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January 24, 2019

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: Plaintiffs State of California and State of New Mexico's Letter Brief in Support of Motion for Summary Judgment, *State of California, et al. v. Zinke, et al.*, Case No. 4:18-cv-05712-YGR

Dear Judge Gonzalez Rogers:

This letter brief serves to respond to the Court's January 16, 2019 Order re: Parties' Joint Case Management Statement, which requested that plaintiffs who plan to file a motion for summary judgment ("MSJ") provide the Court with an executive summary of the issues that the MSJ will address and whether those issues require independent briefing. *See* ECF No. 81.

In this matter, Plaintiffs State of California, by and through Xavier Becerra, Attorney General, and the California Air Resources Board ("CARB"), and State of New Mexico, by and through Hector Balderas, Attorney General (collectively, "State Plaintiffs") challenge the decision by the U.S. Bureau of Land Management ("BLM") to repeal key requirements of the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule (the "Waste Prevention Rule" or "Rule"). The Waste Prevention Rule was a commonsense measure that was promulgated in November 2016 to reduce the enormous waste of natural gas on public lands that results from venting, flaring, and equipment leaks. Several conservation and tribal organizations ("Conservation and Tribal Plaintiffs") have filed a similar action. The Court granted the parties' request to consolidate these two actions, although the parties specifically retained the right to file separate pleadings. *See* ECF No. 48.

This case involves review of a final agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and all parties agree that the cases can be resolved through MSJs.

See ECF No. 77, p. 3. At this time, State Plaintiffs plan to file an MSJ addressing the following issues: (1) State Plaintiffs' standing to challenge BLM's decision to repeal the Waste Prevention Rule (the "Waste Rule Repeal"), (2) BLM's failure to provide a reasoned analysis for the Waste Rule Repeal, in violation of the APA; (3) BLM's adoption of a new definition of "waste oil or gas" that is contrary to the Mineral Leasing Act ("MLA") and arbitrary and capricious under the APA; and (4) BLM's failure to take a "hard look" at the environmental impacts of the Waste Rule Repeal, in violation of the National Environmental Policy Act ("NEPA") and the APA. The ultimate scope of the MSJ, however, will depend on the contents of the administrative record, which BLM has agreed to produce by February 15, 2019.

Due to the separate and distinct interests that each plaintiff group represents, and pursuant to their sovereign authority as Attorney Generals to bring civil actions to protect the public, State Plaintiffs request to file independently from the Conservation and Tribal Plaintiffs. In an effort to reduce repetition between the plaintiff groups' MSJs, however, this letter brief identifies issues which State Plaintiffs believe could be briefed jointly. Should the Court order joint briefing on any of these issues, State Plaintiffs request that the amount of pages provided reflect the complexity of the arguments summarized in this letter brief and the wide range of interests that the plaintiff groups represent.

I. **Legal Background**

State Plaintiffs bring this case under the APA, NEPA, and several federal land management statutes, including the MLA. Judicial review of administrative decisions is governed by section 706 of the APA. Agency actions are subject to judicial reversal where they are "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 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 in view or be the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

An "agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change." *Id*. at 42. However, 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). 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). Further, an agency cannot repeal a validly promulgated rule without first "pursu[ing] available alternatives that might have corrected the deficiencies in the program which the agency relied upon to justify the suspension." *Public Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984). The APA requires that interested parties have a "meaningful opportunity to comment on proposed regulations." *See Safe Air for Everyone v. U.S. EPA*, 488 F.3d 1088, 1098 (2007).

The MLA is one of several federal statutes that mandate BLM to minimize waste from oil and gas operations on federal and Indian lands. The MLA 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." 30 U.S.C. § 187. The MLA specifically requires BLM to ensure that "[all] 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.

NEPA requires federal agencies to take a "hard look" at the environmental consequences of a proposed activity before taking action. *See* 42 U.S.C. § 4332. To achieve this purpose, a federal agency must prepare an Environmental Impact Statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C); 40 C.F.R. § 1502.3. A "major federal action" can include "new or revised agency rules and regulations." 40 C.F.R. § 1508.9. If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts are insignificant. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001). However, an EIS must be prepared if "substantial questions are raised as to whether a project … may cause significant degradation of some human environmental factor." *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998).

II. Summary of Arguments

A. State Plaintiffs Have Standing to Challenge the Waste Rule Repeal.

To the extent that BLM challenges State Plaintiffs' standing to bring this action, State Plaintiffs will need to show that they (1) have suffered an "injury in fact" that is (2) fairly traceable to the challenged action of defendants and (3) is likely redressable by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 180–81 (2000). As the U.S. Supreme Court has found, "States are not normal litigants" and are entitled to "special solicitude" for purposes of standing, and a state's "well-founded desire to preserve its sovereign territory" supports standing in cases implicating environmental harms. *Mass. v. EPA*, 549 U.S. 497, 517-19 (2007). To demonstrate standing to bring a procedural claim, such as a NEPA violation, a plaintiff "must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *WildEarth Guardians v. U.S. Dep't of Agric*., 795 F.3d 1148, 1154 (9th Cir. 2015).

Because of State Plaintiffs' special solicitude and interests in protecting their sovereign territory from the impacts of the Waste Rule Repeal, as well as the complex and multifaceted nature of this claim, this issue will require independent briefing.

B. BLM Failed to Provide a Reasoned Analysis or "Good Reasons" for the Waste Rule Repeal.

The analysis BLM provided during the rulemaking process for the Waste Rule Repeal was deficient in numerous ways, rendering the action arbitrary and capricious under the APA. As states that receive millions of dollars in royalties from federal mineral extraction, State Plaintiffs have a unique perspective on the benefits of reducing lost royalty revenue through the

Waste Prevention Rule, as well as the costs that the repeal of the Rule generates. Further, as the agency charged with protecting air quality in California, CARB has specific knowledge regarding the adverse air quality impacts from the production of fossil fuels within California. Therefore, because State Plaintiffs will bring these unique interests to their discussion of BLM's deficient analysis, we believe this multi-pronged issue will require independent briefing.

i. BLM Failed to Explain how the Waste Rule Repeal Achieves Its Statutory Mandates to Prevent Waste.

BLM failed to provide a reasoned explanation regarding how the Waste Rule Repeal will achieve their statutory mandates to prevent waste, ensure the adequate payment of royalties, protect "the interests of the United States," safeguard "the public welfare" in federal mineral leases, protect air and atmospheric values, prevent unnecessary or undue degradation of the lands, or fulfill their statutory trust responsibilities on tribal lands. And BLM has not explained how the existing regulations and authorities that were considered inadequate to prevent waste when the Waste Prevention Rule was promulgated, and to which they are now reverting, are now sufficient to address these mandates.

ii. The Justifications Provided by BLM for the Waste Rule Repeal Are Contradicted by the Record.

The justifications that BLM does provide for the Waste Rule Repeal are contradicted by evidence in the record. For example, while BLM cites newfound concerns about compliance costs, BLM previously found that marginal or low-producing wells would not be overburdened by the Waste Prevention Rule because, inter alia, the Rule contains a provision allowing operators to propose a less costly alternative where compliance with the Rule would be "so costly as to cause the operator to cease production and abandon significant recoverable oil or gas reserves under a lease." 81 Fed. Reg. at 83,030. In addition, BLM does not explain why they now consider the Rule to be duplicative of state and federal laws and regulations that were largely already on the books when the Waste Prevention Rule was finalized.

iii. BLM's Reliance on an "Interim Domestic Social Cost of Methane" Model in Its Regulatory Impact Analysis Is Arbitrary and Capricious.

In support of the Waste Rule Repeal, BLM released a "Regulatory Impact Analysis for the Final Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule" ("Regulatory Impact Analysis"). While the Regulatory Impact Analysis draws heavily upon the analysis conducted for the Waste Prevention Rule, it reaches the opposite conclusion in finding that the costs of the Rule's requirements outweigh its benefits. The primary reason for this change is BLM's use of an "interim domestic social cost of methane" metric that fails to consider the best available science, inadequately addresses risk and uncertainty, ignores significant climate impacts, and undervalues benefits of the Waste Prevention Rule. Moreover, the Regulatory Impact Analysis also finds that the administrative burdens of the Rule are twice as high as those calculated in the Waste Prevention Rule but does not explain why this estimate is so much higher than the estimate calculated in 2016. Furthermore, State Plaintiffs had no opportunity to review and comment on BLM's new analysis of the alleged impacts of the Rule

on marginal wells, including a calculation of "the per-well reduction in revenue" from costs imposed by the Rule, which appeared for the first time in the final Regulatory Impact Analysis.

iv. BLM Did Not Consider Alternatives to Repealing the Waste Prevention Rule.

BLM failed to consider alternatives to repealing the Rule's key requirements, in violation of the APA. In its rulemaking, BLM did not even explore the possibility of addressing any alleged deficiencies with the Waste Prevention Rule or allegedly unreasonable burdens on regulated entities through, for example, narrowly-tailored changes or exemptions.

C. BLM's New Definition of "Waste Oil or Gas" in the Waste Prevention Rule Repeal Is Contrary to Law.

BLM's new definition of "waste of oil or gas," which would limit such waste to acts "where compliance costs are not greater than the monetary value of the resources they are expected to conserve," is contrary to law. Under the MLA, 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. The statutory language makes clear that BLM must require leaseholders to prevent waste irrespective of such cost considerations. Identifying "waste" only when resource value exceeds compliance costs effectively nullifies these statutory provisions.

Furthermore, BLM's new definition of "waste of oil or gas" is arbitrary and capricious. This new definition is contrary to the existing definition of "waste" found elsewhere in BLM's regulations and constitutes an unexplained and unsupported change in position. Further, this definition completely ignores BLM's statutory mandates to ensure that the American public receives a fair return on publicly-owned resources, as well as BLM's duty to protect public health and the environment.

Due the largely legal nature of this issue, State Plaintiffs believe that it could be briefed jointly with the Conservation and Tribal Plaintiffs.

D. BLM Failed to Take a "Hard Look" at the Environmental Impacts of the Waste Rule Repeal.

There are substantial questions as to whether repealing the Waste Rule Repeal will cause significant environmental impacts. For example, BLM admits that the Waste Rule Repeal would result in increased emissions of volatile organic compounds (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. Additionally, the Waste Rule Repeal acknowledges that "the final rule will remove almost all of the requirements in the 2016 rule that we previously estimated would … generate benefits of gas savings or reductions in methane emissions." 83 Fed. Reg. at 49,204.

Despite this, the environmental assessment ("EA") and the Finding of No Significant Impact ("FONSI") prepared by BLM for the Waste Rule Repeal do not take a "hard look" at these impacts and improperly conclude that the environmental impacts are not significant. In

particular, BLM's analysis of the impacts on public health and safety resulting from increased VOC emissions and hazardous air pollutants consists of one conclusory sentence. The same is true for their consideration of noise and light impacts resulting from increased flaring due to the Waste Rule Repeal. Furthermore, BLM's claims that climate impacts "cannot reliably be assessed" and are too "uncertain" to be reasonably foreseeable are arbitrary and contrary to law and the agency's past findings. Ultimately, the FONSI fails to provide a convincing statement of reasons to support BLM's finding of no significant impacts and its failure to prepare an EIS.

State Plaintiffs are already suffering the environmental harms caused from the production of fossil fuels in their borders and the impacts of climate change. CARB, as the California agency tasked with monitoring and protecting the public's air quality, is a unique authority on air pollution in the state. In their comment letter on the draft EA, State Plaintiffs discussed particular concerns about impacts that the Waste Rule Repeal would have on their states, including air pollution impacts in Kern County, California and the San Juan Basin in the Four Corners region of New Mexico. Because of their particular expertise regarding the environmental harms from the Waste Rule Repeal on the state level, State Plaintiffs believe that this issue requires independent briefing.

III. Conclusion

Based on the issues summarized above, State Plaintiffs will seek to file a motion for summary judgment on all the causes of action in their First Amended Complaint, and respectfully request the ability to file an independent brief. Should the Court order State Plaintiffs to brief one or more of these issues jointly with the Citizens and Tribal Plaintiffs, we request that the Court consider the diversity of interests the plaintiff groups represent, as well as the complexity of the issues to be discussed, when assigning page allocations to the parties.

Sincerely,

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