

1 ROBERT W. FERGUSON  
Attorney General of Washington  
2 KELLY T. WOOD, WSBA #40067  
WILLIAM R. SHERMAN, WSBA #29365  
3 STACEY S. BERNSTEIN, WSBA #40143  
Assistant Attorneys General  
4 800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
5 Telephone: (206) 326-5494  
Fax: (206) 587-5088  
6

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8 **UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

9 PEOPLE OF THE STATE OF  
CALIFORNIA, ex rel. XAVIER BECERRA,  
10 ATTORNEY GENERAL; STATE OF NEW  
MEXICO, ex rel. HECTOR BALDERAS,  
11 ATTORNEY GENERAL,  
Plaintiff,

12 v.

13 UNITED STATES DEPARTMENT OF THE  
INTERIOR; OFFICE OF NATURAL  
14 RESOURCES REVENUE; RYAN ZINKE,  
Secretary of the Interior; and GREGORY  
15 GOULD, Director, Office of Natural  
Resources Revenue,  
16 Defendants.

Case No. 3:17-cv-02376-EDL

NOTICE OF MOTION AND MOTION  
OF THE STATES OF WASHINGTON,  
OREGON, MARYLAND, AND NEW  
YORK TO FILE AN *AMICUS CURIAE*  
BRIEF IN SUPPORT OF PLAINTIFFS

Judge: Hon. Elizabeth D. Laporte

17 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

18 PLEASE TAKE NOTICE THAT the States of Washington, Oregon, Maryland, and New  
19 York (*amici* states) hereby move the Court for leave to file a brief *amicus curiae* in the above-  
20 captioned case in support of Plaintiffs. A copy of the proposed *amicus* brief is attached as an  
21 exhibit to this motion.

22 **I. LEGAL STANDARD**

23 District courts have wide discretion in granting leave to participate as *amicus curiae*.  
24 *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). While there is no specific rule on when  
25 such leave is proper, this discretion is liberally applied when the legal issues in a case “have  
26 potential ramifications beyond the parties directly involved.” *NGV Gaming, Ltd. v. Upstream*

1 | *Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005). Indeed, the “classic role” of  
2 | *amicus curiae* is filled in cases that involve the general public interest, including the  
3 | interpretation and status of the law. *Funbus Systems, Inc. v. State of Cal. Pub. Util.s Comm’n*,  
4 | 801 F.2d 1120, 1125 (9th Cir. 1986) (referencing *Miller-Wohl Co. v. Commissioner of Labor &*  
5 | *Industry*, 694 F.2d 203, 204 (9th Cir. 1982)); *Cnty. Ass’n for Restoration of the Env’t. (CARE)*  
6 | *v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

## 7 | II. STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

8 | The current case involves allegations that the United States Department of Interior,  
9 | Office of Natural Resources Revenue (ONRR), engaged in an expansive and illegal  
10 | interpretation of the federal Administrative Procedure Act (APA) to effectively rescind a duly  
11 | adopted and effective rule. The ramifications of this action go well beyond the parties to the case  
12 | and are well within matters of general public interest. As a result, the States are well-positioned  
13 | to file a brief *amicus curiae*. Each State has a proprietary interest in receiving its proper share of  
14 | royalty payments from oil and gas that may be produced on federal and tribal lands within the  
15 | State. Each State also has a strong interest in ensuring that federal agencies comply with the  
16 | APA and refrain from engaging in arbitrary and capricious decision-making. The States and their  
17 | businesses and residents depend on a stable and predictable federal regulatory environment.  
18 | Furthermore, the States have particular insights to share because they already have suffered  
19 | concrete harms following expansionary applications of § 705 of the APA.

## 20 | III. AMICI CURIAE’S EXPERTISE WILL BENEFIT THE COURT

21 | The *amici* States have “unique information” and a “perspective that can help the [C]ourt”  
22 | by demonstrating the broad implications flowing from ONRR’s actions and other expansionary  
23 | applications of § 705 by the new administration. *Sonoma Falls Developers, LLC v. Nev. Gold &*  
24 | *Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003). The ramifications of this case directly  
25 | affect the States, which will be negatively impacted if federal agencies engage in questionable  
26 | and expansive interpretations of the APA to postpone regulations already in effect that are

1 | important for the economic and environmental health of the state. States depend upon a stable  
2 | and predictable regulatory environment. It is especially important for the Court to consider the  
3 | States' view that the regulatory instability and administrative whim embodied by the  
4 | government's broad interpretation of § 705 of the APA imperils regulated entities and businesses  
5 | within the States. A favorable ruling from the Court in this challenge will make it more difficult  
6 | for federal agencies to engage in ad-hoc indefinite postponement of duly adopted regulations.

7 | **IV. CONCLUSION**

8 | For the foregoing reasons, the *amici* States respectfully request this Court's leave to file  
9 | the attached *amicus* brief.

10 | RESPECTFULLY SUBMITTED this 14th day of June 2017.

11 | ROBERT W. FERGUSON  
12 | Attorney General

13 | s/ Kelly T. Wood  
14 | KELLY WOOD, WSBA #40067  
15 | WILLIAM R. SHERMAN, WSBA #29365  
16 | STACEY S. BERNSTEIN, WSBA #40143  
17 | Assistant Attorneys General  
18 | Counsel for Environmental Protection Unit  
19 | Attorneys for Amicus Curiae  
20 | State of Washington

21 | ADDITIONAL COUNSEL:

22 | FOR THE STATE OF MARYLAND

23 | BRIAN E. FROSH  
24 | Attorney General of the State of Maryland  
25 | Steven M. Sullivan  
26 | Solicitor General  
Office of the Attorney General  
200 Saint Paul Place, 20<sup>th</sup> Floor  
Baltimore, Maryland 21202  
Tel: (410) 576-6427  
Email: ssullivan@oag.state.md.us

1 FOR THE STATE OF NEW YORK

2 ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
3 Attorney for Amicus Curiae State of New  
York

4 MONICA WAGNER  
Deputy Bureau Chief  
5 LEMUEL M. SROLOVIC  
Bureau Chief  
6 Environmental Protection Bureau  
Office of the Attorney General of the State  
7 of New York  
120 Broadway  
8 New York, NY 10271

9

10 FOR THE STATE OF OREGON

11 ELLEN F. ROSENBLUM  
ATTORNEY GENERAL  
12 Paul Garrahan  
Attorney-in-Charge  
13 Natural Resources Section  
Oregon Department of Justice  
14 1162 Court Street NE  
Salem, OR 97301-4096  
15 Tel: (503) 947-4593

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23

24

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26

1 ROBERT FERGUSON  
Attorney General of Washington  
2 KELLY T. WOOD, WSBA #40067  
WILLIAM R. SHERMAN, WSBA #29365  
3 STACEY BERNSTEIN, WSBA #40143  
Assistant Attorneys General  
4 800 Fifth Avenue, Suite 2000  
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5 Telephone: (206) 326-5494  
6 Fax: (206) 587-5088

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15 GOULD, Director, Office of Natural  
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Judge: Hon. Elizabeth D. Laporte

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## I. INTRODUCTION

States have fundamental interests in ensuring the proper execution of federal law by federal agencies. States are directly impacted by the federal government’s regulatory actions. States also have a duty to protect the legal rights of their citizens and ensure that federal actions impacting state interests are lawful. Here, the United States Department of Interior and its Office of Natural Resource Revenue (ONRR) violated the Administrative Procedure Act (APA) in a way that significantly impacts these interests.

In 2016, after a five-year rulemaking, including an extensive administrative record and over 1,000 pages of written comments, ONRR adopted a rule amending its formula for calculating royalties paid to the United States and tribes for oil, gas, and coal produced from federal and tribal lands; the new rule closed a loophole that had been exploited by industry to artificially lower the royalties paid for these resources. Fifty-seven days *after* the rule became effective—and with no notice or opportunity to comment—ONRR indefinitely suspended the rule and directed States and other regulated entities to use the superseded version of the rule. ONRR’s action violates the APA and effectively repeals the rule without notice and comment rulemaking with impacts far beyond the particular rule at issue here. The Court should invalidate the suspension.

## II. FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2016, after a five-year rulemaking process, ONRR finalized the “Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform” rule (“Rule”) in order to clarify the process for calculating royalties on oil, gas, and coal extracted from federal and Indian lands. 81 Fed. Reg. 43,338 (July 1, 2016). The Rule ended a long-standing industry practice of lowering

1 commodity values by selling coal to affiliated companies at artificially low prices. *Id.* at 43,339.  
2 In doing so, the rule ensures that American taxpayers and tribal governments receive royalties  
3 reflective of fair market value for resources extracted from public and tribal lands. 80 Fed.  
4 Reg. 608 (Jan 6, 2015). On December 29, 2016, various coal and oil industry groups challenged  
5 the Rule in the U.S. District Court for the District of Wyoming. *Cloud Peak Energy Inc., v. U.S.*  
6 *Dept. of Interior*, Case No. 2:16-cv-00315-NDF. The Rule became effective on January 1, 2017.

8 On February 22, 2017, nearly two months after the Rule's effective date, ONRR's  
9 Deputy Director issued a letter announcing the agency's decision to "postpone the effective date"  
10 of the Rule and re-instate the prior, superseded version. Stay Of the Consolidated Federal Oil &  
11 Gas and Federal & Indian Coal Valuation Reform Final Rule, *available at*  
12 <https://www.onrr.gov/about/PDFDocs/20170222.pdf>. In doing so, ONRR cited Section 705 of  
13 the APA, which allows an agency in narrow circumstances and when "justice so requires" to  
14 "postpone the effective date of action taken by it, pending judicial review." *Id.* Five days later,  
15 ONRR issued a "postponement of effectiveness" notification for the Rule in the Federal Register,  
16 largely mirroring the effect and reasoning set out in the February 22, 2017, letter and again citing  
17 Section 705 and the pending litigation as bases for suspending the Rule during the district court  
18 proceedings. 82 Fed. Reg. 11,823 (Feb. 27, 2017).

21 On April 4, 2017, ONRR published dual notices in the Federal Register: (1) an "advanced  
22 notice of forthcoming rulemaking" seeking comments on whether the Rule should be retained  
23 or modified (82 Fed. Reg. 16,330 (Apr. 4, 2017)); and (2) notice of its intent to repeal the Rule  
24 and "maintain the current regulatory status quo" (82 Fed. Reg. 16,323 (April 4, 2017)). Based  
25 on ONRR's notification of intent to repeal the Rule, the Wyoming court granted ONRR's request  
26

1 to stay the industry challenge pending the repeal process. *Cloud Peak Energy*, Order Granting  
2 In Part Unopposed Motion For Stay (April 27, 2017) (Dkt No. 33).

3 Because ONRR suspended the effective date of the Rule pending judicial review and  
4 judicial review of the Rule has been stayed pending the completion of the repeal process, the  
5 Rule has been effectively suspended pending permanent repeal. The States of California and  
6 New Mexico filed the current lawsuit, challenging ONRR's suspension of the Rule, on April 26,  
7 2017.  
8

### 9 III. ISSUE ADDRESSED

10 Whether ONRR violated the APA when it suspended the effective date of a rule that was  
11 already in effect and effectively repealed the rule without notice and comment rulemaking.  
12

### 13 IV. ARGUMENT

#### 14 A. ONRR's Suspension of the Valuation Reform Rule Violates the APA.

15 This Court should hold that ONRR's suspension of the Rule is barred by the APA. To  
16 begin with, ONRR's suspension of the Rule is not authorized by Section 705. Section 705 is  
17 narrowly crafted only to permit an agency to "postpone the effective date" of a not yet effective  
18 rule pending judicial review. 5 U.S.C. § 705. It does not allow the retroactive suspension of a  
19 rule that has already gone into effect. Here, contrary to the language, ONRR invoked Section  
20 705 to suspend a rule that was already effective. There should be little question that this action  
21 is outside the narrow range of what Section 705 permits.<sup>1</sup> For this reason, ONRR's suspension  
22 of the Valuation Rule is invalid on its face.  
23

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25 <sup>1</sup> In fact, to the *amici* states' knowledge, there is only one documented instance of an  
26 agency attempting to use Section 705 to "postpone" an effective rule. *See Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324 (D.C. Cir. 1996). In that case, the D.C. Circuit, in a one-page

1 Next, even if the effective date of a regulation that is already in effect can be suspended  
2 under section 705 pending judicial review of the regulation, that is not how ONRR applied  
3 Section 705 here. Instead, ONRR relied on Section 705 to suspend the effective date of the Rule  
4 pending its ultimate repeal. That amounts to a repeal of the Rule without notice and comment  
5 rulemaking, as required by section 553 of the Administrative Procedure Act. 5 U.S.C. § 553; *see*  
6 *also id.* § 551(5) (“rule making” includes “the agency process for . . . repealing a rule”).

8 Because effective dates are an “essential part” of adopted rules, the indefinite suspension  
9 of a rule is deemed a repeal that is invalid without notice and comment rulemaking. *See Natural*  
10 *Resources Defense Council v. EPA*, 683 F.2d 752, 761–62 (D.C. Cir. 1982) (*NRDC*); *see also*  
11 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (*State Farm*)  
12 (rescissions or modifications of substantive rules require a new rulemaking proceeding). In  
13 *NRDC*, the Court of Appeals ruled that the indefinite postponement of a regulation’s effective  
14 date pending reconsideration of the regulation effectively repealed the regulation and thus  
15 constituted a rulemaking for which notice and comment was required. 683 F.2d at 761–62.

17 Here, it is even clearer that the Rule has effectively been repealed because ONRR has  
18 announced its intent to repeal it and then postponed the Rule’s effective date until it can complete  
19 the repeal process. ONRR’s “postponement” lasts “until the judicial challenges to the Rule are  
20 resolved.” 82 Fed. Reg. 11,823. Almost immediately after suspending the Rule, however, ONRR  
21 sought—and received—a stay of the judicial challenge to the Rule effective until ONRR  
22

23 \_\_\_\_\_  
24 unreported *per curiam* decision, invalidated the action on this same basis. *Id.* (holding that  
25 Section 705 “permits an agency to postpone the effective date of a not yet effective rule, pending  
26 judicial review. It does not permit the agency to suspend without notice and comment a  
promulgated rule.”).

1 completes its repeal.<sup>2</sup> *Cloud Peak Energy*, Order Granting In Part Unopposed Motion For Stay  
 2 (April 27, 2017). As a result, the Rule’s effective date has been suspended until ONRR completes  
 3 the repeal process, which could take years. That amounts to a repeal of the Rule—without notice  
 4 and comment—well *before* ONRR completed its APA-mandated rulemaking to repeal the Rule.  
 5

6 In short, ONRR’s actions are well outside what the APA requires and should be  
 7 invalidated.

8 **B. ONRR’s Actions Undermine the APA’s Goal of Creating Stability and**  
 9 **Predictability With Regard to Federal Regulatory Efforts With Potential for**  
 10 **Impacts Well Beyond the Current Dispute.**

11 As noted above, States have a fundamental interest in ensuring the proper execution of  
 12 federal law by federal agencies, both as impacted parties and pursuant to their duties to protect  
 13 the legal rights of their citizens. When it comes to regulatory actions, both States and the citizens  
 14 and businesses within their borders frequently undertake substantial efforts to prepare for, and  
 15 comply with, regulatory actions. And, in many instances—including here—States and their  
 16 citizens are the direct beneficiaries of federal regulatory efforts.<sup>3</sup>

17 These significant interests are backstopped by two bedrock principles of the APA: (1)  
 18 advance notice of potential agency action and (2) an opportunity to meaningfully comment on  
 19 proposed actions before they are final. *See* 5 U.S.C. § 553. These requirements ensure that  
 20

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21  
 22 <sup>2</sup> ONRR’s announcement of its intent to repeal the Rule does not moot the States’  
 23 challenge to the suspension of the Rule pending repeal. That challenge will be moot only if and  
 24 when the repeal becomes final. *See Linlor v. Nev. DMV*, No. 12-15061, 2014 U.S. App. LEXIS  
 25 7135, at \*\*3 (9th Cir. Apr. 16, 2014) (challenged to a repealed regulation is moot because the  
 26 repeal is final). Furthermore, as discussed below, Defendants Secretary Zinke and the  
 Department of Interior continue to take the same action with other rules. *See*  
<https://www.federalregister.gov/d/2017-12325>.

<sup>3</sup> In this case, Plaintiff States impacted by the Rule stand to lose significant revenues  
 from ONRR’s suspension. *See* Complaint ¶¶ 21-23 (ECF No. 1).

1 interested parties are involved early in the rulemaking process and provide a mechanism to  
2 substantively engage with the regulating agency on proposed rules. *See, e.g., N.L.R.B. v. Wyman-*  
3 *Gordon Co.*, 394 U.S. 759, 764 (1969) (APA “designed to assure fairness and mature  
4 consideration” when adopting regulations); *Brown Express, Inc. v. U.S.*, 607 F.2d 695, 701 (5th  
5 Cir. 1979) (APA ensures that the broadest base of information is provided to agencies by those  
6 most impacted and, thus, perhaps best informed); *Nat’l Retired Teachers Ass’n v. U.S. Postal*  
7 *Service*, 430 F. Supp. 141, 147 (D.D.C. 1977) (APA’s rulemaking provisions were enacted for  
8 the central purpose of allowing public participation in the promulgation of rules that have a  
9 substantial impact on those regulated).  
10

11 The consequences of failing to follow these procedures are clear. Shifting policies and  
12 regulatory instability “imperils” regulated entities and “muddles the regulatory landscape.”  
13 *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502, 541 (2009) (Kennedy,  
14 J., dissenting) (discussing undisputed APA policy rather than matters specific to the majority  
15 decision). As a result, both the APA and the rule of law “favor stability over administrative  
16 whim.” *Id at 542.*  
17

18 Allowing ONRR to effectively repeal a rule without notice and comment rulemaking  
19 flips this paradigm on its head and encourages policy whiplashes to the detriment of stability and  
20 predictability. The Valuation Rule represents *years* of preparation and process across multiple  
21 administrations. The rulemaking efforts trace back to 2007 when a Bush Administration  
22 committee recognized that states and tribes were not receiving fair royalties for oil, gas, and coal.  
23 80 Fed. Reg. 607, 608. Following the committee’s recommendations, the official rulemaking  
24 started in 2011 and concluded in 2016 after five years and a robust public process.  
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1 76 Fed. Reg. 30,878, 30,881. At the time ONRR issued its suspension notice, the Rule had been  
2 final for the better part of a year and effective for almost two months. By that time, and beginning  
3 well ahead of the Rule’s effective date, affected parties had already taken steps to comply with  
4 the new Rule. 82 Fed. Reg. 11823 n.2. ONRR’s postponement of the Rule’s effective date  
5 undermined those steps, disregarded the years of effort and outreach the agency had undertaken,  
6 and instantly disrupted any reasonable reliance on the predictability and stability of duly  
7 promulgated agency rulemaking.  
8

9 This is the opposite of what the APA requires. Under the APA, agencies must engage in  
10 notice and comment rulemaking when adopting *or repealing* any substantive rules.<sup>4</sup>  
11 *See* 5 U.S.C. §§ 551(5), 553. As with adoption, the repeal of a rule must be supported by a  
12 “reasoned analysis for the change.” *State Farm*, 463 U.S. at 42. Once an agency finalizes a rule,  
13 it “embodies the agency’s informed judgment” that the rule discharges its duty to “carry out the  
14 policies committed to it by Congress.” *Id* at 41–42. As a result, adopted rules create “a  
15 presumption that those policies will be carried out best if the [existing] rule is adhered to” and a  
16 “presumption ... *against* changes in current policy that are not justified by the rulemaking  
17 record.” *Id.* at 42 (emphasis original); *see also AFGE, Local 3090 v. FLRA*, 777 F.2d 751, 759  
18 (D.C. Cir. 1985) (“an agency seeking to repeal or modify a legislative rule promulgated by means  
19 of notice and comment rulemaking is obligated to undertake similar procedures to accomplish  
20 such modification or repeal and to provide a reasoned explanation for the change addressing  
21 with some precision any concerns voiced in the comments received” (citation omitted)). Ad-hoc  
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26 <sup>4</sup> An agency also may not “simply disregard rules that are still on the books.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

1 rescissions of existing rules with no record to justify and without following the APA’s mandated  
2 procedures for doing so destroys these presumptions and violates both the letter and the spirit of  
3 the APA.

4           The impacts of allowing actions like ONRR’s are not limited to the Valuation Rule.  
5 ONRR’s assertion of what is permissible under Section 705 leaves no logical end point for the  
6 amount of time a regulation can be effective yet still be “postponed.” Under ONRR’s rationale,  
7 so long as a rule has been challenged, agencies can suspend existing rules indefinitely pending  
8 their ultimate repeal. Because the general statute of limitations for APA actions is six years,  
9 incoming administrations—both current and future—could reach back *years* into a prior  
10 administration and nullify duly adopted regulations that are subject to that limitations period,  
11 with little or no notice to impacted parties or the public. *See, e.g., Hells Canyon Preservation*  
12 *Council v. U.S. Forest Service*, 593 F.3d 923, 930 (9th Cir. 2010) (unless otherwise specified by  
13 statute, APA claims are subject to general six-year statute of limitations). Armed with this  
14 knowledge, those hostile to regulations within this time window are incentivized to file judicial  
15 challenges or draw existing challenges out until a more friendly administration is in place. As  
16 with this case, the agency need only indefinitely stay the litigation pending official repeal (likely  
17 a multi-year process itself<sup>5</sup>) in order to accomplish what is, in very real effect, a rescission of the  
18 regulation without any opportunity for notice and comment.  
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24 <sup>5</sup> Because it will need to overcome its own substantial record to the contrary, ONRR’s  
25 repeal of the Valuation Rule will likely take several years to accomplish. *See, e.g., State Farm*,  
26 463 U.S. at 42 (“an agency changing its course by rescinding a rule is obligated to supply a  
reasoned analysis for the change beyond that which may be required when an agency does not  
act in the first instance.”).

1 Throughout the federal government, *thousands* of rules potentially fall within this  
2 category. Among federal agencies, there are 17,246 final rules with effective dates  
3 between May 2011 and May 2017. *See* Office of the Federal Register,  
4 <https://www.federalregister.gov/documents/search#advanced> (last accessed on May 25, 2017).  
5 Although some may have shorter statutes of limitations, the six-year limitations period will apply  
6 to many. ONRR alone has over two dozen rules proposed or finalized in the last six years, some  
7 with effective dates going back to 2012. *See, e.g.*, 77 Fed. Reg. 25,881 (governing debt  
8 collection); 78 Fed. Reg. 52,431 (amending service of official correspondence rule);  
9 79 Fed. Reg. 62,047 (amending appeals procedures).  
10

11 Beyond potential future harm, similar expansive readings of Section 705 and other  
12 provisions of the APA are in fact already occurring. In fact, just today the Department of  
13 Interior’s Bureau of Land Management provided pre-publication notice that it intends to use  
14 Section 705 to postpone the “Waste Prevention Rule,” which aims to reduce the flaring of natural  
15 gas from federal and Indian leases. *See* <https://www.federalregister.gov/d/2017-12325>. The rule  
16 has been in effect for nearly six months. 81 Fed. Reg. 83,008 (Nov. 18, 2016). For another  
17 example, on April 25, 2017, without public notice or opportunity to comment, EPA used Section  
18 705 to promulgate a stay of an EPA regulation regarding new water effluent limits for steam  
19 power plants, suspending and indefinitely postponing remaining compliance deadlines for  
20 covered power plants and effectively grinding the rule to a halt. 82 Fed. Reg. 19,005  
21 (April 25, 2017). Several regulated entities and industry groups challenged the regulation in the  
22 Fifth Circuit, *Southwestern Electric Power Co., et al. v. EPA*, No. 15-60821, and the day before  
23 EPA issued its suspension, the Fifth Circuit granted an EPA motion to put the litigation on hold.  
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26



1 should reverse this expansive and illegal interpretation of APA authority by granting Plaintiffs’  
2 Motion for Summary Judgment.

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4 RESPECTFULLY SUBMITTED this 14 day of June 2017.

5 ROBERT W. FERGUSON  
6 Attorney General

7 s/ Kelly T. Wood  
8 KELLY T. WOOD, WSBA #40067  
9 WILLIAM R. SHERMAN, WSBA #29365  
10 STACEY BERNSTEIN, WSBA #40143  
11 Assistant Attorneys General  
12 Counsel for Environmental Protection Unit  
13 Attorneys for Amicus Curiae  
14 State of Washington

15 ADDITIONAL COUNSEL:

16 FOR THE STATE OF MARYLAND

17 BRIAN E. FROSH  
18 Attorney General of the State of Maryland  
19 Steven M. Sullivan  
20 Solicitor General  
21 Office of the Attorney General  
22 200 Saint Paul Place, 20<sup>th</sup> Floor  
23 Baltimore, Maryland 21202  
24 Tel: (410) 576-6427  
25 Email: ssullivan@oag.state.md.us

26 FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for Amicus Curiae State of New York  
MONICA WAGNER  
Deputy Bureau Chief  
LEMUEL M. SROLOVIC  
Bureau Chief  
Environmental Protection Bureau  
Office of the Attorney General of the State of New York  
120 Broadway  
New York, NY 10271

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FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM  
ATTORNEY GENERAL  
Paul Garrahan  
Attorney-in-Charge  
Natural Resources Section  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096  
Tel: (503) 947-4593