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The Honorable Yvonne Gonzalez Rogers
United States District Court, Northern District of California
Oakland Courthouse, Courtroom 1 – 4th Floor
1301 Clay Street
Oakland, CA 94612

Re: Intervenor-Defendant American Petroleum Institute ("API") Letter Brief in Support of Motion for Summary Judgment, *State of California, et al. v. Zinke, et al.*, No. 4:18-cv-05712-YGR

Dear Judge Gonzalez Rogers:

This letter brief responds to the Court's January 16, 2019 Order re Parties' Joint Case Management Statement. *See* ECF No. 81.

I. Background

The States of California and New Mexico ("State Plaintiffs") and various conservation and Tribal citizen advocacy groups ("Citizen Groups") (collectively, "Plaintiffs") are challenging the Bureau of Land Management's ("BLM") final rule, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 (Sep. 28, 2018) ("2018 Rule"). The 2018 Rule supersedes a regulation BLM promulgated in 2016, Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("2016 Rule"), which, *inter alia*, unlawfully exceeded BLM's statutory "waste" prevention authority under the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. §§ 187, 225. The majority of the 2016 Rule's provisions never went into effect because they were stayed by the U.S. District Court for the District of Wyoming in 2018. *See Wyoming v. DOI*, No. 2:16-cv-00285-SWS, Order Staying Implementation of Rule Provisions and Staying Action Pending Finalization of Revision Rule, ECF No. 215 (D. Wyo. Apr. 4, 2018).

The 2018 Rule restores the longstanding economic underpinnings of the concept of "waste" as originally intended under the MLA and implemented by BLM and its predecessor agencies for decades. Moreover, despite Plaintiffs' mischaracterization, the 2018 Rule is not simply a rescission of the 2016 Rule. The 2018 Rule replaces most – but not all – of the

provisions of 2016 Rule. The 2018 Rule further establishes a regulatory scheme different from both the 2016 Rule and BLM's pre-2016 regulatory structure under Notice to Lessees 4-A, Royalty or Compensation for Oil and Gas Lost (Jan. 1, 1980) ("NTL-4A").

II. Likely Contents of API's MSJ

API has conferred with the other Intervenor-Defendants in this case which intend to file briefs with the Court: (1) the Western Energy Alliance ("Alliance") and the Independent Petroleum Association of America ("IPAA"), and (2) the State of Wyoming. Following the federal shutdown, API also has conferred with Federal Defendants regarding their MSJ. All of these parties desire to minimize duplication in refuting the two sets of Plaintiffs' various (and largely duplicative) arguments under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*.

API plans to file a MSJ addressing the following issues: (1) the 2018 Rule properly reinstates the well-established concepts of "waste" and operator diligence as intended under the MLA; (2) BLM's ratification of states' venting and flaring regulatory programs as sufficiently protective against undue waste of federal mineral resources was not arbitrary and capricious under the APA; and (3) BLM's alternatives and impacts analysis in its Environmental Assessment ("EA") accompanying the 2018 Rule complied with NEPA. These issues may change once the requisite administrative record and Plaintiffs' MSJs are filed.

Due to the separate and distinct interests that each defendant group represents, and as reflected in the briefing on API's granted motion to intervene, API requests to file independently from Federal Defendants and the other Intervenor-Defendants. API uniquely represents not only oil and gas producers on BLM-managed lands, but companies involved in all sectors of the oil and gas industry nationwide. API submitted separate comments on both the 2016 Rule and the 2018 Rule. API's MSJ will focus on the issues identified herein, which are of particular importance to API's members, and which API anticipates will be largely distinct from, but complementary to, the issues addressed by the Alliance and IPAA's MSJ. While API will further coordinate with Federal Defendants and the State of Wyoming, joint briefing with those parties would not be appropriate because of their distinct governmental interests. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) ("The interests of government and the private sector may diverge."); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896 (N.D. Cal. 1984), *amended*, (N.D. Cal. Sep. 17, 1984) ("agency's interest in content of regulation will differ from the interest of the one governed by those regulations") (internal citation omitted).

A. The 2018 Rule Properly Returns to BLM's Well-Established Concepts of "Waste" Prevention and Operator Diligence.

The MLA does not expressly define "waste." However, it requires that all oil and gas leases contain provisions to ensure that lessees "exercise . . . reasonable diligence, skill, and care. . . ." in operating their leases and comply with BLM's regulations "for the prevention of undue

waste . . . ." 30 U.S.C. § 187. The MLA also requires lessees to "use all reasonable precautions to prevent waste of oil or gas . . . ." in developing their leases. 30 U.S.C. § 225. Plaintiffs misinterpret these requirements to mean that BLM has the authority to limit venting and flaring however it deems "reasonable," and also the obligation to limit venting and flaring precisely as it did in the 2016 Rule.

BLM's 2018 Rule definition of "waste" in 43 C.F.R. § 3179.3 is consistent with the concept of "waste" incorporated into the MLA and understood by BLM and its predecessor agencies for decades. As it relates to venting and flaring, "waste" is generally understood as the "preventable loss of [oil and gas] the value of which exceeds the cost of avoidance." Stephen L. McDonald, Petroleum Conservation in the United States, An Economic Analysis, Johns Hopkins Press, 1971 (reprinted in 2011 by Resources For the Future), at 129; see also *id.*, at 117-18, 123-124, 128-129. Consistent with this principle and the lessee's obligation to prudently operate the lease, statutes and regulations prohibiting waste frequently incorporate the widely understood concept that any "waste" determination must take into account whether it makes economic sense for a prudent operator to recover and sell the gas, or instead whether capture and sale is uneconomic.

This understanding has been so widely held throughout the BLM, oil and gas producing states, and the industry over the years, that most state statutes defining "waste" make no express reference to the venting and flaring of gas that is uneconomic to capture and produce, and instead focus on forms of waste such as leaving otherwise recoverable reserves in the ground. This lack of reference is a reflection of the general presumption that, where individualized findings are made that it is uneconomic to market associated gas, venting and flaring is "necessary" and "reasonable," and therefore not "waste." *See* McDonald, *supra*, at 124 ("In most states . . . actual prohibition or exception for venting and flaring . . . is [generally] based on immediate circumstances."). Although the MLA and its legislative history do not expressly define the term "waste," no evidence indicates that Congress intended to eschew the commonly established meaning of that term. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (where Congress uses an established term of art, "it presumably knows and adopts the cluster of ideas that [are] attached . . . . [and the] absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departures from them"). Except for the 2016 Rule, BLM historically has implemented through its regulatory requirements a concept of waste so consistent with prevailing industry practice that it lacks discretion to substantially alter it. *See, e.g., Marathon Oil Co. v. Andrus,* 452 F. Supp. 548 (D. Wyo. 1978); *Rife Oil Properties, Inc.* 131 IBLA 357, 373-77 (1994).

Although the 2016 Rule did not define "waste," it deviated from BLM's consistent historical practice and, under the guise of waste prevention, impermissibly and indiscriminately imposed general venting and flaring prohibitions on lessees even when the cost of capture exceeded the value of the vented or flared gas. The 2018 Rule eliminates the offending provisions from BLM's regulations and properly restores the concept of "waste" as an economic

inquiry where, for gas that is vented or flared, the lessee commits "waste" only where the value of the lost gas exceeds the cost of capture.

The 2018 Rule's "waste" definition also properly references "prudent and proper" lease operations as the only means by which "waste" can be assessed (i.e., if the costs of capture outweigh the value of the production because the lessee is imprudent or is developing the lease in an unreasonable manner, then the lessee commits waste). In preserving the linkage between "waste" and reasonable and prudent lease operations, the revised definition prevents BLM from impermissibly requiring a diligent lessee to capture production at a loss, which cannot be required in the name of waste prevention. Plaintiffs' attempts to shoehorn environmental and other considerations into the legal definition of "waste" are unfounded. The mere fact that gas is vented or flared does not make it "waste."

B. BLM's Reliance on State and Tribal Venting and Flaring Standards Adequately Protects Against Undue Waste of Federal Mineral Resources.

Under the 2018 Rule, BLM directly regulates venting and flaring associated with (1) initial production testing, (2) well testing, (3) downhole well maintenance and liquids unloading, and (4) emergency response. *See* 43 C.F.R. §§ 3179.101-104. In all other cases, applicable rules, regulations, and orders of the appropriate state or Tribal authorities control. 43 C.F.R. § 3179.201. BLM reasonably considers any venting or flaring conducted in compliance with state and Tribal requirements acceptable, and not "undue waste."

The 2018 Rule is not a "delegation" of BLM's MLA waste prevention authority to the states as Plaintiffs allege. Instead, BLM reviewed and accepted existing state standards as a reasonable and administratively efficient means of avoiding unnecessarily burdensome, and possibly duplicative or inconsistent, regulation to prevent the undue waste of federal mineral resources. In crafting this federal requirement, BLM reviewed the statutory and regulatory restrictions on venting and flaring in the 10 states where more than 99 percent of federal oil and 98 percent of federal gas are produced, and the vast majority of venting and flaring occurs. BLM found that each of these states has legal restrictions on venting and flaring that are sufficient to prevent undue waste as required under the MLA. *See* 83 Fed. Reg. at 49,202.

BLM's analysis of each state's restrictions on venting and flaring reveals that although states regulate venting and flaring differently, each regulates more restrictively than BLM could under its MLA waste prevention authority. States may impose venting and flaring regulatory programs that are more restrictive than BLM's because states' authorities to regulate venting and flaring are not limited to waste prevention. States may regulate venting and flaring under numerous legal authorities, including those related to public health, air quality, environmental protection, economic regulation, and general state police power. In contrast, BLM's authority over venting and flaring is limited to the MLA's waste prevention requirement, and BLM lacks authority to restrict venting and flaring to achieve other purposes, such as air quality protection, which is within the exclusive purview of the states and the U.S. Environmental Protection

Agency under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq*. Accordingly, states may, and do, restrict venting and flaring to a greater extent than BLM may under its MLA waste prevention authority.

When preparing the 2016 Rule, BLM conducted a state-by-state venting and flaring regulatory analysis and found that no state venting and flaring regulatory regime was sufficient to protect against what it thought was undue waste. However, the agency only was able to reach this conclusion because at the time BLM's 2016 Rule fundamentally misapplied the concept of "waste" and the scope of its authority to prevent undue waste under the MLA. BLM revisited these state regulations when promulgating the 2018 Rule, and now-appropriately viewed through the prism of its well-established historical understanding of waste prevention principles, the agency properly concluded that state regulations were sufficient under federal law to prevent the undue waste of federal mineral resources. BLM's acceptance of state venting and flaring standards also is entirely consistent with the provisions of BLM's pre-2016 Rule regulations, which authorized venting and flaring pursuant to the rules, regulations, or orders of the appropriate state regulatory agency when BLM "ratified or accepted" the applicable state standards. NTL-4A, section I. Notably, Plaintiffs do not challenge the legality of those longstanding pre-2016 regulations.

C. BLM's EA Adequately Considered the Reasonably Foreseeable Environmental Consequences of the 2018 Rule; NEPA Does Not Mandate Consideration of Additional Alternatives or the Preparation of an Environmental Impact Statement ("EIS").

BLM promulgated the 2016 Rule after preparing a 57-page EA, and issued a Finding of No Significant Impact ("FONSI") concluding that promulgating extensive venting and flaring limitations – even when considering climate impacts and the global carbon budget – would have no significant environmental consequences, obviating the need for an EIS. The 2018 Rule, which replaces most of the 2016 Rule but imposes stricter emissions limitations than the pre-2016 status-quo, is similarly supported by an EA/FONSI concluding that the 2018 Rule likewise will have no significant environmental impacts.

Neither the record for the 2016 Rule nor the record for the 2018 Rule points to any significant environmental effects, one way or the other. Plaintiffs' position – that the act of "rescinding" a rule with no significant environmental impacts could have significant environmental impacts – is nonsensical. If promulgating the 2016 Rule had no significant effect, then "rescinding" the 2016 Rule two years later also likely would have no significant environmental effect, either individually or cumulatively. That is particularly true given that the 2016 Rule largely never went into effect, and the 2018 Rule creates no new harms. Plaintiffs are unable to demonstrate that an EIS is necessary here.

Likewise, there is no evidence that BLM failed to consider a reasonable range of alternatives when promulgating the 2018 Rule. The 2018 Rule was the product of a detailed

rulemaking process including extensive public comment. Plaintiffs identify no specific alternative that BLM failed to consider in the rulemaking. Nor was BLM legally obligated to consider additional alternatives in the EA. *See Earth Island Inst. v. United States Forest Serv.,* 697 F.3d 1010, 1021-23 (9th Cir. 2012) (EA consideration of "no action" and proposed action sufficient).

III. Conclusion

API intends to file a MSJ based on the issues identified above in refuting Plaintiffs' APA and NEPA claims. API intends to adopt by reference the arguments of the Alliance and IPAA for the issues raised in Plaintiffs' Amended Complaints that are not addressed in API's MSJ.

API respectfully requests to file its own brief. API remains willing to share any combined page limit for its and the IPAA/Alliance merits briefs, as proposed in the Parties' Joint Case Management Statement, ECF No. 77. API requests that any individual or combined page limits ordered by the Court reflect Intervenor-Defendants' independent need to directly address each of the issues identified in their respective letter briefs.

Sincerely,

/s/ Gary J. Smith

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