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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

DAVID BERNHARDT, et al.,

Defendants.

SIERRA CLUB, et al.,

Plaintiffs,

v.

DAVID BERNHARDT, et al.,

Defendants.

Case No. 4:18-cv-05712-YGR

(Consolidated with No. 4:18-cv-05984-YGR)

STATE PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT

Date: January 14, 2020
Time: 10:00 a.m.
Courtroom: 1, 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on January 14, 2020, at 10:00 a.m., or as soon thereafter as it may be heard, Plaintiffs State of California, by and through Xavier Becerra, Attorney General, and the California Air Resources Board, and State of New Mexico, by and through Hector Balderas, Attorney General (collectively, "State Plaintiffs"), by and through the undersigned counsel, will, and hereby do, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Civil Local Rule 7. This motion will be made before the Honorable Yvonne Gonzalez Rogers, United States District Judge, Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs hereby move for summary judgment on the ground that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In support of this motion, Plaintiffs submit the accompanying Memorandum of Points and Authorities and a Proposed Order.

MEMORANDUM OF POINTS AND AUTHORITIES

In this action, State Plaintiffs challenge the latest decision by the U.S. Bureau of Land Management, *et al*. ("BLM" or "Defendants") to repeal the key requirements of the 2016 Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule (the "Waste Prevention Rule" or "Rule"). Developed over the course of several years, the Waste Prevention Rule was a commonsense measure to reduce the enormous waste of natural gas from oil and gas operations on federal and tribal lands. At the time that it was promulgated, BLM estimated that the Rule would allow for an additional 41 billion cubic feet of natural gas production per year, increasing royalty payments to the federal government, tribes, and states, while reducing harmful emissions of methane and hazardous air pollutants.

However, soon after the change in Presidential administration in January 2017, BLM initiated a series of illegal attempts to prevent implementation of the Rule. First, the agency purported to postpone certain compliance dates of the Rule even though it had already gone into effect—an illegal action that was vacated by this District Court. *State of California v. U.S.*

Bureau of Land Mgmt., 277 F. Supp. 3d 1106 (N.D. Cal. 2017) ("*California I*"). Then, BLM finalized a rule to suspend certain requirements of the Rule pending its reconsideration. In deciding a motion for preliminary injunction, this District Court found the agency's action unlawful, holding that BLM had failed to provide any reasoned basis for its action or adequate notice and comment as required by the Administrative Procedure Act ("APA"). *State of California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018) ("*California II*").

BLM's latest attempt to repeal the key requirements of the Waste Prevention Rule fares no better. 83 Fed. Reg. 49,184 (Sept. 28, 2018) (the "Rescission") (AR 1).[1] Contrary to the requirements of the APA, BLM failed to offer a reasoned explanation for repealing the key provisions of a Rule that, just two years prior, it determined was necessary to fulfill its statutory mandates to prevent waste, ensure that wasted gas is subject to royalties, and safeguard the public welfare. Instead, the justifications that BLM does provide for the Rescission lack merit and are contrary to BLM's governing statutes and the evidence in the record, providing several independent bases for this Court to find the Rescission to be arbitrary and capricious. First, BLM's assertion that the Rule exceeds its statutory authority to regulate "waste" is unsupported by legal authority and is contrary to BLM's own statements when promulgating both the Rescission and the Rule itself. Second, BLM's claim that the Rule would "unnecessarily encumber energy production, constrain economic growth, and prevent job creation" is directly contradicted by its own findings. Third, BLM's analysis purporting to show that the costs of the Rule now exceed its benefits—a wholesale reversal from its own conclusions in 2016—relies on arbitrary, outcome-driven, and unsupported cost figures. Fourth, BLM has failed to explain why other federal and state requirements, which were in existence at the time the Rule was promulgated, now warrant the Rescission. Furthermore, BLM's new definition of "waste of oil or gas" is contrary to the language of the Mineral Leasing Act and the agency's longstanding definition and interpretation of this term, and lacks any reasoned basis. Finally, BLM's perfunctory conclusion that the Rescission would result in no significant environmental impacts violates the requirements of the National Environmental Policy Act ("NEPA").

[1] The administrative record in this matter is cited as "AR [page number], excluding leading zeros.

Consequently, this Court should find that State Plaintiffs are entitled to judgment as a matter of law on their claims that BLM violated the APA and NEPA in promulgating the Rescission, and should vacate the Rescission so that the Waste Prevention Rule is reinstated in its entirety.

STATUTORY BACKGROUND

I. FEDERAL LAND MANAGEMENT STATUTES AND BLM'S DUTY TO PREVENT WASTE.

BLM has a statutory duty to prevent waste and regulate royalties from oil and gas operations on federal and Indian lands. First, the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 181 *et seq*., instructs BLM to require oil and gas lessees to observe "such rules … for the prevention of undue waste as may be prescribed by [the] Secretary," to protect "the interests of the United States," and to safeguard "the public welfare." *Id*. § 187. The MLA specifically requires that "[a]ll leases of lands containing oil or gas … shall be subject to the condition that the lessee will … use all reasonable precautions to prevent waste of oil or gas developed in the land… ." *Id*. § 225.

Pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g, and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–08, BLM has authority to regulate oil and gas development on 56 million acres of Indian mineral estate held in trust by the federal government. *See, e.g.*, 25 U.S.C. § 396d (oil and gas operations on Indian lands subject "to the rules and regulations promulgated by the Secretary").

BLM has authority to regulate royalty payments pursuant to the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), 30 U.S.C. § 1701 *et seq*. In FOGRMA, Congress reiterated its concern about the waste of public resources by providing that: "Any lessee is liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence on the part of the operator of the lease, or due to the failure to comply with any rule or regulation, order or citation issued under this chapter or any mineral leasing law." *Id*. § 1756.

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*., provides BLM with broad authority to regulate "the use, occupancy, and development of the

public lands" under the principles of "multiple use and sustained yield." *Id*. § 1732. Among other requirements, FLPMA mandates that BLM manage public lands "in a manner that will protect the quality of … ecological, environmental, [and] air and atmospheric … values," *id*. § 1701(a)(8), and provides that BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." *Id*. § 1732(b).

II. THE ADMINISTRATIVE PROCEDURE ACT.

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, governs the procedural requirements for agency decision-making, including the rulemaking process. Prior to formulating, amending, or repealing a rule, agencies must engage in a notice-and-comment process. 5 U.S.C. §§ 551(5), 553. Notice must include "the legal authority under which the rule is proposed," and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id*. § 553(b). The public may then submit comments which the agency must consider before promulgating a final rule. *Id*. § 553(c). Specifically, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id*. To satisfy the requirements of Section 553, notice of a proposed rule must "provide an accurate picture of the reasoning that has led the agency to the proposed rule," so as to allow an "opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 528-30 (D.C. Cir. 1982); *Safe Air for Everyone v. U.S. E.P.A.*, 488 F.3d 1088, 1098 (9th Cir. 2007) (finding that the APA requires that interested parties have a "meaningful opportunity to comment on proposed regulations").

The above notice and comment requirements likewise apply when an agency seeks to amend or repeal a rule that has previously been promulgated. *See Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) ("Section 553 of the Administrative Procedure Act requires agencies to afford notice of a proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, amendment, modification, or repeal."). "The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it

accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982). If an agency fails to comply with these procedures, a court "must" set aside the rule. *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

FACTUAL AND PROCEDURAL BACKGROUND[2]

I. WASTE OF FEDERALLY-MANAGED OIL AND GAS RESOURCES.

BLM, a component of the U.S. Department of the Interior ("DOI"), oversees more than 245 million acres of land and 700 million subsurface acres of federal mineral estate, on which reside nearly 100,000 producing onshore oil and gas wells. 83 Fed. Reg. at 49,184 (AR 1). In fiscal year 2017, federal onshore production lands accounted for approximately 9 percent of domestic natural gas production, 5 percent of U.S. oil production, and generated $1.9 billion in royalties, which were shared with tribes and states. 83 Fed. Reg. at 49,184-85 (AR 1-2); *see* 30 U.S.C. § 191(a). Oil and gas production in the United States has increased dramatically over the past decade due to technological developments such as hydraulic fracturing and directional drilling. 81 Fed. Reg. at 83,009 (AR 910). However, the American public has not fully benefitted from this increase in domestic energy production because it "has been accompanied by significant and growing quantities of wasted natural gas." *Id*. at 83,014 (AR 915). For example, between 2009 and 2015, nearly 100,000 oil and gas wells on federal land released approximately 462 billion cubic feet ("Bcf") of natural gas through venting and flaring, enough gas to serve about 6.2 million households for a year. *Id*. at 83,009 (AR 910). In 2014 alone, operators vented about 30 Bcf and flared at least 81 Bcf of natural gas, approximately 4.1 percent of the total production from BLM-administered leases or enough natural gas to supply 1.5 million households for a year. *Id*. at 83,010 (AR 911).

When oil and gas operators waste natural gas through venting, flaring, and leaks, this not only squanders a valuable public resource that could be used to supply our nation's power grid and generate royalties, but it also harms air quality. For example, venting, flaring, and leaks of

[2] Additional background is provided in the Joint Statement Regarding Procedural History, ECF No. 98.

natural gas can release volatile organic compounds ("VOCs"), including benzene and other hazardous air pollutants, as well as nitrogen oxides and particulate matter, which can cause and worsen respiratory and heart problems. *Id*. at 83,014 (AR 915). In addition, the primary constituent of natural gas—methane—is an especially potent greenhouse gas, which contributes to climate change at a rate much higher than carbon dioxide. *Id*. at 83,009 (AR 910).

II. BLM'S DEVELOPMENT OF THE WASTE PREVENTION RULE.

Prior to 2016, BLM's regulatory scheme governing the minimization of resource waste had not been updated in over three decades. *Id*. at 83,008 (AR 909). Several oversight reviews, including those by the Government Accountability Office ("GAO") and the Department of the Interior's Office of the Inspector General, specifically called on BLM to update its "insufficient and outdated" regulations regarding waste and royalties. *Id*. at 83,009-10 (AR 910-11). The GAO specifically noted in 2010 that "around 40 percent of natural gas estimated to be vented and flared on onshore Federal leases could be economically captured with currently available control technologies." *Id*. at 83,010 (AR 911). The reviews recommended that BLM require operators to augment their waste prevention efforts and clarify policies regarding royalty-free, on-site use of oil and gas. *Id*.

In 2014, BLM responded to these reports by initiating the development of a rule to update its existing regulations on these issues. *Id*. After soliciting and reviewing input from stakeholders and the public, BLM released its proposal in February 2016. 81 Fed. Reg. 6,616 (Feb. 8, 2016) ("Proposed Rule") (AR 992). BLM received approximately 330,000 public comments, including approximately 1,000 unique comments, on the Proposed Rule. 81 Fed. Reg. at 83,021 (AR 922). The agency also hosted stakeholder meetings and met with regulators from states with significant federal oil and gas production. *Id*.

BLM issued the final Waste Prevention Rule in November 2016. *Id*. at 83,008 (AR 909). In the final Rule, BLM refined many of the provisions of the Proposed Rule based on public comments to ensure both that compliance was feasible for operators and that the Rule achieved its waste prevention objectives. *Id*. at 83,022-23 (AR 923-24). The Rule was designed to attain considerable reductions in waste from flaring, venting, and equipment leaks, saving and putting to

use up to 41 billion cubic feet of gas per year. *Id.* at 83,014 (AR 915). In addition, the Rule would annually avoid an estimated 175,000-180,000 tons of methane emissions, cut emissions of volatile organic compounds by 250,000–267,000 tons, reduce toxic air pollutants by 1,860–2,030 tons, and generate up to $14 million in additional royalties. *Id*.

The Rule addressed each major source of natural gas waste from oil and gas production—venting, flaring, and equipment leaks—through different requirements. *Id*. at 83,010–13 (AR 911-14). In particular, the Rule prohibited venting except under specified conditions, and required updates to existing equipment. *Id*. at 83,011–13 (AR 912-14). The Rule's flaring regulations reduced waste by requiring gas capture percentages that increased over time, providing exemptions that scaled down over time, and requiring operators to submit waste minimization plans. *Id*. at 83,011 (AR 912). Leak detection provisions required semi-annual inspections for well sites and quarterly inspections for compressor stations. *Id*.

BLM determined that the Rule's benefits outweighed its costs "by a significant margin." *Id*. at 83,014 (AR 915). Using a peer-reviewed model known as the "social cost of methane," which was developed by a federal agency working group for use in agency rulemakings, BLM measured the benefits of the Rule by considering "the cost savings that the industry would receive from the recovery and sale of natural gas and the environmental benefits of reducing the amount of methane (a potent [greenhouse gas]) and other air pollutants released into the atmosphere." *Id*. BLM estimated that the Rule would result in monetized benefits of $209–$403 million annually, including the monetized benefits of reducing methane emissions by roughly 35 percent, and would improve air quality and overall quality of life for residents living near oil and gas wells. *Id*. The Rule's costs, on the other hand, would be minimal—between $114 and $275 million per year industry-wide—which even for small operators would reduce profit margin by an average of just 0.15 percentage points. *Id*. at 83,013-14 (AR 914-15). BLM acknowledged that these cost estimates could be overstated because they did not take into account operators that were already in compliance with the requirements of the Rule. *Id*. at 83,013 (AR 914).

III. ATTEMPTS TO INVALIDATE, POSTPONE, AND SUSPEND THE RULE.

Soon after the Rule was finalized, two industry groups and the States of Wyoming and Montana (later joined by North Dakota and Texas) (collectively, "Petitioners") challenged the Rule in federal district court in Wyoming, on the alleged basis that BLM did not have statutory authority to regulate air pollution and that the Rule was arbitrary and capricious. *Western Energy Alliance v. Jewell*, No. 2:16-cv-00280-SWS (D. Wyo. petition filed Nov. 16, 2016); *State of Wyoming v. U.S. Dep't of the Interior*, No. 2:16-cv-00285-SWS (D. Wyo. petition filed Nov. 18, 2016). State Plaintiffs, along with several environmental organizations, intervened on the side of BLM in defense of the Rule. On January 16, 2017, the Wyoming district court denied the Petitioners' motions for a preliminary injunction, finding that the Petitioners had failed to establish a likelihood of success on the merits or irreparable harm. *Wyoming v. U.S. Dep't of the Interior*, 2017 WL 161428 (D. Wyo. Jan. 16, 2017). The Waste Prevention Rule went into effect on January 17, 2017. 81 Fed. Reg. at 83,008 (AR 909).

On March 28, 2017, President Donald Trump issued Executive Order 13783, entitled "Promoting Energy Independence and Economic Growth." 82 Fed. Reg. 16,093 (Mar. 31, 2017) (AR 1871). Section 7 of that Executive Order, entitled "Review of Regulations Related to United States Oil and Gas Development," specifically called on the Secretary of the Interior to review and "as soon as practicable, suspend, revise, or rescind" the Waste Prevention Rule. *Id*. at 16,096 (AR 1874). The next day, then-Secretary of the Interior Ryan Zinke issued Secretarial Order 3349, which provided that within 21 days, BLM would review the Rule and issue an internal report as to "whether the rule is fully consistent with the policy set forth in Section 1 of the March 28, 2017 E.O." AR 1863-1867.

Concurrently, various states and industry groups lobbied members of Congress to repeal the Waste Prevention Rule using the Congressional Review Act, 5 U.S.C. § 801 *et seq*. On February 3, 2017, the House passed Joint Resolution 36 to disapprove of the Waste Prevention Rule. 163 Cong. Rec. H949, H951 (Feb. 3, 2017). However, on May 10, 2017, a similar resolution failed in the Senate, leaving the Rule in effect. 163 Cong. Rec. S2851, S2853 (May 10, 2017).

On June 15, 2017, BLM published a notice in the Federal Register purporting to postpone certain compliance dates of the Rule subject to APA Section 705, 5 U.S.C. § 705. 82 Fed. Reg. 27,430 ("Postponement Notice"). State Plaintiffs challenged this unlawful action on July 5, 2017 in this District Court. On October 4, 2017, the Court ruled that Section 705 did not apply to an already-effective rule, and that BLM had failed to comply with the APA's notice and comment procedures. *California I*, 277 F. Supp. 3d at 1121. The Court also found that BLM's failure to consider foregone benefits rendered their action arbitrary and capricious in violation of the APA. *Id*. at 1123. Thus, the Court vacated the Postponement Notice, and the Rule went back into effect. *Id*. at 1127.

On October 5, 2017, BLM published a notice in the Federal Register proposing to delay and suspend certain requirements of the Rule that were already in effect, or set to take effect in January 2018, until January 17, 2019. 82 Fed. Reg. 46,458 (Oct. 5, 2017) ("Proposed Suspension") (AR 685). The requirements BLM targeted for suspension include those covered by its prior Postponement Notice, as well as already-effective rules governing waste minimization plans, well drilling, well completion and related operations, and downhole well maintenance and liquids unloading. The public was permitted 30 days to submit comments. *Id*. State Plaintiffs commented in opposition to the Proposed Suspension.

On December 8, 2017, BLM issued a final rule suspending key requirements of the Waste Prevention Rule. 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Suspension") (AR 661). To justify the Suspension, BLM stated it had "concerns regarding the statutory authority, cost, complexity, feasibility, and other implications" of the Rule, and therefore sought to suspend "requirements that may be rescinded or significantly revised in the near future." *Id*. State Plaintiffs challenged the Suspension in this District Court. On a motion for preliminary injunction, the Court ruled in favor of State Plaintiffs once again, finding that BLM had failed to provide a reasoned analysis for the Suspension or factual support for the concerns which allegedly justified this action. *California II*, 286 F. Supp. 3d at 1068. The Court also found that Suspension was likely to result in "concrete harms that BLM's own data suggests are significant and imminent," such as

significant emissions of methane, VOCs, and other hazardous pollutants. *Id*. at 1073-75. Consequently, the Court enjoined the Suspension. *Id*. at 1076.

After the failure of BLM's first two attempts to undo the Waste Prevention Rule, opponents of the Rule returned to the Wyoming district court to seek to revive their dormant challenge. On April 4, 2018, following briefing on Petitioners' renewed motions for preliminary relief, the Wyoming district court issued an Order staying implementation of the Waste Prevention Rule's provisions with January 2018 compliance deadlines. *Wyoming v. U.S. Dep't of the Interior*, Case No. 2:16-cv-00285-SWS, ECF No. 215 ("Stay Order") (AR 23323-23333). On April 5 and 6, 2018, the Conservation and Tribal Citizen Group Plaintiffs and State Plaintiffs, respectively, appealed the Stay Order to the Tenth Circuit Court of Appeals, challenging the district court's failure to apply the four preliminary injunction factors prior to issuing a stay. On April 9, 2019, the Tenth Circuit issued an Order and Judgment dismissing the appeals as moot and vacating the Wyoming district court's Stay Order. *Wyoming v. U.S. Dep't of Interior*, --- Fed. Appx. ---, 2019 WL 1531498 (10th Cir. 2019).

IV. THE RESCISSION.

On February 22, 2018, BLM published a proposed "Rescission or Revision of Certain Requirements" of the Waste Prevention Rule, 83 Fed. Reg. 7,924 ("Proposed Rescission") (AR 415), in which the agency proposed to repeal the majority of the Rule's provisions. *Id*. at 7,928 (AR 419). BLM offered three primary justifications for the Proposed Rescission: (1) the agency had reconsidered the balance of the Rule's burdens and benefits, (2) the Rule overlapped with other federal and state requirements, and (3) the Rule would have an undue impact on marginal or low-producing wells. *Id*. at 7,924 (AR 415). The agency also requested comment on "whether the 2016 Rule is consistent with [BLM's] statutory authority," without elaborating on whether BLM had changed its longstanding position that the Rule was within its broad authority to regulate waste or providing a basis for its request. *Id*. at 7,927 (AR 418); *see, e.g.*, AR 21397 (BLM arguing that "[b]ecause the Rule is aimed at waste prevention, it falls squarely within BLM's authority under the Mineral Leasing Act"). State Plaintiffs submitted comments on the Proposed Rescission on April 23, 2018, urging BLM to preserve the Waste Prevention Rule's

important requirements to prevent waste, protect public resources, boost royalty receipts for American taxpayers, and ensure the safe and responsible development of oil and gas resources. AR 84743-84760, 104442-104461.

On September 28, 2018, BLM issued a final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements." 83 Fed. Reg. 49,184 (Sept. 28, 2018) (AR 1). The Rescission eliminated key provisions of the Waste Prevention Rule, including: (1) waste minimization plans, (2) gas-capture percentages, (3) well drilling requirements, (4) well completion and related operations requirements, (5) pneumatic controller requirements, (6) pneumatic diaphragm pump requirements, (7) storage vessel requirements, and (8) leak detection and repair requirements. *Id.* at 49,190 (AR 7). The Rescission also modified requirements related to gas capture, downhole well maintenance and liquids unloading, and measuring and reporting volumes of flared and vented gas—effectively reverting to regulatory requirements that preceded the Rule. *Id.* As BLM admits, the final rule "will remove almost all of the requirements in the 2016 rule that [BLM] previously estimated would pose a compliance burden to operators and generate benefits of gas savings or reductions in methane emissions." *Id.* at 49,204 (AR 21).

BLM's justifications for the Rescission included those offered for the Proposed Rescission: that the Waste Prevention Rule "added regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation"; that the Rule would have "imposed compliance costs well in excess of the value of the resource (natural gas) that would have been conserved," especially with regard to marginal wells; and that the Rule overlapped with EPA and state requirements for oil and gas operations. *Id.* at 49,184 (AR 1). In addition, BLM argued for the first time that the Rule "exceeded the BLM's statutory authority to regulate the prevention of 'waste,'" and it adopted a new regulatory definition of "waste of oil or gas" so that it would only apply "where compliance costs are not greater than the monetary value of the resources they are expected to conserve." *Id.* at 49,185-86, 49,197 (AR 2-3, 14).

On September 28, 2018, BLM also released a "Regulatory Impact Analysis for the Final Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule"

("Regulatory Impact Analysis" or "RIA"). AR 32. While the Regulatory Impact Analysis "draws heavily upon the analysis conducted in the RIA for the 2016 rule," it reaches the opposite conclusion in finding that the costs of the Rule's requirements outweigh its benefits for three primary reasons. RIA at 2-3 (AR 36-37). First, BLM relied upon a new "interim domestic social cost of methane" metric that excludes the "global" costs resulting from increased methane emissions. RIA at 2, 40-44 (AR 36, 74-78). BLM also found that the administrative burdens of the Rule were twice as high as those calculated in 2016, and added a new discussion regarding the impacts of the Rule on marginal wells. RIA at 39-40 (AR 73-74).

BLM also issued a 26-page Final Environmental Assessment ("EA"), and a Finding of No Significant Impact, concluding that the Rescission would have no significant impacts on the environment. AR 297-323, 332-339. While BLM admits that the Rescission would result in increased VOC emissions (80,000 tons per year) and hazardous air pollutants (1,860 tons per year) and that "minority and low-income populations living near oil and gas operations would have benefitted from the reductions in emissions" under the Rule, it provides no consideration of this issue other than to state that "[t]hese air pollutants affect the health and welfare of humans, as well as the health of plant and wildlife species." EA at 19 (AR 316). Although BLM's estimates of increased methane emissions are similar to what it calculated in 2016 (175,000 tons per year), the agency concludes that "the actual effects of such emissions on global climate change cannot be reliably assessed and thus are sufficiently uncertain as to be not reasonably foreseeable." EA at 18 (AR 315). Furthermore, BLM provides virtually no analysis of impacts from increased noise and light pollution. EA at 20 (AR 317).

STANDARD OF REVIEW

Summary judgment should be granted when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding whether to grant summary judgment in an APA challenge, the district court "is not required to resolve any facts in a review of an administrative proceeding." *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769

(9th Cir. 1985). Rather, the district court "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.*

Under the APA, a "reviewing court shall … hold unlawful and set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority or limitations," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). An agency action is arbitrary and capricious under the APA where the agency (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) is so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

An "agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."); *see Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (finding that "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation"). Moreover, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"). Any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *see Organized Village of Kake*, 795 F.3d at 966-67 (holding that an agency's contrary conclusions "[o]n precisely the same record" were arbitrary and capricious). Each of these failures provide a separate basis for finding a rule to be arbitrary and capricious. *See, e.g.*, *California II*, 286 F. Supp. 3d at 1065-73 (finding several independent bases for determining that Suspension was arbitrary and capricious); *Air*

Alliance Houston v. E.P.A., 906 F.3d 1049, 1066 (D.C. Cir. 2018) ("EPA's explanations for its changed position on the appropriate effective and compliance dates are inadequate under *Fox* and *State Farm*, and therefore arbitrary and capricious, for several reasons").

When an agency's decision turns upon the construction of a statute, the court must consider whether the agency correctly interpreted and applied the relevant legal standards. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("*Chevron*"). An agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Id*. at 844. Only if "the statute is silent or ambiguous" must the court "decide how much weight to accord an agency's interpretation." *McMaster v. United States*, 731 F.3d 881, 889 (9th Cir. 2013) (internal quotations and citation omitted). As the Supreme Court has also stated, "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *U.S. v. Mead*, 533 U.S. 218, 228 (2001) (citations omitted); *see California Pub. Utilities Comm'n v. Fed. Energy Regulatory Comm'n*, 879 F.3d 966, 975 (9th Cir. 2018) (finding that "an agency's interpretation is not owed deference if 'there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'") (quoting *W. Radio Servs. Co. v. Qwest Corp*., 678 F.3d 970, 985 (9th Cir. 2012)). Furthermore, an agency's interpretation of a statute that it does not administer is not entitled to deference, and the Court may conduct its review *de novo*. *See Dep't of Treasury-I.R.S. v. Federal Labor Relations Authority*, 521 F.3d 1148, 1152 (9th Cir. 2008); *Air North America v. Dep't of Transp*., 937 F.2d 1427, 1436 (9th Cir. 1991).[3]

[3] Given Defendants' representation to the Court "that they do not intend to challenge Plaintiffs' standing," ECF No. 96, State Plaintiffs do not address standing in this motion.

ARGUMENT

I. BLM VIOLATED THE APA BY FAILING TO PROVIDE A REASONED EXPLANATION FOR THE RESCISSION.

A. BLM's Assertion That the Waste Prevention Rule Exceeds its Statutory Authority to Regulate Waste is Arbitrary and Capricious (Issues A-1 and A-4).[4]

The first rationale provided for the Rescission is BLM's "belie[f] that many of the provisions of the 2016 rule exceeded the BLM's statutory authority to regulate for the prevention of 'waste' under the Mineral Leasing Act." 83 Fed. Reg. at 49,185 (AR 2). In particular, BLM claims that "[t]he 2016 rule was based on the premise that essentially any losses of gas at the production site could be regulated as 'waste,' without regard to the economics of conserving that lost gas," and it cites a few cases that allegedly support this position. *Id*. at 49,186 (AR 3).[5] However, this rationale is arbitrary and capricious for numerous, independent reasons.

First, as BLM stated in 2016, "[t]he purpose of [the Waste Prevention Rule] is to reduce waste of natural gas owned by the American public and tribes, which occurs during the oil and gas production process." 81 Fed. Reg. at 83,015 (AR 916). The Rule is well within BLM's authority to prescribe "rules … for the prevention of undue waste" and to require lessees to use "all reasonable precautions to prevent waste of oil or gas." 30 U.S.C. §§ 187, 225; *see also* 30 U.S.C. § 1756. As the Wyoming district court stated in finding that Petitioners' had failed to demonstrate a likelihood of success on the merits of their claim that the Rule was an illegal air quality regulation, "[t]he terms of the MLA and FOGRMA make clear that Congress intended the Secretary, through the BLM, to exercise its rulemaking authority to prevent the waste of federal and Indian mineral resources and to ensure the proper payment of royalties to federal, state, and tribal governments." *Wyoming v. U.S. Dep't of the Interior*, 2017 WL 161428 at *6.

[4] Pursuant to the direction of the Court (ECF No. 95), State Plaintiffs hereby provide issue numbers for each argument that correspond to the numbers provided by the Conservation and Tribal Citizen Group Plaintiffs in their Motion for Summary Judgment.

[5] BLM's new definition of "waste of oil or gas," which follows from this rationale and improperly includes an economic limitation on the concept of waste, is addressed in Part II below.

None of the legal authorities cited address BLM's mandates under the MLA to regulate waste. *See* 30 U.S.C. §§ 187, 225. For example, the decision in *Brewster v. Lanyon Zinc. Co*, 140 F. 801 (8th Cir. 1905), which predates the Mineral Leasing Act, involved a contract dispute between a drilling company and private land owner where the court found a breach of the covenant to exercise "reasonable diligence" when the company failed to proceed with the contemplated operations. Moreover, the decision in *Marathon Oil Company v. Andrus*, 452 F. Supp. 548 (D. Wyo. 1978), as well as the Interior Board of Land Appeals opinions in *Rife Oil Properties, Inc.*, 131 IBLA 357 (1994) and *Ladd Petroleum Corp*., 107 IBLA 5 (1989), discuss the issue of when gas is "avoidably lost" and thus subject to federal royalties – a related but distinct issue from BLM's authority to require lessees to take "all reasonable precautions" to prevent "waste." Even the Rescission maintains a separate definition of "avoidably lost," which includes "[g]as that is vented or flared without the authorization or approval of the BLM," and "[p]roduced oil or gas that is lost" due to "[t]he failure of the operator to take all reasonable measures to prevent or control the loss" or "to comply fully with the applicable lease terms and regulations." 43 C.F.R. § 3179.4; 83 Fed. Reg. at 49,212 (AR 29); *see also* Public Comments and Responses on the Waste Prevention - Revise or Rescind Rule ("Response to Comments") at 48-49, 124, 125, 127 (AR 189-90, 265, 266, 268) (disagreeing with commenters that definitions of "avoidably lost" and "waste of oil or gas" should be combined). Given that oil or gas is deemed "avoidably lost" when a lessee fails to comply with a BLM regulation, these cases say nothing about BLM's ability to enact regulations for the prevention of waste (as the agency did in 2016); nor do they provide support for the Rescission.[6]

Second, these legal authorities were not even mentioned, let alone discussed, in the Proposed Rescission. This failure deprived State Plaintiffs of a meaningful opportunity to comment on this central justification for the Rescission. It is not enough that an agency merely identify some of the problems it believes may justify a repeal; rather, "[n]otice of a proposed rule

[6] Indeed, since at least the adoption of NTL-4A in 1979, the term "avoidably lost" has included the loss of oil and gas resulting from an operator's failure to comply with "lease terms and regulations" enacted by BLM. *See* 44 Fed. Reg. 76,600 (Dec. 27, 1979); *see also* 81 Fed. Reg. at 83,082 (AR 983); 83 Fed. Reg. at 49,212 (AR 29).

must include sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment[.]" *Am. Med. Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (citation omitted); *Home Box Office v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("[T]he notice required by the APA ... must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based"). Without such information, the public cannot not meaningfully participate in the rule making process. *See Connecticut Light & Power Co.*, 673 F.2d at 530 ("If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."); *accord Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 452 (3d Cir. 2011) (notice of proposed rulemaking lacked sufficient detail to permit "discussion of the actual issues involved"). BLM's inclusion of this brand new rationale in the Rescission failed to comply with the APA's notice and comment requirement. *Nat. Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002) ("A decision made without adequate notice and comment is arbitrary or an abuse of discretion."); *State of California v. U.S. Dep't of the Interior*, --- F. Supp. 3d ---, 2019 WL 2223804, *14-15 (N.D. Cal. Mar. 29, 2019) (finding that DOI violated the APA by "failing to provide the requisite information to adequately apprise the public regarding the reasons" for repealing a duly promulgated regulation).

In fact, as the record further demonstrates, BLM staff did not agree that they lacked the statutory authority to issue the Waste Prevention Rule. Rather, this rationale was pushed by the White House's Office of Information and Regulatory Affairs ("OIRA"), which reviews all Executive Branch regulations, as well as Department of the Interior political appointees. During the drafting of the proposed rule, BLM had rejected the inclusion of language regarding its statutory authority when pushed by OIRA. AR 172946 ("OIRA recommended that the BLM explicitly state that it lacked the authority to issue the 2016 final rule. BLM disagrees but provided alternate preamble language as compromise."); AR 173733 ("The second issue is in relation to whether and how we speak to our authority surrounding the rule itself. Seems DOI/DOJ are on one side and OMB/OIRA are on another."). Moreover, as late as August 2, 2018, the draft version of the final rule did not contain this rationale, but was added following a

meeting with then-Deputy Secretary of the Interior David Bernhardt, Assistant Secretary of Land and Minerals Management Joe Balash, and then-Principal Deputy Assistant Secretary of Land and Minerals Management Katharine MacGregor, among others. *Cf.* AR 159791-92 (August 6, 2018 version of draft final rule with addition of statutory authority argument) *with* AR 159895-96 (August 2, 2018 version of draft final rule with no statutory authority argument).[7]

To the extent that this rationale was made at the direction the White House, it does not deserve the deference that might be afforded to it under *Chevron*. *See Chevron*, 467 U.S. at 844 (finding that such deference due only to the agency "entrusted to administer" the relevant statute). The limited statutory mandate of OIRA, which was created by the Paperwork Reduction Act of 1980, 44 U.S.C. § 3503, does not involve administration of the Mineral Leasing Act. Moreover, BLM's abruptly chosen rationale, made in response to pressure from OIRA and political appointees rather than through careful deliberation and application of its expertise, also warrants reducing the level of deference afforded to this interpretation. *See Mead*, 533 U.S. at 228; *California Pub. Utilities Comm'n*, 879 F.3d at 975.

Third, BLM's current position represents an unexplained inconsistency with the 2016 Rule, where the agency explicitly considered and rejected this statutory authority argument when it was raised by industry commenters. As BLM stated at that time, "there is no statutory or jurisprudential basis for the commenters' position that the BLM must conduct an inquiry into a lessee's economic circumstances before determining a loss of oil or gas to be "'avoidable.'" 81 Fed. Reg. at 83,038 (AR 939). Rather, BLM found that the Waste Prevention Rule "is a necessary step in fulfilling its statutory mandate to minimize waste of the public's and tribes' natural gas resources," as waste under its prior regulations was "unacceptably high." *Id*. at 83,009-10, 83,015 (AR 910-911, 916). Moreover, BLM did not previously take the position that "any" losses of gas could be regulated as waste or ignore "the economics of conserving that lost gas." To the contrary, BLM determined that the Waste Prevention Rule represented "economical,

[7] Executive Order 12866, which governs the federal agency rulemaking process, provides that an agency "shall … [i]dentify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA." Executive Order 12866, Section 6(a)(3)(E)(iii), 58 Fed. Reg. 51,735 (Sept. 30, 1993). BLM has not explicitly identified any changes in the Rescission that were suggested or recommended by OIRA.

cost-effective, and reasonable measures that operators can take to minimize gas waste." *Id*. at 83,009 (AR 910); *see id*. at 83,015 (AR 916) ("Today's rule updates the existing provisions to direct operators to take reasonable and common-sense measures to prohibit routine venting, minimize the quantities of natural gas routinely flared, reduce natural gas losses through leaks, and deploy up-to-date technology to reduce routine losses from production equipment."). The Rule also contained several exemptions for situations where regulatory requirements would "cause the operator to cease production and abandon significant recoverable oil reserves under the lease." *See* 81 Fed. Reg. at 83,011 (AR 912) (capture targets); 83,012 (AR 913) (pneumatic controllers and pumps; storage vessels); 83,028 (AR 929) (leak detection and repair). In sum, BLM's current position represents an "unexplained inconsistency" with the 2016 rulemaking that renders the Rescission arbitrary and capricious. *See Brand X Internet Servs.*, 545 U.S. at 981.

Fourth, the Rescission itself is internally inconsistent regarding whether the Rule "exceeded the BLM's statutory authority to regulate for the prevention of 'waste.'" *See* 83 Fed. Reg. at 49,185 (AR 2). For example, BLM states later in the preamble that "even if the 2016 rule did *not* exceed the BLM's statutory authority, it is nonetheless within the BLM's authority to revise its 'waste prevention' regulations in a manner that balances compliance costs against the value of the resources to be conserved." *Id*. at 49,189 (AR 6) (emphasis added). BLM also claims that it "received a number of comments addressing its statutory authority and obligations," but "did not make any changes to the rule based on these comments." *Id.* However, as discussed above, nowhere in the Proposed Rule did BLM actually take the position that the Waste Prevention Rule exceeded its statutory authority under the MLA to regulate waste. And BLM later characterizes its position not as a statutory issue, but as a "policy determination." *Id*. at 49,190, 49,197 (AR 7, 14). These shifting explanations for BLM's primary rationale further render the Rescission arbitrary and capricious.

Finally, there is no merit to BLM's statement that its "experience in the litigation of the 2016 rule reinforces the BLM's conclusion that the 2016 rule exceeded its statutory authority." *Id*. at 49,186 (AR 3). The Wyoming district court addressed an argument made by Petitioners that the Waste Prevention Rule was actually an illegal attempt by BLM to regulate air pollution

under the Clean Air Act, which BLM contested. *Wyoming v. U.S. Dep't of the Interior*, 2017 WL 161428, at *3-9. Ultimately, the Wyoming district court found that Petitioners did not demonstrate a likelihood of success on this argument. *Id*. at *9. The statutory authority rationale now relied upon by BLM was not addressed by the Wyoming district court. Thus, the litigation over the 2016 Rule provides no support for BLM's rationale in the Rescission.

In sum, the Rescission is arbitrary and capricious because it relies on an unsupportable claim by BLM that the Waste Prevention Rule exceeded its statutory authority to regulate waste.

B. BLM's Reliance on Executive Order 13783 is Unfounded (Issue B-1).

BLM next asserts that the Waste Prevention Rule "would have added regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation," contrary to the policies set forth in Section 1 of Executive Order 13783. 83 Fed. Reg. at 49,184, 49,185 (AR 1, 2); RIA at 6-7 (AR 40-41) ("Need for Policy Action"). However, these conclusory statements not only lack support, but they are directly contradicted by the record of both the 2016 Rule and the 2018 Rescission. Additionally, BLM's reliance on Executive Order 13783 contravenes both the terms of the order itself and the statutory responsibilities the agency acknowledges. In short, BLM's reliance on Executive Order 13783 falls well short of supplying the required "reasoned explanation" for the Rescission. *See Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1342, 1350 (D.C. Cir. 2014) (conclusory agency statements deemed insufficient); *State of California v. U.S. Dep't of the Interior*, --- F. Supp. 3d ---, 2019 WL 2223804 at *11-12 (DOI failed to provide "reasoned explanation" for its reliance on Executive Order 13783 to justify rule repeal).

To begin, BLM's rationale is contradicted not only by its 2016 findings in promulgating the Waste Prevention Rule, but also by the record for the Rescission. BLM's regulatory impact analysis for the Waste Prevention Rule ("2016 RIA") found that implementation costs for "individual operators would be small, even for businesses with less than 500 employees." *See* 81 Fed. Reg. at 83,013 (AR 914). Specifically, BLM estimated that average costs for a "representative small operator" would "result in an average reduction in profit margin of 0.15 percentage points." *Id*. at 83,013-14 (AR 914-15). As a result, BLM found that the Rule would

"not have a significant economic impact on a substantial number of small entities," and "would not alter the investment or employment decisions of firms or significantly adversely impact employment." *Id*. at 83,070 (AR 971). BLM also concluded that the Rule would increase natural gas production by 9–41 Bcf per year, but would not "significantly impact the supply, distribution, or use of energy." *Id*. at 83,014, 83,077 (AR 915, 978). Moreover, as discussed above, the Rule contained exemptions for situations where certain requirements would "cause the operator to cease production and abandon significant recoverable oil reserves under the lease." *See* 81 Fed. Reg. at 83,011, 83,012, 83,028 (AR 912, 913, 929).

BLM's findings for the Rescission do not differ in any material way. For example, BLM finds that for even the smallest operators, the rule will increase annual profit margins by just "0.19 percentage points," 83 Fed. Reg. at 49,206 (AR 23), and "will not have a 'significant economic impact on a substantial number of small entities.'" *Id*. at 49,207 (AR 24). BLM states that it does "not believe that the cost savings in themselves will be substantial enough to substantially alter the investment or employment decisions of firms." *Id*. at 49,206 (AR 23); RIA at 65, 83 (AR 99, 117) ("the reduction in compliance costs represents such a small fraction of company net incomes that we believe that the rule is unlikely to impact the investment decisions of firms"); *see also* AR 159746, 179988, 179835 ("BLM does not expect the Waste Prevention Rule to alter the investment or employment decisions of firms or significantly adversely impact employment"). And BLM admits that it does "not expect that the final rule will significantly impact the price, supply, or distribution of energy." 83 Fed. Reg. at 49,205, 49,211 (AR 22, 28); RIA at 57 (AR 91). To the contrary, BLM finds that the Rescission will actually *reduce* natural gas production by 299 billion cubic feet, and royalty payments by $79.1 million. 83 Fed. Reg. at 49,205 (AR 22); RIA at 3, 57, 60, 63 (AR 37, 91, 94, 97).

Separately, BLM's cursory discussion failed to consider important provisions of the Executive Order that are relevant to the Rescission. For instance, given the increased pollution that BLM admits will result from the Rescission, the agency failed to address the Order's direction that "all agencies should take appropriate actions to promote clean air and clean water for the American people." *See* 82 Fed. Reg. at 16,093 (AR 1871). Nor does BLM acknowledge

that the bases it offered in 2016 for the Rule—national security, domestic energy development and economic growth—are substantially consistent with Section 1 of E.O. 13783. The Executive Order begins by stating that "[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security." *Id*. And, in explaining its justification for the Rule in 2016, BLM stated that:

> [N]atural gas is a limited and valuable public resource, which is critical to U.S. energy security and national security. Natural gas also provides significant economic benefits as an energy source for electricity generation and industrial and residential use, and as a feedstock for manufacturing.... Venting, flaring, and leaks of natural gas from production on BLM-administered sites waste this limited natural resource and deprive the American public and tribes of the security and economic benefits that this resource, which belongs to the public and tribes, would otherwise provide.

81 Fed. Reg. at 83,014 (AR 915). BLM fails to offer any reasoned explanation for reversing itself.

Further, as Executive Order 13783 recognizes, a President's Order cannot "impair or otherwise affect" the statutory mandates imposed upon BLM by Congress. 82 Fed. Reg. at 16,096 (AR 1874); *see In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013) ("[T]he President and federal agencies may not ignore statutory mandates or prohibitions merely because of a policy disagreement with Congress."). In finalizing the Waste Prevention Rule, BLM acknowledged specifically that the "rule [was] a necessary step in fulfilling its statutory *mandate* to minimize waste of the public's and tribes' natural gas resources." 81 Fed. Reg. at 83,010 (AR 911) (emphasis added). Moreover, BLM emphasized that the agency "must carry out its responsibility, delegated by Congress, to ensure the public's resources are not wasted and are developed in a manner that provides for long term productivity and sustainability." *Id.* In light of Congress's direction, Executive Order 13783 cannot provide the reasoned explanation required of BLM to rescind the Waste Prevention Rule.

This district court has twice rejected BLM's failure to explain its contradictory findings to first postpone, and then suspend, the requirements of the Rule. *See California I*, 277 F. Supp. 3d

at 1123 ("New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and address [the] prior factual findings underpinning a prior regulatory regime.") (internal quotations and citation omitted); *California II*, 286 F. Supp. 3d at 1067 (finding that BLM failed to provide an adequate explanation because it failed to "point to any fact that justifies its assertion that the Waste Prevention Rule encumbers energy production. Its concern remains unfounded."). BLM's latest attempt to undo the requirements of the Waste Prevention Rule without a reasoned explanation, and despite its own findings to the contrary, is similarly arbitrary and capricious. *See Brand X Internet Servs.*, 545 U.S. at 981; *State of California v. U.S. Dep't of the Interior*, --- F. Supp. 3d ---, 2019 WL 2223804 at *12 (DOI's statements regarding burden on energy development "directly contradict its previous findings in its promulgation of" the rule it seeks to repeal, in violation of the APA).

C. BLM's Regulatory Impact Analysis for the Rescission is Arbitrary and Capricious (Issues C and B-2).

BLM also claims that the 2016 Rule's "compliance costs for industry and implementation costs for the BLM exceed the rule's benefits." 83 Fed. Reg. at 49,186-88, 49,204-05 (AR 3-5, 21-22). BLM's wholesale reversal from the conclusions of its 2016 RIA relies on an arbitrary, outcome-driven manipulation of the numbers that fails to offer a reasoned explanation for the inconsistencies with its prior analysis. BLM ignores several benefits of the Rule entirely, including the reduction in hazardous air emissions, and undermines the other key benefits, such as the reduction in methane emissions, by substituting spurious "interim" findings for peer-reviewed science. On the cost side, BLM declares, without any factual support, that the administrative burdens of the Rule are twice as high as those calculated in 2016. And BLM sandbags the public with a new analysis of the alleged impacts of the Rule on marginal wells, which appeared for the first time in the final RIA. Any one of the above flaws is enough to render BLM's reliance on this rationale a violation of the APA.

1. BLM's Use of a "Domestic" Social Cost of Methane Metric Arbitrarily Ignores Substantial Climate Impacts and is Contrary to the Best Available Science (Issue C-1).

In 2016, to estimate the benefits of reducing methane emissions, BLM drew upon the conclusions of an Interagency Working Group ("IWG") founded under the Administration of George W. Bush.[8] AR 104455-104456. The IWG was specifically organized to develop a single, harmonized value for greenhouse gas emissions for federal agencies to use in their regulatory impact analyses for rulemaking under Executive Order 12866. AR 21377, 104456. The IWG's approach, known as the "social cost of greenhouse gases," estimates the present value of the damages caused from each additional ton of greenhouse gas emitted at a point in time, or conversely, the present value of the benefits from reducing a ton of greenhouse gas emissions. AR 21376. As the IWG stated in 2015, these damages must be considered globally "because emissions of most greenhouse gases contribute to damages around the world and the world's economies are now highly interconnected." AR 22069. This approach was developed over several years through robust scientific and peer-reviewed analyses and public processes, and represents the best available science on this issue. AR 21377, 104456.

In addition to being scientifically sound, IWG's approach is consistent with longstanding guidance regarding the valuing of effects of a rule generally. OMB Circular A-4 recognizes that a regulation may "have effects beyond the borders of the United States," and states that an agency's economic analysis should encompass "all the important benefits and costs likely to result from the rule," including "any important ancillary benefits." AR 7598, 7609. OMB Circular A-4 instructs agencies to monetize costs and benefits wherever possible. AR 7610. Moreover, OMB Circular A-4 states that "where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately." AR 7598. Likewise, Executive Order 12866 directs agencies to assess "*all* costs and benefits" of regulatory actions. E.O. 12866, Section 1(a), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (emphasis added); *id*. at Section

[8] The IWG was comprised of members from the Council of Economic Advisors, Council on Environmental Quality, Department of Agriculture, Department of Commerce, Department of Energy, Department of the Interior, Department of Transportation, Department of Treasury, Environmental Protection Agency, National Economic Council, Office of Management and Budget, and the Office of Science and Technology Policy. AR 21377.

1(b)(6) ("Each agency shall assess both the costs and the benefits of the intended regulation"). And, federal agencies have relied on the IWG's valuation of the impacts of greenhouse gas emissions in rulemakings since 2009, and courts have upheld this approach. *See Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 678-79 (7th Cir. 2016) (finding that agency acted reasonably in utilizing social cost methodology and considering global estimates).

In 2016, using the IWG methodology, BLM estimated that the benefits of methane emission reductions from the Rule would be from $2.55-$3.84 billion over a ten-year period, which far outweighed the estimate of costs. 81 Fed. Reg. at 83,014 (AR 925). In the Rescission, BLM's analysis cut that number by more than tenfold to $66-$259 million. RIA at 4 (AR 38). BLM did so by relying on its own "interim"[9] metric — which lacks any peer review — that arbitrarily dismisses most of the costs associated with increased methane emissions. RIA at 94 (AR 128). The interim metric purports to estimate the "domestic" cost of methane. BLM claims that it created this new "interim" approach because Executive Order 13783 disbanded the IWG and rescinded its technical support documents. 83 Fed. Reg. at 49,186-87, 49,190 (AR 3-4, 7).

However, BLM fails to provide any reasoned explanation for its decision to ignore the best available scientific and economic information in conducting its regulatory impacts analysis for rulemaking. For example, Executive Order 13783 itself directed agencies to ensure that their estimates of the social costs of greenhouse gases used in regulatory analyses are "based on the best available science and economics." 82 Fed. Reg. at 16,096 (AR 1874). OMB Circular A-4 provides that agencies should use "the best reasonably obtainable scientific, technical, and economic information available. To achieve this, you should rely on peer-reviewed literature, where available." AR 7600. Executive Order 12866 provides that "[e]ach agency shall base its decision on the best reasonably obtainable scientific, technical, economic, and other information." E.O. 12866, Section 1(b)(7), 58 Fed. Reg. at 51,735. While Executive Order 13783 disbanded the IWG and withdrew its technical support documents, the President did not alter by fiat what

[9] As BLM admits, this approach relies upon "interim values for use in regulatory analyses until an improved estimate of the impacts of climate change to the U.S. can be developed." RIA at 41 (AR 75). Yet BLM has failed to show that any such improved estimates are actually being developed.

constitutes the best available science. Rather, recognition of the best available science is hard won through exacting peer-review by experts in the relevant fields. The Executive Order in and of itself has no impact on the consensus that IWG's estimates constitute the best available science in monetizing the impacts of greenhouse gas emissions. *See, e.g.*, AR 104456 (California Air Resources Board commenting that "California continues to utilize the IWG-supported social cost of [greenhouse gas] values in its policy and regulatory planning, as they continue to represent the best available science."); AR 83471 (Richard L. Revesz, *et al.*, "Best Cost Estimate of Greenhouse Gases," 357 SCIENCE 6352 (2017), stating that the "IWG's estimates already are the product of the most widely peer-reviewed models and best available data").

By contrast, BLM's "interim" measure lacks substantial analysis, much less peer review, and relies on assumptions that are at odds with current scientific understanding. Among the impacts on the United States left out of BLM's "domestic" analysis are: impacts on 8 million U.S. citizens living abroad, including thousands of U.S. military personnel; impacts on billions of dollars of physical assets abroad owned by U.S. companies; spillover impacts on U.S. companies from impacts on their trading partners and suppliers abroad; and impacts from changes in global migration and geopolitical security. AR 6806-6807, 83422-83426, 83508-83515. BLM's approach—effectively treating the United States as an island completely cut-off from effects outside its borders—has been soundly rejected by economists as improper and unsupported by science. In 2015, the IWG concluded that "good methodologies for estimating domestic damages do not currently exist." AR 22074. In 2017, the National Academies of Science found that the calculation of a domestic social cost of methane cannot be credibly done using current models, as they ignore important spillover effects given the global nature of climate change. AR 22728. And even the federal agency economists attempting to utilize a domestic-only measure have acknowledged that "the development of a domestic [social cost of carbon ("SCC")] is greatly complicated by the relatively few region-or country-specific estimates of the SCC in the literature." AR 180230 (June 8, 2017 email exchange between EPA and BLM economists).

The obvious flaws in BLM's approach are readily apparent in the RIA. For example, BLM attempts to "approximate" the climate change impacts that occur within U.S. borders from one

model that generates only global estimates, claiming that such impacts are 10% of global values based on a 2017 paper by William Nordhaus. AR 128 (citing Nordhaus (2017)). However, the Nordhaus paper itself undermines this analysis, finding that such estimates vary based on the model used, and concludes that "regional damage estimates are both incomplete and poorly understood," and "[a] key message here is that there is little agreement on the distribution of the SCC by region." AR 8949. Further, Dr. Robert S. Pindyck, whose work is also cited in the RIA (*see* RIA at 99, 100 (AR 133, 134)), previously commented on BLM's attempt to use this approach for the Suspension, stating that "the domestic-only approach as implemented in the RIA is wrong from an economic perspective. The most economically justifiable approach is, instead, to use the full international value." AR 83411.

BLM fails to provide any justification for its arbitrary "domestic-only" measure of emissions impacts, nor could it. None of the orders governing regulatory impact analyses — Executive Order 13783, OMB Circular A-4, or Executive Order 12866 — allow BLM to completely ignore the global impacts of a rulemaking. To the contrary, Executive Order 13783 specifically identified the need for agencies to consider "domestic versus international impacts." 82 Fed. Reg. at 16,096 (AR 1874); *see also* RIA at 53 (AR 87). Executive Order 13783 also assumes that federal agencies will continue to "monetiz[e] the value of changes in greenhouse gas emissions," and instructs agencies to ensure that such estimates are "consistent with the guidance contained in OMB Circular A-4." 82 Fed. Reg. at 16,096 (AR 1874). Yet, instead of assessing all costs and benefits of the Rescission or separately reporting effects that occur beyond the borders of the United States, BLM has arbitrarily chosen not to report or consider global effects at all, thereby grossly undervaluing the benefits of the Rule's reductions in methane emissions. This failure to "consider an important aspect of the problem" is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

In sum, hiding under the language of Executive Order 13783, BLM has employed a new "domestic" social cost of methane approach that is contrary to the best available science and fails to consider an important aspect of the problem of increased methane emissions. BLM has failed to provide a reasoned analysis for this change, let alone the "detailed justification" required for its

complete reversal in position. *See Fox*, 556 U.S. at 515. As such, BLM's approach is arbitrary and capricious and should be found unlawful.

2. BLM Failed to Quantify or Otherwise Consider Other Substantial Benefits of the Waste Prevention Rule (Issue C-2).

The RIA also fails to quantify or provide any weight to other foregone benefits of repealing the Waste Prevention Rule, such as the public health consequences of many additional tons of VOC emissions and hazardous air pollutants, and visual and noise impacts on local communities from flaring. *See* 81 Fed. Reg. at 83,009, 83,015 (AR 910, 916). For example, the Rescission will increase VOC emissions by approximately 79,000-80,000 tons per year, or 798,000 tons over the ten-year evaluation period in the RIA. RIA at 47 (AR 81). Yet BLM admits that it did not attempt to "monetize the costs to public health and the environment of forgoing VOC or hazardous air pollution emissions reductions," despite the fact that such emissions "pose negative impacts on climate, health, and human welfare." RIA at 48 (AR 82). Additionally, the RIA fails to even mention the visual and noise impacts that will result from the Rescission.

These deficiencies directly contradict the requirements for a regulatory impact analysis to quantify or otherwise consider the non-monetary benefits that would be lost by repealing the Waste Prevention Rule. As OMB Circular A-4 provides, "When there are important non-monetary values at stake, you should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs. When your analysis is complete, you should present a summary of the benefit and cost estimates for each alternative, including the qualitative and non-monetized factors affected by the rule, so that readers can evaluate them." AR 7586. Similarly, as discussed above, Executive Order 12866 requires agencies to assess "*all* costs and benefits" of regulatory actions. 58 Fed. Reg. at 51,735 (emphasis added).

As this district court previously concluded in overturning BLM's illegal attempt to delay the requirements of the Waste Prevention Rule, "[w]ithout considering both the costs and the benefits of" a deregulatory action, an agency "fail[s] to take [an] 'important aspect' of the problem into account." *California I*, 277 F. Supp. 3d at 1122; *id*. at 1123 ("Defendants' failure to consider the benefits of compliance with the provisions that were postponed, as evidenced by the

face of the Postponement Notice, rendered their action arbitrary and capricious and in violation of the APA."). Consequently, the RIA for the Rescission, and thus the Rescission itself, is arbitrary and capricious.

3. BLM's New Analysis of Impacts to Marginal Wells is Arbitrary and Capricious (Issue B-2).

State Plaintiffs hereby incorporate by reference Argument, Section II.B of the Conservation and Tribal Citizen Group Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

4. BLM Failed to Provide a Reasoned Explanation for its Change to the Administrative Burdens of Implementing the Waste Prevention Rule (Issue C-3).

BLM's claim that the costs of the Waste Prevention Rule now exceed its benefits is further based an unsupported recalculation that nearly doubles the "administrative burdens" for industry and BLM to implement the Rule. 83 Fed. Reg. at 49,184, 49,188 (AR 1, 5); RIA at 39-40, 86-93 (AR 73-74, 120-127). In particular, the 2016 RIA calculated the burden to industry at $5.5 million (based on an estimated 85,170 hours of administrative effort), and the burden to BLM at $1.3 million (based on 30,117 hours). 2016 RIA at 99, 102 (AR 1166, 1169). However, the 2018 RIA raises industry's estimated administrative burden to $10.7 million (and 164,000 hours), and increased BLM's burden to $3.27 million (and 72,700 hours). RIA at 40 (AR 74). Yet BLM provides no basis for this drastic increase other than to state that it consulted "with BLM State and field offices to determine the level of expected response per provision." RIA at 86 (AR 120).

However, the numbers provided by BLM in 2016 were also developed in consultation with BLM staff. 2016 RIA at 96 n.81 (AR 1163) ("Estimates for the number of responses and burden hours per response were provided by BLM program staff"). BLM has failed to identify or explain any changed circumstances, technology, or economic conditions that would justify this dramatic recalculation. For example, a large portion of this increase resulted by BLM's tripling of the number of hours that it would take industry to submit a waste minimization plan, from 8 to 24, and increasing the number of responses by 50% from 2,000 to 3,000 — thereby increasing the burden to industry from $1.03 million to $4.7 million. *Cf.* 2016 RIA at 96 (AR 1163) with RIA at 86 (AR 120). Given that operators never submitted any such plans, there is no basis in the record

for BLM's latest numbers, let alone the "more detailed justification" required by the U.S. Supreme Court. *Fox*, 556 U.S. at 515; *see also Center for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1149 (N.D. Cal. 2006) (finding it arbitrary and capricious for agency's economic analysis "to rely on a critical assumption that lacks support in the record to justify" decision).

D. There is No Basis in the Record to Support BLM's Claim that the Waste Prevention Rule is Duplicative of Federal and State Regulations (Issue A-4).

Finally, BLM posits that the Waste Prevention Rule is duplicative of other federal and state requirements. 83 Fed. Reg. at 49,188, 49,191 (AR 5, 8). In particular, BLM claims that the Rule "had many requirements that overlapped" with EPA's new source performance standards ("NSPS") for new, reconstructed, and modified sources in the oil and natural gas sector issued under the Clean Air Act, 42 U.S.C. § 7401 *et seq*., and that "some States with significant Federal oil and gas production have similar regulations addressing the loss of gas from these sources." *Id*. at 49,188 (AR 5).

However, BLM previously considered these same requirements when it promulgated the Waste Prevention Rule, and it fails to provide any reasoned explanation for reaching an entirely contrary conclusion regarding the need for Rule less than two years later. With regard to EPA's regulations, BLM was well aware in 2016 that EPA was in the process of finalizing its NSPS and "carefully coordinated" with that agency "to minimize compliance burdens for operators and to avoid unnecessary duplication." 81 Fed. Reg. at 6,618, 6,635 (AR 994, 1011); 81 Fed. Reg. at 83,013, 83,018-19 (AR 914, 919-920).[10] As BLM acknowledges, the EPA standards only apply to new wells, not existing sources, and thus exclude the vast majority of U.S. oil and gas operations. RIA at 26-27 (AR 60-61). Unlike EPA's requirements, which impose numeric percentage-reduction requirements on emissions of greenhouse gases and VOCs from specified

[10] Similarly, EPA stated in its own rulemaking that it "worked closely with [BLM] during development of this rulemaking in order to avoid conflicts in requirements between the NSPS and BLM's proposed rulemaking." 81 Fed. Reg. 35,824, 35,825 (June 3, 2016) (AR 2838); *see id*. at 35,831 (AR 2844) ("While we intend for our rule to complement the BLM's action, it is important to recognize that the EPA and the BLM are each operating under different statutory authorities and mandates in developing and implementing their respective rules.").

equipment and processes within the oil and natural gas source category, 81 Fed. Reg. at 35,824 (AR 2837), the Waste Prevention Rule sets no emissions standards for particular pollutants and contains no air quality monitoring requirements. Moreover, BLM already addressed the potential for overlapping regulations in 2016 by (1) allowing compliance with EPA's requirements for new or modified sources to satisfy the requirements of the Waste Prevention Rule when both EPA regulations and the Rule apply; and (2) exempting from the Rule equipment covered by existing EPA regulations. 81 Fed. Reg. at 83,013, 83,027, 83,055, 83,058-59, 83,061 (AR 914, 928, 956, 959-960, 962). Furthermore, just like the Waste Prevention Rule, EPA has already attempted to illegally delay its NSPS and is now reconsidering the standards. *See* 82 Fed. Reg. 25,730 (June 5, 2017) (Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay) (AR 2961); 82 Fed. Reg. 27,641 (June 16, 2017) (Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements) (AR 2956); *Clean Air Council v. Pruitt*, 862 F.3d 183 (D.C. Cir. 2017) (finding that EPA's stay was arbitrary and capricious and in violation of the Clean Air Act and vacating stay). Subsequently, EPA proposed to weaken the NSPS's requirements. 83 Fed. Reg. 52,056 (Oct. 15, 2018) (Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration). BLM's reliance on a rule that is itself being rolled back is suspect, even if it could show any duplication.

With regard to state regulations, BLM already considered such requirements in 2016 and concluded that they were not as comprehensive or effective as the Waste Prevention Rule. *See* 81 Fed. Reg. at 83,019 (AR 920). Specifically, as BLM found:

> Of the States with extensive oil and gas operations on BLM-administered leases, only one has comprehensive requirements to reduce flaring, and only one has comprehensive statewide requirements to control losses from venting and leaks. Furthermore, State regulations do not apply to BLM-administered leases on Indian lands, and States do not have a statutory mandate or trust responsibility to reduce the waste of Federal and Indian oil and gas... . There is therefore a need for uniform, modern waste reduction standards for oil and gas operations on public and Indian lands across the country.

Id. The Waste Prevention Rule also allowed a state to request a variance if its regulations are at least as effective as the Rule in reducing waste. 81 Fed. Reg. at 83,013, 83,017, 83,067-68 (AR

914, 918, 968-969). In the Rescission, BLM continues to admit that regulations "vary from State to State" and some are "not as stringent" as the 2016 Rule. 83 Fed. Reg. at 49,202 (AR 19); *id*. at 49,203 (AR 20) ("BLM does not argue that each State's existing flaring regulations will necessarily reduce flaring rates in that State").

In fact, BLM can only identify one State – California – that issued new regulations regarding waste since promulgation of the 2016 rule. *Id.* at 49,188 (AR 5). However, even California's updated requirements on this issue do not obviate the need for the Waste Prevention Rule. As the California Air Resources Board stated in its comments on the Proposed Rescission, "several aspects of the Waste Prevention Rule provide greater and/or earlier benefits to California than the State's Oil and Gas Regulation alone, including requirements on liquids unloading, mandatory planning for gas capture, and inclusion of flared gas in royalty rates (which creates important financial incentives to reduce waste)." AR 104447. Moreover, federal regulation can increase implementation and enforcement of state and tribal regulations and is necessary to fill any gaps in these regulatory schemes. *Id*.

Regardless of EPA or state regulation, BLM has its own statutory mandates and public trust responsibilities to limit resource waste on federal and tribal lands. *See* 81 Fed. Reg. at 83,019 (AR 920) ("State regulations do not apply to BLM-administered leases on Indian lands, and States do not have a statutory mandate or trust responsibility to reduce the waste of Federal and Indian oil and gas"). As BLM explained in 2016, the Waste Prevention Rule "helps to meet the Secretary's statutory trust responsibilities with respect to the development of Indian oil and gas interests," in part because "this rule will help ensure that the extraction of natural gas from Indian lands results in the payment of royalties to Indian mineral owners, rather than the waste of owners' mineral resources." *Id*. at 83,020-21 (AR 921-922). The Rule also meets these responsibilities because "tribal members and individual Indian mineral owners who live near Indian oil and gas development will realize environmental benefits as a result of this rule's

reductions in flaring and air pollution from Indian oil and gas development." *Id.* at 83,021 (AR 922).[11]

In short, there is no basis for BLM's claim that EPA or state regulations, which are far from universal or consistent, somehow obviate the need for the Waste Prevention Rule. To the extent that such regulations are duplicative (*i.e.*, that compliance with the Rule is already required by other authorities), this would only further undermine BLM's rationale that the Rule is unduly costly or burdensome to industry. BLM has failed to provide any reasoned explanation for its complete reversal in policy, and this unexplained inconsistency in rationale warrants reversal under the APA. *See Navarro*, 136 S. Ct. at 2126 (holding that an agency's change in practice without explaining a prior inconsistent finding is arbitrary and capricious); *State of California v. U.S. Dep't of the Interior*, --- F. Supp. 3d ---, 2019 WL 2223804, *10 (finding that DOI's rule repeal was arbitrary and capricious where it failed to "explain the inconsistencies between its prior findings in enacting the" rule and its decision to repeal the rule).

II. BLM'S NEW DEFINITION OF "WASTE OF OIL OR GAS" IS CONTRARY TO LAW AND ARBITRARY AND CAPRICIOUS (Issue A-2).

Along with its arbitrary rationale that the Waste Prevention Rule exceeds BLM's statutory authority, BLM added a new definition of "waste of oil or gas" that, for the first time, includes an economic limitation. 83 Fed. Reg. at 49,197 (AR 14). In particular, this new definition limits "waste of oil or gas" to acts "where compliance costs are not greater than the monetary value of the resources they are expected to conserve." *Id.* at 49,197-98, 49,212 (AR 14-15, 29); *see* 43 C.F.R. § 3179.3. However, BLM's new definition is contrary to law, arbitrary, and unworkable for several reasons.

Under the Mineral Leasing Act, BLM must enforce leaseholders' use of "all reasonable precautions to prevent waste of oil or gas developed in the land," 30 U.S.C. § 225, and require leaseholders to comply with rules "for the prevention of undue waste," 30 U.S.C. § 187. Congress also reiterated its concern about waste in FOGRMA by providing that, "Any lessee is

[11] To the extent that the agency is also relying on "voluntary" industry reductions to justify the Rescission, BLM provides no evidence to support this position. *See* 83 Fed. Reg. at 49,191, 49,195 (AR 8, 12).

liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence [or] the failure to comply with any rule or regulation, order or citation issued under this chapter or any mineral leasing law." 30 U.S.C. § 1756.

These statutory provisions include no specific economic limitations and make clear that BLM must require leaseholders to prevent waste beyond what self-interest would impel. As BLM stated in the 2016 rule, there is "no statutory or jurisprudential basis" requiring the agency to "conduct an inquiry into a lessee's economic circumstances before determining a loss of oil or gas to be 'avoidable'" or to regulate waste. 81 Fed. Reg. at 83,038-39 (AR 939-940). Since economic self-interest should independently motivate leaseholders to avoid squandering natural resources for which market value exceeds the costs of conservation, defining "waste" in this way effectively nullifies these statutory provisions and is contrary to law. *See, e.g., King v. Burwell*, 135 S. Ct. 2480, 2498 (2015) (Scalia, J., dissenting) ("the rule against treating [a term] as a nullity is as close to absolute as interpretive principles get"); *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997) (holding that a statute "must be interpreted, if possible, to give each word some operative effect"); *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 965 (9th Cir. 2013) ("In interpreting statutes, we observe the cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotations and citations omitted).

The Rescission itself demonstrates how BLM's new definition would nullify these statutory mandates. For example, BLM has decided to eliminate the requirement that operators install low-bleed pneumatic controllers,[12] despite the fact that the monetary value of the natural resources conserved by this measure ($20-26 million) is greater than the compliance costs ($12-13 million). 83 Fed. Reg. at 49,194-95 (AR 11-12); RIA at 54 (AR 88). Yet because of this finding, BLM reasons that it "expects many operators to adopt low-bleed pneumatic controllers even in the

[12] As described by BLM, pneumatic controllers are "are automated instruments used for maintaining a process condition, such as liquid level, pressure, pressure differential, and temperature. Depending on the design, controllers are most often used in the oil and gas industry to operate and control valves by use of readily available high-pressure natural gas." RIA at 17 (AR 51).

absence of" a requirement to do so. 83 Fed. Reg. at 49,195 (AR 12). Such reasoning effectively eliminates all regulation of waste: if compliance costs are greater than resource values, it is not "waste" by definition; if resource values are greater than compliance costs, there no need to regulate because industry will supposedly act voluntarily. BLM has failed to provide any reasoned analysis to support this tortured position, nor could it.

As with its statutory authority rationale, this new definition was initially advocated not by BLM, but by OIRA. *See* AR 164724 ("OMB/OIRA examiner pushed for its inclusion, but the team is concerned that it would allow operators to broadly claim no losses are waste"); AR 172946 ("Economic Definition of Waste to Regulatory Text: OIRA provided subject language. BLM accepted and added preamble discussion"); AR 173733 ("There are 3 primary issues that have been brought up during the OMB/OIRA review… . The third issue is whether we need/want an explicit definition of waste."); AR 173828 (addition of definition to proposed rule). Consequently, this Court should afford no deference to BLM's explanation for this change. *Dep't of Treasury-I.R.S.*, 521 F.3d at 1152.

BLM's new definition of "waste of oil or gas" is arbitrary and capricious for several other reasons. First, BLM already defines this term *without* regard to economic considerations in its operating regulations, as it has done since 1982. *See* 43 C.F.R. § 3160.0-5 (defining "waste of oil or gas" as "any act or failure to act by the operator that is not sanctioned by the authorized officer as necessary for proper development and production and which results in: (1) A reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations; or (2) avoidable surface loss of oil or gas."); 47 Fed. Reg. 47,758 (Oct. 27, 1982) (Oil and Gas Operating Regulations; final rule). BLM has failed to explain the inconsistency that it has created between these two regulations.

BLM further offers no reasoned basis regarding how to actually determine when "compliance costs are not greater than the monetary value of the resources they are expected to conserve," which will likely result in arbitrary determinations. For example, compliance costs will differ based on company size, which could result in a practice that constitutes "waste" for one company and not another. Moreover, given the regular fluctuation in oil and gas prices, the

failure to install particular equipment could be considered "waste" one month but not the next. And even if compliance costs can be readily assessed, it is entirely unclear what time horizon should be used to assess the value of the resources conserved (e.g., 1 year? 5 years? 10 years? The life of an oil and gas well?), which could significantly affect whether waste is occurring or not. *See* Response to Comments at 51 (AR 192) (BLM admitting that "it would be absurd to apply the definition without taking into account a time frame for recovering the operator's investment").

For all of these reasons, the Court should find that BLM's new definition of "waste of oil or gas" is contrary to law and arbitrary and capricious.

III. BLM FAILED TO TAKE A "HARD LOOK" AT THE ENVIRONMENTAL IMPACTS OF THE RESCISSION AS REQUIRED BY NEPA (Issue D).

State Plaintiffs hereby incorporate by reference Argument, Section IV of the Conservation and Tribal Citizen Group Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

CONCLUSION

Declaratory relief and vacatur are the proper remedies "when a court concludes that an agency's conduct was illegal under the APA." *State of California v. U.S. Dep't of the Interior*, --- F. Supp. 3d ---, 2019 WL 2223804 at *18 (citing *Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)); *see* 5 U.S.C. § 706(2) ("reviewing court shall … hold unlawful and set aside" agency action that violates the APA). Given BLM's numerous violations of the APA in promulgating the Rescission, State Plaintiffs respectfully request that this Court grant their motion for summary judgment, declare that the Rescission is unlawful, and vacate the Rescission.

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