserved the status quo by leaving in place the parts of the Rule that were effective as of January  
 18 17, 2017, while postponing other parts of the Rule that did not require compliance until one year  
 19 later on January 17, 2018. Under Defendants’ interpretation, the parts of the Rule with  
 20 compliance dates of January 17, 2018 were not yet “effective” at the time that the Bureau issued  
 21 the Postponement Notice. Thus, because operators in the oil and gas industry were no longer  
 22 required to prepare for and then achieve compliance at a later date with those parts of the Rule,  
 23 Defendants contend that the Postponement Notice maintained the status quo because compliance  
 24 was not mandatory until January 17, 2018.

25 This reasoning is circular at best. It tacitly acknowledges that the Postponement Notice did  
 26 not maintain the status quo for those parts of the Rule with a compliance date of January 17, 2018  
 27 because the year leading up to that date was intended to give operators in the oil and gas industry  
 28 the time they needed to adjust their operations to come into compliance. At the time that the

1 Bureau issued the Postponement Notice on June 15, 2017, the regulated parties either had to start  
2 preparing or continue preparing to make the necessary changes in light of the Rule’s impending  
3 compliance date. Similar to the regulation at issue in Becerra, the Rule imposed compliance  
4 obligations starting on its effective date of January 17, 2017 “that increased over time but did not  
5 abruptly commence” on January 17, 2018. Becerra, 2017 WL 3891678, at \*8. Indeed, as  
6 Intervenor Western Energy Alliance stated at oral argument, preparing to meet the January 17,  
7 2018 compliance date could take operators up to six months, depending on the size of the  
8 operation. For example, Intervenor Western Energy Alliance stated that large operators needed to  
9 begin inspections during the summer of 2017 to complete the new leak prevention and repair  
10 obligations by the January 17, 2018 compliance date. While smaller operators would need less  
11 time to complete those tasks, Intervenor Western Energy Alliance stated that all operators would  
12 need some lead-up time to achieve compliance by January 17, 2018.

13 Second, Defendants argue that the Rule at issue here, unlike the one in Becerra,  
14 specifically referenced compliance dates in the regulation that were meant to phase in over time,  
15 which thereby established at least two different “effective dates” under the Rule. Defendants  
16 analogize the one-year period between the January 17, 2017 effective date and the January 17,  
17 2018 compliance date with the period between publication of a final rule and its effective date.  
18 During the time between publication and its effective date, Section 705 expressly permits the  
19 agency to invoke its Section 705 authority pending judicial review. According to Defendants, by  
20 analogy, the agency should also be able to use Section 705 after the official effective date but  
21 before the January 17, 2018 compliance date comes due because the compliance date is  
22 functionally equivalent to a second effective date. Not only is this argument contrary to the plain  
23 language of the statute, but it collapses the clear statutory distinction between the two periods  
24 before and after a rule takes effect.

25 The remaining arguments that Defendants repeat from Becerra are likewise unavailing  
26 here. With respect to Defendants’ claim that limiting Section 705 to situations where the effective  
27 date of a regulation has not passed would unduly hamper its ability to use this authority, Plaintiffs  
28 persuasively argue that the challenges to the Rule in the District of Wyoming prove the fallacy of

1 this argument. There, the industry groups moved quickly (in one case, even before the final Rule  
2 was published in the Federal Register) to initiate litigation challenging the validity of the Rule and  
3 seek a preliminary injunction. In response, the Bureau appeared in those actions to defend the  
4 Rule and, ultimately, the court declined to issue a preliminary injunction before the effective date  
5 passed. As Congress envisioned, the Bureau had ample time between the filing of the District of  
6 Wyoming lawsuits and the Rule’s effective date to issue a stay pursuant to Section 705, but it  
7 chose not to do so.

8 Defendants’ policy argument that the Court should construe Section 705 to include  
9 “compliance dates” because Section 705 is meant to allow an agency to maintain the status quo  
10 pending judicial review is equally unpersuasive. Indeed, Defendants’ position undercuts  
11 regulatory predictability and consistency. See Price, 697 F.3d at 830 (formal rulemaking exists in  
12 order to provide “notice and predictability to regulate parties”). After years of developing the  
13 Rule and working with the public and industry stakeholders, the Bureau’s suspension of the Rule  
14 five months after it went into effect plainly did not “maintain the status quo.” To the contrary, it  
15 belatedly disrupted it. Regulated entities with large operations had already needed to make  
16 concrete preparations after the Rule had not only become final but had actually gone into effect.  
17 The uncertainty that can arise from this kind of sudden agency reversal of course is illustrated by  
18 its impact on the regulated entities here. As Intervenor Western Energy Alliance explained to the  
19 Court at oral argument, many of the companies it represents within the gas and energy industry  
20 stopped moving toward compliance with the Rule based, in significant part, on Defendants’  
21 issuance of the Postponement Notice. In arguing against a remedy of vacatur (discussed more  
22 fully below), Intervenor Western Energy Alliance contended that some large regulated entities  
23 would be less likely to be able to meet the compliance deadline of January 17, 2018 because they  
24 relied on Defendants’ postponement.

25 Finally, Defendants argue that the term “effective date” in Section 705 must be interpreted  
26 broadly based on its context in the overall scheme of the APA. Under their interpretation, the  
27 definition of effective date in Section 705 must be broader than the definition in Section 553(d) of  
28 the APA, which applies to rulemaking, because Section 705 applies more broadly to all agency



1 action rather than just rulemaking. See 5 U.S.C. § 705 (allowing an agency to postpone “action  
 2 taken by it”); 5 U.S.C. § 551(13) (defining agency action to include “the whole or a part of an  
 3 agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”).  
 4 Their argument is not persuasive. While Section 705 allows the postponement of the effective  
 5 date of a broader range of agency actions than a complete rule, such as a part of a rule or a license,  
 6 and would have allowed the agency lawfully to postpone certain parts of the Rule, rather than its  
 7 entirety, had it done so before the effective date of January 17, 2017, that possibility does not alter  
 8 the plain meaning of “effective date.”

9 **E. APA’s Notice-and-Comment Requirements**

10 Plaintiffs also argue that Defendants violated the APA’s notice-and-comment requirements  
 11 by effectively repealing the Rule without engaging in the process for obtaining comment from the  
 12 public. Sections 553(b) and (c) of the APA set forth the notice-and-comment requirements for  
 13 agency “rule making.” 5 U.S.C. § 553. “Rule making means agency process for formulating,  
 14 amending, or repealing a rule.” 5 U.S.C. § 551(5). The retraction of a duly-promulgated  
 15 regulation requires compliance with the APA’s notice-and-comment procedures. See Env’tl Def.  
 16 Fund, Inc. v. Gorsuch, 713 F.3d 802, 817 (D.C. Cir. 1983); Clean Air Council v. Pruitt, 2017 WL  
 17 2838112, at \*11 (D.C. Cir. July 3, 2017); Perez v. Mortg. Bankers Ass’n, \_\_ U.S. \_\_ 135 S. Ct.  
 18 1199, 1206 (2015); F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Nat. Res.  
 19 Def. Council v. Env’tl. Prot. Agency, 683 F.3d 752, 761 (3d Cir. 1982).

20 Defendants respond that Section 705 does not refer to notice-and-comment requirements.  
 21 Without citing any authority, Defendants also argue that notice-and-comment would impede its  
 22 ability to act swiftly to maintain the status quo, as Congress envisioned when it crafted the Section  
 23 705 authority. Defendants rely on Sierra Club v. Jackson, 833 F. Supp. 2d 11, 28 (D.D.C. 2012),  
 24 which held that the section 705 delay notice did not constitute substantive rulemaking. The Court  
 25 has already rejected this argument in Becerra, explaining that in Sierra Club the agency properly  
 26 invoked section 705 *before* the rule’s effective date. Therefore, the postponement of the rule there  
 27 was not effectively a repeal, unlike here. The APA does not permit an agency to

28 guide a future rule through the rulemaking process, promulgate a

1 final rule, and then effectively repeal it, simply by indefinitely  
2 postponing its operative date. The APA specifically provides that  
3 the repeal of a rule is rulemaking subject to rulemaking procedures.

4 Nat. Res. Def. Council, 683 F.2d at 762. By now only belatedly following the requisite notice-  
5 and-comment procedures to issue a proposed rule that postpones the compliance dates for six  
6 months after first trying to bypass those procedures, Defendants' actions speak louder than words,  
7 tacitly conceding that the Postponement Notice was improper.

8 As the Court observed in Becerra, the policy underlying the statutory requirement of  
9 notice-and-comment is equally applicable to the repeal of regulations as to their adoption. See  
10 Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n, 673 F.2d 425, 446 (D.C.  
11 Cir. 1982) ("The value of notice and comment prior to repeal of a final rule is that it ensures that  
12 an agency will not undo all that it accomplished through its rulemaking without giving all parties  
13 an opportunity to comment on the wisdom of repeal.").

#### 14 **F. Bureau's Justification under Section 705**

15 In addition to contending that Defendants exceeded their power under Section 705,  
16 Plaintiffs also argue that the Postponement Notice was unlawful because it was arbitrary and  
17 capricious and did not meet the additional statutory requirements of "pending litigation" and  
18 "justice so requires."

##### 19 **1. Reconsideration of the Rule**

20 First, Plaintiffs argue that one of the Bureau's stated justifications for the Postponement  
21 Notice was to delay compliance while it "reviews and reconsiders the Rule." 82 Fed. Reg. 27,431.  
22 Citing Sierra Club, Plaintiffs argue that invoking Section 705 for this purpose was arbitrary and  
23 capricious because Section 705 is not applicable where "[t]he purpose and effect of the  
24 [Postponement] Notice plainly are to stay the rules pending reconsideration, not litigation." 833 F.  
25 Supp. 2d at 33. Defendants respond that there is nothing in Section 705 that prohibits the Bureau  
26 from having two reasons for postponing a regulation (in this case, "pending judicial review" and  
27 agency reconsideration).

28 As in Sierra Club, however, Defendants have merely paid "lip service" to the pending  
judicial review in the District of Wyoming. See Sierra Club, 833 F. Supp. 2d at 34. Rather than

1 justify the Section 705 postponement based on the litigation in the District of Wyoming cases, the  
2 Postponement Notice reiterated that the Bureau believed the Rule had been properly promulgated  
3 and merely stated, without any specificity, that “the petitioners have raised serious questions  
4 concerning the validity of certain provisions of the Rule.” 82 Fed. Reg. 27,431. Furthermore,  
5 similar to the stay the defendants sought in Becerra, the Bureau requested and received a 90 day  
6 extension to the briefing schedule in the District of Wyoming litigation, relying on the  
7 Postponement Notice and future administrative review as justifications for the extension. These  
8 actions run counter to the Bureau’s statement that pending judicial review in the District of  
9 Wyoming litigation was the true reason for the Postponement Notice. While there is no  
10 prohibition against having more than one justification for invoking Section 705, provided that one  
11 of them meets the statutory requirements, Defendants must be able to show that they properly  
12 invoked the statutorily required ground of “pending judicial review.” Defendants have not done  
13 so here.

14 **2. “Justice So Requires” and the Failure to Consider the Foregone**  
15 **Benefits**

16 Alternatively, Plaintiffs argue that the Bureau’s decision was arbitrary and capricious  
17 because it only took into account the costs to the oil and gas industry of complying with the Rule  
18 and completely ignored the benefits that would result from compliance. It is a fundamental  
19 principle of the APA that an agency’s decision is arbitrary when it “entirely failed to consider an  
20 important aspect of the problem.” Motor Vehicles Mfs., 463 U.S. at 43. Although an agency is  
21 entitled to change its policy positions, it has an obligation to adequately explain the reason for the  
22 change and its rejection of its earlier factual findings. See Organized Vill. of Kake v. U.S. Dep’t  
23 of Ag., 795 F.3d 956, 966-67 (9th Cir. 2015) (en banc) (citing FCC v. Fox Television Stations,  
24 Inc., 556 U.S. 502, 515-16 (2009)).

25 Here, based on the rationale stated in the Postponement Notice, the Bureau entirely failed  
26 to consider the benefits of the Rule, such as decreased resource waste, air pollution, and enhanced  
27 public revenues. Defendants’ argument that Section 705 “places no limitations on an agency’s  
28 determination of what ‘justice so requires,’” (Defs.’ Opp. at 13), would render that language mere

1 surplusage, contrary to a basic rule of statutory construction. If the words “justice so requires” are  
2 to mean anything, they must satisfy the fundamental understanding of justice: that it requires an  
3 impartial look at the balance struck between the two sides of the scale, as the iconic statue of the  
4 blindfolded goddess of justice holding the scales aloft depicts. Merely to look at only one side of  
5 the scales, whether solely the costs or solely the benefits, flunks this basic requirement. As the  
6 Supreme Court squarely held, an agency cannot ignore “an important aspect of the problem.”  
7 Motor Vehicles Mfs., 463 U.S. at 43. Without considering both the costs *and* the benefits of  
8 postponement of the compliance dates, the Bureau’s decision failed to take this “important aspect”  
9 of the problem into account and was therefore arbitrary. Furthermore, Defendants’ argument that  
10 they can ignore the benefits of the Rule because they do not materialize until 2018 is a self-  
11 fulfilling prophecy because, according to the agency’s own cost-benefit analysis made in  
12 promulgating the Rule, those benefits will be reaped starting in January 2018 and outweigh the  
13 costs—*unless* the agency prevents compliance with that deadline as it sought to do through the  
14 unlawfully issued Postponement Notice.

15         Instead of taking into account the benefits of the Rule when issuing the Postponement  
16 Notice, Defendants premised their action on the grounds that the costs were not justified because  
17 circumstances had changed between the time the Rule was developed and finalized and the time it  
18 was postponed in June 2017. Defendants contend that the relevant changed circumstances include  
19 the completely foreseeable and foreseen fact that the January 17, 2018 compliance deadline was  
20 becoming more urgent, as well as the District of Wyoming having “expressed misgivings with the  
21 Rule”—even though it denied the challengers’ motion for a preliminary injunction—and the  
22 President issuing an executive order directing the executive agencies to re-evaluate regulations  
23 that affect the energy industry. For their part, Plaintiffs contend that the only thing that actually  
24 changed before issuance of the Postponement Notice was “the agency’s position with respect to  
25 whether those costs are justified.” (Grps’ Opp. at 11).

26         New presidential administrations are entitled to change policy positions, but to meet the  
27 requirements of the APA they must give reasoned explanations for those changes and “address  
28 [the] prior factual findings” underpinning a prior regulatory regime. See Organized Vill. of Kake,

1 795 F.3d at 966. Significantly, Defendants have not argued that the Rule’s promulgation was  
 2 based on inaccurate facts or faulty cost-benefit studies. Indeed, in support of postponing the  
 3 compliance date because of a new concern with the costs to the oil and gas industry, the  
 4 Postponement Notice relied on precisely the same Regulatory Impact Analysis that it had  
 5 previously relied upon to support adoption of the Rule and justify its costs, which showed that the  
 6 benefits substantially outweighed the costs. Thus, it supported the Postponement Notice by only  
 7 considering one side of the equation. As the Supreme Court held, “a reasoned explanation is  
 8 needed for disregarding facts and circumstances that underlay or were engendered by the prior  
 9 policy.” Fox Television Stations, 556 U.S. at 515-16. Defendants have presented no “reasoned  
 10 explanation” for the agency’s action and “[i]t would be arbitrary or capricious to ignore such  
 11 matters.” Id.<sup>5</sup> Defendants’ failure to consider the benefits of compliance with the provisions that  
 12 were postponed, as evidenced by the face of the Postponement Notice, rendered their action  
 13 arbitrary and capricious and in violation of the APA.

### 14 3. “Justice So Requires” and the Preliminary Injunction Test

15 Finally, Plaintiffs argue that the Bureau was required to apply the four-part preliminary  
 16 injunction test to show that “justice so requires” postponing compliance under Section 705, which  
 17 the Bureau did not reference or apply in the Postponement Notice. Plaintiffs rely on Sierra Club  
 18 in which the court found that the EPA’s invocation of Section 705 was arbitrary and capricious  
 19 based on EPA’s failure to apply the four-part preliminary injunction test. See Sierra Club, 833 F.  
 20 Supp. 2d at 30-31. As the court in Sierra Club noted, the legislative history of Section 705  
 21 provides some support for this interpretation:

22 This Section permits either agencies or courts, if the proper showing  
 23 be made, to maintain the status quo . . . The authority granted is  
 24 equitable and should be used by both agencies and courts to prevent  
 irreparable injury or afford parties an adequate judicial remedy.

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25  
 26 <sup>5</sup> While Defendants’ failure to fully consider all important aspects of postponing the compliance  
 27 deadlines when issuing the Postponement Notice was arbitrary and capricious, this result does not  
 28 necessarily resolve the issue raised by *amicus* The Institute for Policy Integrity that Defendants  
 were required to support their change in policy with a full cost-benefit analysis. Because the  
 Postponement Notice was arbitrary and capricious for its failure to consider the foregone benefits  
 of compliance at all, the Court need not resolve this question.

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1 Id. at 31 (quoting Administrative Procedure Act, Pub. L. 1944-46, S. Doc. 248 at 277 (1946)  
2 (describing the intent of 5 U.S.C. § 1009(d), the prior version of Section 705)). Sierra Club  
3 reasoned that there was nothing in the text of Section 705 or its legislative history that suggested  
4 that the standard for a stay pending judicial review differs between agencies and courts. Sierra  
5 Club, 833 F. Supp. 2d at 30-31.

6 Defendants disagree that they were required to consider the four-part preliminary  
7 injunction test when issuing the Postponement Notice pursuant to Section 705 and that Sierra Club  
8 was wrongly decided. Defendants point out that the text of Section 705 requires neither a court  
9 nor an agency to make findings about the four preliminary injunction factors when issuing a  
10 Section 705 stay:

11 When *an agency* finds that justice so requires, it may postpone the  
12 effective date of action taken by it, pending judicial review. On  
13 such conditions as may be required and to the extent necessary to  
14 prevent irreparable injury, *the reviewing court*, including the court to  
15 which a case may be taken on appeal from or on application for  
certiorari or other writ to a reviewing court, may issue all necessary  
and appropriate process to postpone the effective date of an agency  
action or to preserve status or rights pending conclusion of the  
review proceedings.

16 5 U.S.C. § 705 (emphasis added). They argue that the text of Section 705 only requires an agency  
17 to base its decision to implement a stay on a finding that “justice so requires,” and that the next  
18 sentence, which references certain factors of the preliminary injunction test, only refers to court-  
19 issued stays. In response to the legislative history noted by Plaintiffs and the court in Sierra Club,  
20 Defendants point to subsequent legislative history from 1946 that they argue more closely tracks  
21 the statutory language and supports their position that Section 705 does not require an agency to  
22 weigh the four factors of the preliminary injunction test when determining if “justice so requires”:

23 [Section 705] provides that any agency may itself postpone the  
24 effective date of its action pending judicial review, or, upon  
25 conditions and as may be necessary to prevent irreparable injury,  
26 reviewing courts may postpone the effective date of contested action  
or preserve the status quo pending conclusion of judicial review  
proceedings.

27 S. Doc. 248 at 369 (1946).

28 Finally, Defendants argue that requiring agencies to weigh the four factors of the

1 preliminary injunction test is impractical. For instance, an agency would be required to find that a  
2 party who is challenging a regulation is likely to succeed on the merits, which would undermine  
3 the agency's litigation position and hinder its defense. Defendants claim that the test is  
4 particularly troubling in situations where an agency is reconsidering a regulation, as the Bureau is  
5 doing here, because it essentially forces an agency to admit error in order to provide relief to  
6 regulated parties pending judicial review and reconsideration, even though agencies can reconsider  
7 regulations for policy reasons without admitting error.

8 The Parties and *amici* vigorously contest whether Defendants were required to satisfy the  
9 four-factor preliminary injunction test when they relied upon Section 705 to postpone the  
10 compliance date under the justification that "justice so requires." The plain language of the statute  
11 leaves room to dispute whether such an analysis is required, and the legislative history provides  
12 limited and not entirely consistent evidence of Congress' intent. The statute is clear, however, that  
13 a postponement requires the agency to make a determination that "justice so requires." Because of  
14 the complete failure to consider the foregone benefits of compliance, Defendants have failed to  
15 meet the "justice so requires" requirement of Section 705. Therefore, the Court does not reach the  
16 issue of whether Defendants' action was arbitrary and capricious for their failure to utilize the  
17 preliminary injunction test.

## 18 **V. REMEDY**

19 Having concluded that Defendants violated the APA when the Bureau issued the  
20 Postponement Notice, the Court must consider the appropriate remedy. Plaintiffs have requested  
21 declaratory relief and vacatur of the Postponement Notice.

22 Vacatur is the standard remedy for violation of the APA. See Se. Alaska Conservation  
23 Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 654 (9th Cir. 2007), rev'd on other grounds  
24 sub nom., Coeur Alaska v. Se. Alaska Conservation Council, 557 U.S. 261 (2009); Klamath-  
25 Siskiyou Wildlands Center v. Nat'l Oceanic and Atmospheric Admin., 109 F. Supp. 3d 1238,  
26 1241 (N.D. Cal. 2015) (citations omitted). To determine whether to make an exception to the  
27 usual remedy of vacatur, the Court considers two factors: (1) "how serious the agency's errors  
28 are," and (2) "the disruptive consequences of an interim change that may itself be changed." See



1 Cal. Cmty. Against Toxics v. Env'tl. Prot. Agency, 688 F.3d 989, 992 (9th Cir. 2012) (quoting  
2 Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.3d 146, 150-51 (D.C. Cir. 1993)).

3 As to the first factor, the Bureau's errors in illegally invoking Section 705 to issue the  
4 Postponement Notice and circumvent the APA's notice-and-comment requirements were serious.  
5 See Nat. Res. Defense Council v. Env'tl. Prot. Agency, 489 F.3d 1364, 1374 (D.C. Cir. 2007)  
6 ("The agency's errors could not be more serious insofar as it acted unlawfully, which is more than  
7 sufficient reason to vacate the rules."). Courts generally only remand without vacatur when the  
8 errors are minor procedural mistakes, such as failing to publish certain documents in the electronic  
9 docket of a notice-and-comment rulemaking. See Cal. Cmty., 688 F.3d at 992. Thus, this factor  
10 heavily favors vacating the Postponement Notice.

11 The second factor is the potential disruptive consequences that would arise from vacatur.  
12 Defendants argue that vacatur would require regulated entities to spend approximately \$114  
13 million dollars to achieve compliance. Requiring these entities to spend that much money is  
14 unnecessarily disruptive and inequitable, they contend, because the Bureau is planning to lawfully  
15 suspend the Rule and ultimately revise or rescind it. They also note that the court presiding over  
16 the District of Wyoming challenge to the Rule expects to issue its decision before the January 17,  
17 2018 compliance date, which could mean that the Rule will be invalidated, even though the court  
18 denied a preliminary injunction in part based on plaintiffs in that case not having shown a  
19 sufficient likelihood of success at that time. Intervenor Western Energy Alliance also contends  
20 that some of its members relied on the Postponement Notice and the District of Wyoming  
21 litigation to defer compliance efforts, so it may well be impossible at this point for at least some of  
22 the larger-scale regulated entities to meet the January 17, 2018 compliance deadline.

23 Notably, the rare exceptions to vacatur involve irreparable and severe disruptive  
24 consequences that went far beyond the potential disruptive consequences that Defendants raise  
25 here. Thus, the Ninth Circuit declined to vacate illegally promulgated regulations where vacatur  
26 could result in the extinction of an already endangered species. See Idaho Farm Bureau Fed. v.  
27 Babbitt, 58 F.3d 1392, 1405-06 (9th Cir. 1995). And it denied vacatur that would have resulted in  
28 rolling blackouts affecting thousands, if not millions of people, more air pollution, and disastrous

1 economic effects. See Cal. Comtys., 688 F.3d at 994.

2 By contrast, as Plaintiffs point out, vacating the Postponement Notice and reinstating the  
3 Rule is predicted to result in a net positive financial and environmental benefit, according to the  
4 agency's analysis, because compliance will reduce the waste of public resources, curb the  
5 emission of harmful environmental pollutants, increase royalty payments, and, for many of the  
6 new requirements relating to reducing the waste of valuable resources, pay for itself over time.  
7 Moreover, vacating the Postponement Notice would merely put the regulated parties back in the  
8 position of working toward compliance. If some of the regulated entities of the oil and gas  
9 industry will not be able to meet the January 17, 2018 compliance date because they suspended  
10 compliance efforts after the District of Wyoming denied the preliminary injunction and the Bureau  
11 issued the Postponement Notice, that is a problem to some extent of their own making and is not a  
12 sufficient reason for the Court to decline vacatur. This lawsuit by California and New Mexico has  
13 been on the public docket since July 5, only 20 days after the Bureau issued the Postponement  
14 Notice, and the related case was filed five days later. As evidenced by its trade association's  
15 intervention in this case, the oil and gas industry was well aware that the Postponement Notice  
16 was potentially vulnerable to invalidation. Moreover, denying the standard remedy of vacatur  
17 based on less severe disruptive consequences than those previously recognized as warranting  
18 keeping the unlawful regulation in place could be viewed as a free pass for agencies to exceed  
19 their statutory authority and ignore their legal obligations under the APA, making a mockery of  
20 the statute.

21 This is not like the situation in Becerra where the agency had already finalized a new rule  
22 and vacatur would only return the parties to the previous regulatory regime for a short one week  
23 period. Under those very unusual circumstances, vacating the illegal postponement of the  
24 regulation was not warranted. In this case, however, the Bureau has not yet promulgated a  
25 replacement for the Rule. Although the Bureau intends to engage in actual rulemaking to  
26 postpone the Rule's compliance dates and issue a proposed rule for public notice and comment,  
27 that proposal is still under review within the agency and by the Office of Management and Budget  
28 ("OMB"). Furthermore, once promulgated, Defendants acknowledged at oral argument that the

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1 Bureau would engage in a 30-day notice-and-comment period. Indeed, if the Bureau receives  
 2 “significant” comments to the proposed rule, as seems likely given the numerous comments it  
 3 originally received in favor of as well as against the Rule that it seeks to functionally suspend, it  
 4 will need to provide written responses, which will take additional time. See Am. Mining Congress  
 5 v. Env’tl. Prot. Agency, 965 F.2d 759, 771 (9th Cir. 1992). After considering and responding to  
 6 any significant comments, the agency must then draft the final rule and, most likely, seek approval  
 7 of the rule from OMB. See Executive Order 12,866. After OMB has approved the agency’s draft  
 8 final rule, the agency must then publish the final rule in the Federal Register, and it will not  
 9 become effective until at least 30 days after its publication. 5 U.S.C. § 553(d). At the hearing on  
 10 Plaintiffs’ motions, Defendants acknowledged that finalizing that new proposed rule would take at  
 11 least two months. Defendants have also informed the Court that they intend to propose another  
 12 round of rulemaking to revise or rescind the Rule, but the Bureau is still drafting that proposed  
 13 rule and it has not yet been circulated for review within the agency or OMB. Given the time-  
 14 intensive steps required to move a draft rule forward to final publication and the additional period  
 15 of 30 days before it comes effective, any such rule revising or rescinding the Rule is unlikely to go  
 16 into effect for a number of months. In the end, there is no certainty that either proposed  
 17 rulemaking will survive potential legal challenge, given the litigation history of this Rule. Thus,  
 18 application of the general rule in favor of vacatur is appropriate here.

19 **VI. CONCLUSION**

20 For the reasons set forth above, the Court GRANTS Plaintiffs’ motions for summary  
 21 judgment and vacates the Postponement Notice.

22

23 **IT IS SO ORDERED.**

24 Dated: October 4, 2017

25

26

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28

  
 ELIZABETH D. LAPORTE  
 United States Magistrate Judge