United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

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March 7, 2017

The Honorable Ryan Zinke
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

One of the fundamental tenets of public land law is that the American people should receive fair market value for the natural resources taken from the public lands.[1] You assured me, at your confirmation hearing, that you supported this important principle and agreed that "taxpayers should always get a fair value" for the resources extracted from the public lands.[2]

Consistent with this principle, last July, the Department of the Interior amended its regulations governing the valuation of oil and gas produced from federal onshore and offshore leases and coal produced from federal and Indian leases. One of the stated purposes of the amendments was to ensure that mining "companies have paid every dollar due" to the American people.[3] The new valuation rule went into effect over two months ago, on January 1, 2017.

On February 22, 2017, however, the Director of the Department's Office of Natural Resources Revenue "postponed the effectiveness" of the new rule, even though it had already been in effect for 53 days.[4] He cited section 705 of the Administrative Procedure Act as giving him that authority. Section 705 provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."[5] The American Petroleum Institute and others have filed suits challenging the new rule. The Director reasoned that "justice requires postponing the effectiveness of the 2017 Valuation Rule until the litigation is resolved."[6]

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1 Federal Land Policy and Management Act, § 102(9), 43 U.S.C. § 1701(9).

2 Hearing Transcript at 37-38 and 132-133.

3 Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 81 Fed. Reg. 43338 (July 1, 2016).

4 Postponement of Effectiveness of the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform 2017 Valuation Rule, 82 Fed. Reg. 11823 (Feb. 27, 2017).

5 5 U.S.C. § 705.

6 82 Fed. Reg. at 11824.

There are two major reasons why section 705 does not give the Department the authority the Director claims and why his attempt to postpone the effectiveness of the rule is contrary to law.

First, as the courts have said, section 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It does not permit the agency to suspend without notice and comment a promulgated rule...."[7] The operative verb in the statute is "to postpone." "According to the dictionary, to 'postpone' means 'to put off until a future time.' It is implicit in this definition that one can only postpone something that has not yet occurred. If a wedding occurs on September 2, one cannot 'postpone' the wedding until September 30 on September 5."[8] By the same token, the Department cannot "postpone" on February 22 the effectiveness of a rule that went into effect more than seven weeks before, on January 1.

Second, even if section 705 were to allow the Department to "postpone" that which has already occurred, the courts have made it clear that section 705 does not allow agencies to grant stays based upon their own notions of what may constitute "justice." The Department may only grant stays under section 705 upon consideration of the four-part test the courts use to determine whether to grant preliminary injunctions.[9] The Supreme Court has said that the proponent of a preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[10] The Director failed to apply—or even mention—this four-part test when he postponed the effective date of the new rule. His failure to do was arbitrary and capricious, and his decision to postpone the effective date must be set aside as unlawful.

We know this to be true because this is not the first time an agency has abused section 705 in this manner. In 2011, the Environmental Protection Agency issued a "Delay Notice," staying the effective date of two air pollution rules on the basis of section 705.[11] But the Agency found that "justice requires a stay, according to its broad, discretionary determination of what constitutes justice." It "neither employed nor mentioned the four-part test in its Delay Notice."[12]

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7 *Safety-Kleen Corp. v. Environmental Protection Agency*, 1996 U.S. App. LEXIS 2324 (D.C. Cir. 1996).

8 *Merriweather v. Sherwood,* 235 F. Supp. 2d 339, 342 (S.D. N.Y. 2002) (construing authority to "postpone the effective date of an automatic stay" under the Prison Litigation Reform Act).

9 *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012).

10 *Winter v. Natural Resources Defense Council,* 555 U.S. 7, 20 (2008).

11 *Sierra Club v. Jackson,* 833 F. Supp. 2d 11 (D.D.C. 2012). Unlike the Department's stay of the valuation rule, EPA tried to postpone the effective date of its rules <u>before</u> they went into effect, not after they were already in effect. *Id.* at 15.

12 *Id.* at 30-31.

The court said that an agency "must set forth its consideration of the [four] factors and its attendant conclusions of law." The court held that "the failure to do so ... is arbitrary and capricious,"[13] and set aside EPA's attempt to postpone the effective date of its two air pollution rules.[14]

The Department has plainly failed to show sufficient grounds for staying the effective date of the valuation rule's effective date under the four-part test. The first test is whether the plaintiffs in the lawsuits challenging the rule have "made a strong showing" that they are "likely to prevail on the merits" in the litigation. The Department's notice announcing the postponement suggests just the opposite. It states that the Office of Natural Resources Revenue "believes the 2017 Valuation Rule was properly promulgated," rather than fatally flawed.

The second test is whether the plaintiffs challenging the rule are "likely to suffer irreparable harm" if the effective date of the rule is not postponed. The Department asserts that its lessees may "incur the unreimbursable costs of reverting back to the old system" and "of correcting its reports and royalty payments" if they pay royalties under the new rule and the courts ultimately find the new rule to be invalid. The Department contends that incurring these costs constitute "potentially irreparable harm."[15]

There are two problems with the Department's reasoning on the second test. The first is that the courts have held that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended [complying with a regulation] in the absence of a stay, are not enough."[16] "Purely economic harm is not considered sufficiently grave under this standard unless it will 'cause extreme hardship to the business, or even threaten destruction of the business.'"[17]

The Department's rulemaking record simply does not support the claim that the lessees will suffer "irreparable harm" if the rule goes into effect and is later overturned. While the new rule is expected to result in the Department's lessees paying more royalties,[18] the additional royalties can be reimbursed if the courts later overturn the rule. Payment of reimbursable royalties does not constitute "irreparable harm."

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13 *Id.* at 31, citing *Gordon v. Holder,* 632 F.3d 722, 724 (D.C. Cir. 2011).

14 *Id.* at 35-36.

15 82 Fed. Reg. at 11824.

16 *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921, 925 (D.C. Cir. 1958).

17 *Affinity Healthcare Services, Inc. v. Sebelius,* 720 F. Supp. 2d 12, 17 (D.D.C. 2010), quoting *Gulf Oil Corp. v. Department of Energy,* 514 F. Supp. 1019, 1025 (D.D.C. 1981) (holding "irretrievable monetary loss" alone "is not enough" to establish "irreparable injury"). *See also Mexichem Specialty Resins, Inc. v. Environmental Protection Agency,* 787 F.3d 544, 555 (D.C. Cir. 2015), quoting *Wisconsin Gas Co. v. Federal Energy Regulatory Commission,* 758 F.2d 669, 674 (D.C. Cir. 1985).

18 81 Fed. Reg. 43359-43360 (estimating increased royalty collections of $71.9 million to $84.9 million).

Perhaps recognizing this, the Department contends that it is not the additional royalties, but the administrative costs the industry will bear "reverting back to the old" royalty system and "correcting its reports and royalty payments," if the new rule is overturned, which constitute "irreparable harm." But according to the rule's preamble, the Department estimates that the new rule will actually save the industry $3.61 million in administrative costs each year compared to the old system.[19] Allowing the new rule to go into effect will reduce the industry's administrative costs. The industry will reap these savings if the rule is upheld. Staying the new rule's effective date will deprive the industry of these savings. Plainly, then, allowing the new rule to go into effect plainly will not cause the industry "irreparable harm."

The other problem with the Department's reasoning on the second test is that the most the Department claims is "*potentially* irreparable harm." But the Supreme Court has said that is not enough to support a stay. It has made it clear that the four-part test requires a showing that "irreparable harm is *likely*."[20] The "possibility" of irreparable harm simply is not enough.

The third part of the four-part test requires the Department to consider whether postponing the effective date of the rule will "substantially harm other parties,"[21] and whether the "balance of equities" between the harm done to the industry from not postponing the effective date and the harm done to other parties by postponing it, "tips in ... favor" of the industry. In its preamble to the new rule, the Department estimated the new rule will increase royalty collections by over $78 million, of which over $18 million would be paid to states and $60 million would be retained by the Federal Government.[22] But in its notice announcing the postponement of the effective date of the rule, the Department simply dismissed the loss of these royalties as insignificant. It declared that "[t]he United States will suffer no significant harm from postponing the effectiveness" of the rule because "the Rule is not expected to have a significant impact on the economy."[23] It made no effort to balance the equities between the loss of $78 million in additional royalties to the federal and state governments and the cost to the industry of "reverting back to the old system" and "correcting its reports and royalty payments."

Moreover, the Department did not consider the substantial harm to the lessees that have already converted their accounting systems to comply with the new rule, and must now recovert their systems in order to report and pay royalties under the old rule. Nor did it balance the equities between those lessees who are willing to pay what is due and have already incurred the administrative costs of complying with the new rule and those lessees who are challenging the new rule in order to avoid the paying royalties on the fair value of their production. The Department ignored the harm postponement causes the former and considered only the potential harm not postponing the effective date may cause the latter.

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19 81 Fed. Reg. at 43359.

20 *Winter v. United States,* 555 U.S. at 22 (emphasis in original).

21 *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d at 925.

22 81 Fed. Reg. at 43367.

23 82 Fed. Reg. at 11823-11824.

The final part of the four-part test requires the Department to determine if staying the rule is in the public interest. Here, the Department simply declares, without explanation, that "the public interest ... requires postponing the effectiveness" of the new rule. In the absence of any analysis of the public interest, the Department's conclusion is unconvincing.[24] "By summarily citing to the public's interest without elaboration," the Department "abdicated its responsibility to fully analyze" the fourth factor in the four-part test.[25]

In sum, the Department's action in postponing the effective date of the new royalty valuation rule, which had already taken effect, exceeded the Department's authority under section 705 of the Administrative Procedure Act and does not meet the standards the courts have long required agencies to apply when they seek to use their authority under that section.[26] Postponing the effective date of the new rule in this manner was plainly contrary to law.

You testified at your confirmation hearing that you "will follow the law." [27] This may be a good place to start. You should lift the stay and let the royalty valuation rule go back into effect.

Sincerely,

Maria Cantwell

Maria Cantwell
Ranking Member

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24 *Winter v. United States,* 555 U.S. at 26 (finding that a district court had not given "serious consideration to the public interest factor," where it addressed this consideration "in only a cursory fashion," despite its importance).

25 *Gordon v. Holder,* 632 F.3d 722, 725 (D.C. Cir. 2011) (finding a "district court erred by addressing" the public interest factor "in conclusory fashion").

26 *Sierra Club v. Jackson,* 833 F. Supp. 2d at 30 ("the standard for a stay [under section 705] at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test"), citing *Cuomo v. Nuclear Regulatory Commission,* 772 F.2d 972, 974 (D.C. Cir. 1985); *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921, 925 (D.C. Cir. 1958).

27 Hearing Transcript at 107.