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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, *et al.*, Plaintiffs, vs. RYAN ZINKE, *et al.*, Defendants.	Civil Case No. 3:17-cv-07186-WHO
SIERRA CLUB, *et al.*, Plaintiffs, vs. RYAN ZINKE, *et al.*, Defendants.	Civil Case No. 3:17-cv-7187-WHO (Related) **[PROPOSED] INTERVENOR-DEFENDANT AMERICAN PETROLEUM INSTITUTE OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION** Date: February 7, 2018 Time: 2:00 pm Courtroom: 2, 17th Floor Judge: Hon. William H. Orrick

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

A preliminary injunction is emergency relief to preserve the status quo; by contrast, Plaintiffs' motions present no emergency and would upend the status quo. For decades, federal and Indian oil and gas lessees operated under established economic principles and avoided the "waste" of oil and gas consistent with federal standards. The Bureau of Land Management's ("BLM") November 2016 final rule ("2016 Rule") – rushed to completion just before the change in administration – unlawfully seeks to alter those long-established standards, regulate air quality in the guise of "waste" prevention, and expand the concept of "waste" beyond what BLM's underlying statutory authority allows. This evisceration of established standards would impose substantial new burdens threatening the viability of federal and Indian oil and gas lease operations. The 2016 Rule is being challenged in federal district court in Wyoming, and that court already has opined preliminarily that the 2016 Rule may overreach BLM's waste prevention authority.

BLM is now stepping back to conduct a review of that Rule's exposed deficiencies, and through a proper notice and comment rulemaking process issued a partial "Suspension Rule" for not-yet effective portions of the 2016 Rule pending BLM's release of proposed regulatory revisions anticipated by the end of this month. Plaintiffs now seek, in this new forum, to unreasonably compel immediate and full application of the 2016 Rule in lieu of preexisting regulations, notwithstanding the 2016 Rule's exposed fundamental flaws and corresponding active reconsideration by BLM.

Plaintiffs fail to justify the extraordinary relief of a preliminary injunction. A brief delay of a random compliance date for requirements largely not yet in effect, and during which time prior, long-standing regulatory standards remain effective, presents no exigency. Plaintiffs cannot demonstrate immediate and irreparable harm from mere continuation of operations on existing leases that will remain highly regulated, which notably they have not previously sought to enjoin as "waste." Consistently, their motions do not dispute BLM's Environmental Assessment ("EA") and Finding of No Significant

Impact ("FONSI") accompanying the Suspension Rule. Likewise, the balance of harms favors the regulated community which would bear a substantial and irrevocable burden absent the Suspension Rule while this litigation is pending.

Plaintiffs' arguments entirely ignore that the Suspension Rule is the product of full public notice and comment rulemaking, and Federal Defendants have not yet had the opportunity to file the complete, extensive administrative record. Plaintiffs also overlook the already recognized shortcomings of the 2016 Rule that BLM rightfully is working to address. The Court should avoid premature merits determinations here, particularly because Plaintiffs' requested preliminary relief and final relief are the same – enjoining the Suspension Rule. The public interest, including regulatory certainty, adherence to law, and judicial economy, similarly warrants denial of Plaintiffs' motions.

FACTUAL BACKGROUND

On November 18, 2016, BLM promulgated the 2016 Rule, which imposes various uniform new limits, restrictions, and prohibitions on the venting and flaring of gas from federal and Indian oil and gas leases. 81 Fed. Reg. 83,008 (Nov. 18, 2016). The 2016 Rule also requires operators to capture and flare or sell, and prevent leaks of, fugitive gas emissions associated with oil and gas lease equipment such as piping, storage tanks, and pumps. *Id.* Although the 2016 Rule took effect on January 17, 2017, compliance with certain provisions was not required until January 17, 2018.

BLM subsequently issued the Suspension Rule challenged by Plaintiffs in this litigation. 82 Fed. Reg. 58,050 (Dec. 8, 2017). The Suspension Rule largely preserves the status quo and postpones only some compliance deadlines in the 2016 Rule for one additional year, while BLM considers potential fixes to its 2016 Rule. *Id.* The government has announced that proposed revisions to the 2016 Rule are undergoing final internal review within the Office of Management of Budget, and anticipates publication in January 2018. Dkt. 50.

Nearly all parties to this case already are litigating the 2016 Rule in the District of Wyoming, in which API filed an amicus merits brief. *State of Wyoming v. USDOI*, Nos. 16-280 & 16-285 (consolidated), Dkt. 153. Most of the parties also are litigating a BLM prior postponement notice regarding the 2016 Rule under 5 U.S.C. § 705, which presently is on appeal to the Ninth Circuit. *California v. BLM*, No. 17-17456 (9th Cir. filed Dec. 8, 2017). Plaintiffs now challenge and seek a preliminary injunction of the Suspension Rule in this Court, to grant them all of their requested relief while this case is pending.

ARGUMENT

I. PLAINTIFFS' MOTIONS DO NOT MEET THE BASIC PURPOSES OF A PRELIMINARY INJUNCTION.

"A preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (internal quotation marks omitted). As Plaintiffs admit, "[t]he purpose of a preliminary injunction is merely to preserve the relative position of the parties until a trial on the merits can be held." States Br. at 12 (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). A preliminary injunction, like a temporary restraining order, is "emergency relief" and cannot issue absent "a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *Smart Techs. ULC v. Rapt Touch Ireland Ltd.*, 197 F. Supp. 3d 1204 (N.D. Cal. 2016); Fed. R. Civ. P. 65(a). "The burden on the moving party is particularly heavy where … granting the preliminary injunction would give the movant substantially the same result it would obtain after a trial on the merits." *Sheen v. Screen Actors Guild*, No. 12-01468, 2012 WL 2360923, at *14 (C.D. Cal. Mar. 28, 2012) (internal citation omitted).

Plaintiffs' motions fundamentally are at odds with each of the above conditions. Plaintiffs rightly assert that "it is critical that this Court preserve the status quo," but that principle supports denial of a preliminary injunction of the Suspension Rule. States Br. at 3. In reality, Plaintiffs' motions improperly seek to enforce new "January 17, 2018 compliance requirements" not yet even in effect, rather than maintain the status quo

through application of BLM regulations that have been in effect for years. *Id.* at 4; *see also* Non-Governmental Organizations ("NGO") Br. at 3. Forcing regulated entities to affirmatively take actions toward compliance with new requirements would be the opposite of the status quo. As this Court has explained:

> Before the court turns to the merits of plaintiffs' motion under the *Winter* standard, it must first address the nature of plaintiffs' desired relief. An injunction typically enjoins some conduct harmful to the party seeking it. In other words, it "restrains" a party from further action. Plaintiffs here are not seeking to stop defendants from doing something. Rather, plaintiffs seek an injunction that would require defendants to take some affirmative action. Namely, plaintiffs ask the court to put in place procedures that in their view would protect LPTs [Licensed Psychiatric Technicians] against something harmful. Such "mandatory preliminary relief" is "subject to a heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party."

Berndt v. Cal. Dep't of Corr., No. 03-3174, 2010 WL 11485028, at *4 (N.D. Cal. June 3, 2010) (internal citations omitted); *see also Bell Atl. Bus. Sys. Servs., Inc. v. Hitachi Data Sys. Corp.*, 856 F. Supp. 524, 525 (N.D. Cal 1993) (denying "mandatory injunction" motion that "does not seek to maintain the status quo, but instead seeks to drastically alter the status quo"). The same is true here, and Plaintiffs' motions similarly should be denied.

Further, there is no exigency. Plaintiffs' refrain that emissions and harms will "increase" absent a preliminary injunction ignores that the Suspension Rule merely continues the status quo of longstanding lease operations, and moreover does not delay certain 2016 Rule provisions or other applicable emissions controls. *See Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F2d 1374, 1377 (9th Cir. 1985) ("Where no new harm is imminent, and where no compelling reason is apparent, the district court was not required to issue a preliminary injunction against a practice which has continued unchallenged for several years."). Indeed, this is not a case involving halting new, near-term, on-the ground activities where a pristine environmental resource hangs in the balance. *See Bell Atl.*, 856 F. Supp. at 525 (finding no circumstances warranting

"extraordinary emergency relief"); *Border Power Plant Working Grp. v. Dep't of Energy*, No. 02-513, 2003 WL 22331251, at *5 (S.D. Cal. June 4, 2003) (declining to preliminarily enjoin power plant interim operations). Nor has there been a statutory change that compels BLM to implement new regulatory standards. BLM's waste prevention authority derives from the Mineral Leasing Act of 1920 ("MLA"), and has been unchanged for decades. 30 U.S.C. §§ 187 & 225.

Lastly, Plaintiffs' motions ask the Court to immediately afford Plaintiffs all relief they could hope to obtain on the merits in this case. Preliminarily enjoining the Suspension Rule would force additional, irrevocable compliance efforts, the same permanent relief sought in Plaintiffs' complaints. Once expended, these efforts and costs cannot be recouped even if Defendants prevail, because initial compliance involves the construction and modification of substantial oil and gas infrastructure. Accordingly, compliance with now-suspended provisions of the 2016 Rule is not something that regulated entities can simply switch on and off, especially at existing facilities, regardless of the ultimate fate of the Suspension Rule or the 2016 Rule. Declaration of Erik Milito ("Milito Decl.", attached) ¶ 17.

Because Plaintiffs' motions are inconsistent with the basic function of a preliminary injunction, they must fail. In addition, they do not satisfy the four requisite factors for a preliminary injunction set forth by the Supreme Court in *Winter*. Namely, the court must deny a preliminary injunction unless a plaintiff can "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 555 U.S. at 20. Plaintiffs fail that test.

II. PLAINTIFFS FAIL TO ESTABLISH IRREPARABLE HARM ABSENT AN INJUNCTION.

Plaintiffs cannot clear their high bar to show they "*likely*" will incur irreparable harm before the Court can issue a final merits decision. *Id.* at 22 (emphasis in original).

The Supreme Court, rejecting the Ninth Circuit's more lenient prior standard, has made clear that "[a] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Id.* (internal citation omitted). Irreparable harm must be "imminent," and "has been defined as that injury which is certain and great." *Berndt*, 2010 WL 11485028, at *6 (internal citations omitted). Because Plaintiffs here cannot demonstrate imminent, irreparable harm from maintaining the decades-long status quo, plus non-suspended provisions of the 2016 Rule, the Court need not inquire further to adjudicate Plaintiffs' motions. Indeed, courts often look first for likely irreparable harm as "the single most important prerequisite" for a preliminary injunction, before even considering any of the other factors. *E.g.*, *Delphon Indus., LLC v. Int'l Test Sols. Inc.*, No. 11-1338, 2011 WL 4915792, at *3 (N.D. Cal. Oct. 17, 2011) (internal citations omitted).

Plaintiffs' alleged irreparable harm rests on two fictions: (i) that the Suspension Rule will cause significant, unregulated environmental effects on January 18, 2017; and (ii) that a preliminary injunction of the Suspension Rule will immediately prevent such effects. The federal district court in Wyoming has debunked such claims by the same parties, finding an injunction of the full 2016 Rule would not substantially harm Plaintiffs:

> [N]either have Respondents shown substantial harm if an injunction were granted. BLM has been regulating oil and gas waste pursuant to NTL-4A for 30 years. The asserted need to update BLM's rules to account for technological advances does not seem so pressing that appreciable harm will result to BLM if the Rule's effective date is delayed pending this Court's ruling on the merits. The asserted benefits of the Rule are found largely in the social benefits of reducing emissions of methane and other pollutants, which is already subject to EPA and state regulations.

Wyoming, 2017 WL 161428, at *12 (D. Wyo. Jan. 16, 2017). The same is true now, one year later.

Any effects of the Suspension Rule also are narrower than the full injunction contemplated by the Wyoming federal district court, as the Suspension Rule defers only select deadlines in the 2016 Rule, and only for up to one year while BLM considers

promulgating revisions to the 2016 Rule. As discussed *infra*, the Suspension Rule preserves some 2016 Rule provisions in effect, including all royalty-related provisions. For example, the Suspension Rule does not alter the 2016 Rule's venting prohibition which, per BLM, is the provision most likely to affect air quality and public health. EA at 17, 21 ("The reductions in VOCs and HAPs are expected to be driven almost entirely by the venting prohibition.").[1] Plaintiffs also do not identify any regulatory gap created by the Suspension Rule compared with former Notice to Lessees and Operators ("NTL")-4A. *See* NGO Br. at 5, 10.

Tellingly, Plaintiffs' motions do not dispute, or even mention, BLM's findings of no significant environmental impact in its EA and FONSI prepared in conjunction with the Suspension Rule pursuant to the National Environmental Policy Act ("NEPA"). Under NEPA and implementing regulations, agencies may prepare an EA and FONSI in lieu of a more detailed Environmental Impact Statement where an agency action (including a rulemaking) does not have a significant effect on the human environment. 42 U.S.C. § 4332(2)(C). Here, after analysis, BLM fully disclosed the Suspension Rule's potential impacts and reasonably concluded that they would not be significant. 82 Fed. Reg. at 58,071; FONSI (attached) at 3, 7.[2]

In its FONSI, BLM pointed out that the Suspension Rule's temporary delay of requirements largely not yet in effect would (i) "essentially maintain[] the environmental status quo"; (ii) "not result in an increase of GHG, air pollutant and HAP emissions over current conditions"; and (iii) have a "limited duration" of only 12 months. *Id.* at 4, 5. BLM deliberately declined to adopt a longer (e.g., 2-year) suspension period while it

[1] Yet, volatile organic compounds ("VOCs") and hazardous air pollutants ("HAPs") are irrelevant to the 2016 Rule's stated purpose to reduce "waste," a concept applicable only to valuable resources such as oil and gas. For that and other reasons in its filed comments on the 2016 Rule and its Wyoming briefing, API does not agree with the venting provisions retained by the Suspension Rule.

[2] Plaintiffs' complaints include a NEPA claim, but neither preliminary injunction motion argues likelihood of success on that claim, or alleges irreparable harm as a result of BLM's supposed violation of NEPA.

evaluates potential revisions to the 2016 Rule. EA (excerpts attached) at 14. Its FONSI also stated that "[a]lthough the 2016 final rule had secondary environmental benefits, the requirements of the 2016 final rule were not imposed for the protection of the environment." FONSI at 6-7. Consistently, the EA clarifies that the 2016 Rule did not "suggest that the climate change effects from implementing the 2016 final rule are precisely known," and finds that "actual effects of [GHG emissions] reductions on global climate change are sufficiently uncertain as to be not reasonably foreseeable." EA at 16, 20.[3] BLM also cautions that key bases and methodologies underlying its 2016 Rule analysis, such as the "social cost of methane," have been rescinded. *Id*. at 16.

Despite their collective volume of filed paper, Plaintiffs' motions and declarations simply repeat bald allegations of "new" harms caused by existing activities that contradict the above reality. As they concede in a footnote, "[e]stablishing injury-in-fact for the purposes of standing is less demanding than demonstrating irreparable harm to obtain injunctive relief." NGO Br. at 25 n.8 (quoting *Salix v. U.S. Forest Serv.*, 944 F. Supp. 2d 984, 1002 (D. Mont. 2013)). Plaintiffs also brush aside extant overlapping EPA, BLM, State, local, and industry standards governing emissions for the duration of the Suspension Rule. As BLM has stated, "[w]here EPA and State regulatory overlap exists, the [Suspension Rule] to delay the 2016 final rule's requirements would not represent a change from the baseline environment," and that overlap "is expected to grow over time." EA at 20; 82 Fed. Reg. at 58,060 ("the requirements of the 2016 final rule that are not being suspended or delayed, various State laws and regulations, and EPA regulations will operate together to limit venting and flaring during the period of the 1-year suspension"). Plaintiffs' contention that the 2016 Rule uniquely and immediately regulates existing oil and gas lease operations only highlights its legal infirmity as BLM overreach into the arena of air quality regulation, given that even EPA – the agency vested with authority to

[3] BLM did not prepare more than an EA for the 2016 Rule because it, too, would not have significant environmental effects, including "beneficial" ones. *See* FONSI at 4; 40 C.F.R. §§ 1508.8, 1508.27.

regulate air quality under the Clean Air Act – cannot regulate existing sources in that manner. *See infra.* Moreover, BLM retains discretion to address site-specific concerns via its individual inspections and approvals. *See* EA at 28-29.

Conversely, Plaintiffs ignore that for the next 12 months the Suspension Rule will beneficially avoid certain adverse environmental effects that would occur if the 2016 Rule were to become fully effective. For example, the Suspension Rule would reduce GHG, VOC, and HAP emissions by averting increased trucking otherwise necessitated by the 2016 Rule, such as for transporting natural gas liquids or conducting leak detection and repair ("LDAR") activities. *Id.* at 24-26. It would avoid "higher levels of localized noise and light pollution for some areas" and "the addition of more compressor stations and other equipment that increase noise pollution" resulting from immediate implementation of the 2016 Rule. *Id.* at 26. Wildlife too would benefit from BLM's postponing "the expected increase in surface disturbance and habitat fragmentation resulting from an accelerated development of gathering line infrastructure" for gas capture and "increased truck traffic and the addition of flare devices to storage vessels." *Id.* at 27. Likewise, delaying "construction of roads, facility pads (including well pads and centralized tank batteries), pipelines, gathering lines, compressor stations, and electrical transmission lines" under the 2016 Rule could benefit human populations in proximity to oil and gas sites. *Id.* at 27-28.

In sum, Plaintiffs show no emergency threatening immediate and irreparable harm absent a preliminary injunction. The Suspension Rule does exactly as it says, largely preserving the longtime status quo for the next 12 months pending potential regulatory changes by BLM. Prior to the 2016 Rule, Plaintiffs did not claim irreparable harm from the operation of BLM's longtime rules, and their various declarations ring hollow now. Simply put, "[t]his is simply not a case in which the bulldozers are standing at the edge of a development site, poised to destroy the last remaining habitat of an endangered species. Nor is it a case in which loggers are standing ready to cut an old growth forest." *Border*

Power Plant, 2003 WL 22331251, at *5. Plaintiffs' cited cases similarly involve new approvals rather than the status quo, pre-date the *Winter* test, or do not involve a preliminary injunction; they do not provide that a State plaintiff or an air emissions claim *per se* shows irreparable harm for a preliminary injunction. Plaintiffs' lack of irreparable harm is fatal to their motions, and the Court should deny them on that ground alone.

III. THE BALANCE OF HARMS FAVORS THE REGULATED COMMUNITY.

While Plaintiffs' motions allege only speculative – and not irreparable – harm, they try to minimize the very real, imminent, substantial, and irreversible harm to the regulated community that a preliminary injunction of the Suspension Rule would cause. Because the 2016 Rule's January 17, 2018 compliance date precedes the Court's scheduled February 7 hearing, enjoining the Suspension Rule would render all of the 2016 Rule's provisions immediately effective. In that event, the regulated community instantly would have to comply with the 2016 Rule's mandated installation of new equipment and significant modifications of lease infrastructure. *See, e.g.*, 43 C.F.R. §§ 3179.7 (alternative capture requirements); 3179.8 (well drilling); 3179.101 (well completion and related operations); 3179.102 (pneumatic controllers and diaphragm pumps); 3179.201-3179.202 (downhole maintenance and unloading); 3179.204 (LDAR). The engineering, installation, and capital costs associated with making these changes are unrecoverable if the 2016 Rule is reversed, either via further BLM rulemaking or in court. Milito Decl. ¶¶ 16-17. None of these regulations has a currently effective regulatory analogue, and all of them will have immediate, significant, and irreversible consequences for operators if immediately implemented. *Id.*

For example, once an operator engineers, designs, and installs a flare meter system to measure low-volume, low pressure, fluctuating gas flow per 43 C.F.R. § 3179.9, that system cannot freely be removed. *Id.* ¶ 17.a. Similarly, investment required under 43 C.F.R. §§ 3179.201 and 3179.202 to replace pneumatic pumps, reroute pumps to new control devices, and replace separators to accommodate the new equipment, cannot be

recouped even if those requirements ultimately are modified. *Id.* ¶ 17.b. At least one API member reported that vapor recovery under 43 C.F.R. § 3179.203 would affect hundreds of storage vessels. *Id.* ¶ 17.c. Meanwhile, the suspended 2016 Rule provisions governing well drilling, downhole well maintenance and liquids unloading, and well completion and related operations would require additional facility modifications, some of which would require unavailable equipment or unproven technology, and provide only *de minimis* waste or emissions reductions because emissions from activities are low and are already largely controlled by operators irrespective of the Suspension Rule. *Id.* ¶¶ 17.d-17-f. Worse, if BLM were to promulgate new regulatory standards to replace the 2016 Rule, they could require something altogether different or revert to pre-2016 Rule standards, thereby squandering operators' time and money.[4]

As explained above and by this Court, mandatory injunctions compelling parties to make such significant investments are not favored:

> One of the factors taken into account in balancing the equities is the nature of the injunctive relief sought, that is, will it merely proscribe a course of action (prohibitory injunction) or will it require defendant to take affirmative, costly remedial steps (mandatory injunction). Mandatory injunctions are disfavored by the courts, especially before trial, and therefore such injunctions will be issued with great caution and only in exceptional cases.

Coffee Dan's, Inc. v. Coffee Don's Charcoal Broiler, 305 F. Supp. 1210, 1216-17 (N.D. Cal. 1969). Because maintenance of the regulatory status quo is the only basis for Plaintiffs' allegedly imminent harms, this litigation does not present "exceptional" circumstances sufficient to force thousands of operators to make the irretrievable investment in equipment and infrastructure that the 2016 Rule immediately would require.

[4] Ironically, compliance with many 2016 Rule requirements likely would consume more gas than it would save. 82 Fed. Reg. at 58,055 ("The volume of royalty-free gas used to generate electricity to provide the power necessary to operate a zero-emission pump could exceed the volume of gas necessary to operate the pneumatic pump that the zero-emission pump would replace."); Milito Decl. ¶¶ 17.b & 17.c.

Retaining the Suspension Rule either will not harm Plaintiffs or will avoid harm to regulated entities. Plaintiffs imply that the Suspension Rule is the only thing precluding widespread industry compliance with the entire 2016 Rule immediately. But that assumes all equipment and implementation methodologies already are in place to achieve compliance right after a preliminary injunction of the Suspension Rule. While Plaintiffs offer no such evidence, their assumption, if true, would moot Plaintiffs' purported benefits of an injunction because operators would already be in compliance. *See* States Br. at 20. Alternately, if full near-term compliance is in fact infeasible, a preliminary injunction would undercut the Suspension Rule's deferral of substantial harm to operators from expensive, permanent modifications to equipment and infrastructure that BLM or the Wyoming court may render unnecessary.

Plaintiffs' contention that the regulated community had ample time to comply with the full 2016 Rule and thus will not be harmed without the Suspension Rule is unfounded. Compliance within a year was never achievable. *See* 81 Fed. Reg. at 83,058-59, 83,061. In the 2016 Rule, BLM did not account for the substantial time needed to engineer and implement such modifications in remote locations throughout the American West in winter weather, to train personnel in the installation, maintenance, and safe operation of the new systems before they are operational, or for initial LDAR screening at every well. Milito Decl. ¶ 18. Additionally, the supply of certain required equipment is insufficient to meet the demand that implementation of the 2016 Rule would trigger. *Id.* ¶ 19.

Plaintiffs' argument also ignores that the 2016 Rule has not continuously been in effect. After finally recognizing the myriad legal and compliance issues with the 2016 Rule, BLM for most of the past year has been working on a replacement rule. *Id.* ¶ 13. For nearly five of the last 12 months, certain 2016 Rule deadlines functionally have been suspended, making them no longer compulsory. *Id.* ¶ 12. As BLM properly found, regulated entities should not have to make irreversible investments in overhauling operations to comply with brand-new and problematic requirements that soon may be

superseded by another set of regulations. 82 Fed. Reg. at 58,051; *cf. Wyoming*, No. 16-285 (consolidated), Dkt. 189 (Dec. 29, 2017) (staying challenge to 2016 Rule because adjudicating the validity of a rule that the agency has suspended and is working to replace presents a "moving target" and is a "waste of time").

Plaintiffs also brush aside operators' costs of compliance as "minor compliance costs" when compared with the net worth of major oil companies. States Br. at 24. But as BLM has recognized, the vast majority of oil and gas operations on BLM-managed leases involve wells of only marginal production, which do not warrant the new investments necessary to comply with the 2016 Rule. 81 Fed. Reg. at 83,029 ("roughly 85 percent of wells on Federal and Indian leases are classified as low production wells"); Milito Decl. ¶ 21. In any event, an operator's investment decisions are generally based on the economics of each individual prospect, lease, or project, and comparing the annual costs of compliance with the net worth of an oil company cannot measure effects of a rule on individual operations or operators. Milito Decl. ¶ 20. The total costs associated with implementation of the 2016 Rule have been estimated by industry as almost $319 million, or approximately $110,000 per well, which cannot be fairly characterized as "minor." *See* www.regulations.gov, Dkt. No. BLM-2017-0002, Comment No. BLM-2017-0002-16496, at 4.

If the Suspension Rule were preliminarily enjoined, operators' inability to comply with the now-suspended 2016 Rule provisions likely would trigger widespread shut-ins, and even abandonment, with lasting, irreparable consequences for operators. *See* EA at 23; Milito Decl. ¶ 22. The 2016 Rule requires all operators to modify their operations, regardless of size or economic feasibility, to comply with emissions requirements of the Rule. It then treats emissions associated with noncompliant operations as "avoidable losses," potentially subjecting noncompliant operators to BLM enforcement actions, penalties, or even lease cancellation for the commission of "undue waste." Milito Decl. ¶ 24; *see* 43 C.F.R. § 3179.4; *see also* 30 U.S.C. § 225. Thus, under the 2016 Rule,

lessees are faced with an unenviable choice: either heavily invest in trying to build the necessary infrastructure to capture and flare or market gas at a loss (while also paying royalties on that production), or cease operations and shut in. Milito Decl. ¶ 25; *see Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1057-1059 (9th Cir. 2009) (similar "Hobson's choice" deemed "irreparable harm").

But as explained above, the unavailability of equipment, infeasibility of implementing certain requirements, and time needed to engineer and implement novel emissions capture or combustion solutions on thousands of geographically widespread leases mean that immediate compliance will not be an option in many instances. Nor are BLM-granted waivers from 2016 Rule requirements a meaningful remedy as Plaintiffs posit, because BLM doubts its own ability to process waiver requests and the outcome is uncertain. 82 Fed. Reg. 58,050; Milito Decl. ¶ 26. In view of BLM's limited staff resources and its announced efforts to replace the 2016 Rule with a new set of regulations, it is unlikely that BLM is prepared to adjudicate a volume of waiver requests in the interim. And if BLM could and did grant waivers, they would negate an injunction.

Temporary shut-ins to avoid noncompliance or meet flaring limits would incur the harm that any business would suffer if forced to indefinitely close its doors. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1970) ("substantial loss of business and perhaps even bankruptcy"); *City of L.A.v. Cnty. of Kern*, 462 F. Supp. 2d 1105, 1120 (C.D. Cal. 2006) ("likelihood of financial ruin") (internal citations omitted), *rev'd on other grounds*, 581 F.3d 841 (9th Cir. 2012). And even a temporary shut-in can reduce recoverable reserves and harm both the lessee and BLM (or Indian lessor) as the royalty owner. *See* 82 Fed. Reg. at 58,050 ("The BLM is reconsidering whether it was appropriate to assume that there would be no reservoir damage if an operator uses temporary well shut-in to comply with the [2016] Rule's capture percentage requirements"); Milito Decl. ¶ 23. As BLM now acknowledges, compliance-related shut-ins likely would disproportionately affect

smaller operators, "who might have fewer wells with which to average volumes of allowable flaring." 82 Fed. Reg. at 58,050; Milito Decl. ¶ 25.

Moreover, re-initiating well production after a shut-in is expensive, and may render a marginal well altogether uneconomic, forcing premature abandonment and potential lease termination. Milito Decl. ¶¶ 23-25; *see* 43 C.F.R. § 3108.2-1 (lease automatically terminates without a well capable of producing in paying quantities, i.e., capable of profitable operation, unless non-refundable shut-in rental is paid). BLM may also cancel any lease that no longer can be profitably operated. 43 C.F.R. § 3108.3. Lease termination or cancellation constitutes an irretrievable loss of the lessee's mineral interest and further triggers abandonment and reclamation obligations. 43 C.F.R. § 3162.3-4. BLM may only reinstate terminated leases under prescribed circumstances, and usually under terms less favorable to the lessee. 43 C.F.R. §§ 3108.2-2, 3108.2-3.

The 2016 Rule's so-called "alternative capture requirement" (§ 3179.8), which allows flaring only where the cost of gas capture would render the entire lease uneconomic and leave "significant" reserves in the ground, also may force widespread abandonment of marginal leases. Milito Decl. ¶ 27. The 2016 Rule does not define or indicate what constitutes "significant" reserves. But there is no assurance that BLM will deem the volume of oil beneath many marginal or stripper wells sufficiently "significant" to warrant application of the alternative capture requirement to allow the operation of the wells to continue. *Id.*

Current lessees are entitled to economic production of producible mineral resources by the terms of their leases, which they entered into in reliance on the traditional understanding of the term "waste," now upended by the 2016 Rule. Milito Decl. ¶ 28. But forcing immediate implementation of the 2016 Rule would prematurely shut in these wells or result in lease cancellation. This not only would create more waste, but also could breach the terms of existing oil and gas lease contracts, permanently and illegally depriving lessees of the benefit of the resources they bargained for. *See Mobil Oil Expl. &*

Prod. Se., Inc. v. U.S., 530 U.S. 604 (2000) ("Mobil"); *Amber Res. Co. v. United States*, 538 F.3d 1358 (2008).

In sum, the Suspension Rule avoids immediate and substantial harm to the regulated community. Compliance with the 2016 Rule's temporarily deferred requirements is not a paper exercise; it would entail significant, unrecoverable time and cost. Indeed, the fact that operators did not face an immediate deadline for most requirements was a chief reason why a year ago the Wyoming federal district court did not preliminarily enjoin the 2016 Rule. *Wyoming*, 2017 WL 161428 at *11 ("undoubtedly certain and significant compliance costs attached to the [2016] Rule" found not to be of "such imminence that there is a clear and present need for equitable relief to prevent irreparable harm" because "many of the Rule's requirements, including equipment replacement, do not take effect for a year"). That circumstance is no longer true. Meanwhile, the Suspension Rule presents insignificant, if any, harms to Plaintiffs. Consistent with the court's ruling in the related Wyoming case, Plaintiffs' purported climate change harms are not even their own. *Id.* at *12. The balance of harms thus cannot support a preliminary injunction.

IV. PLAINTIFFS CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs' APA merits arguments likewise fail to justify a preliminary injunction of the Suspension Rule, which is the product of full public notice and comment rulemaking procedures under the APA. Indeed, Plaintiffs cite no case that, as they attempt to do here, preliminarily enjoined a final rule issued after full APA-compliant notice and comment, or found that a suspension rule once challenged must yield to predecessor rules pending the litigation. Here, BLM complied with the APA by utilizing its familiar procedures to issue the Suspension Rule, and that rulemaking outcome is entitled to no less a presumption of regularity than the 2016 Rule. Similarly, Plaintiffs' APA arguments alleging "waste" and environmental harm from the Suspension Rule only highlight their

own, and the partially suspended 2016 Rule's, illegal conflating of "waste" with air quality, and BLM's lack of authority to supplant EPA's and the States' exclusive roles as regulators of air quality.[5]

As even Plaintiffs must concede, the Suspension Rule "is subject to the same APA requirements as BLM's initial decision to promulgate [the 2016] Rule." NGO Br. at 9; *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009) (APA "makes no distinction … between initial agency action and subsequent agency action undoing or revising that action"); *San Diego Navy Broadway Complex Coal. v. U.S. Coast Guard*, 2011 WL 1212888 (S.D. Cal. Mar. 30, 2011) (APA applies to regulatory suspensions). Thus, NGO Plaintiffs' merits arguments that the Suspension Rule is a "substantive rule" or a "repeal" are non-sequiturs and beside the point, because the same APA standards apply, and BLM adhered to those standards here. Reevaluating the rationale for a previous administration's regulations is a valid reason for suspending regulatory requirements. *See Nat'l Ass'n of Homebuilders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.") (internal quotations omitted). So long as "the agency remains within the bounds established by Congress [including the APA], it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Id.* (internal citation omitted).

BLM properly followed the APA notice and comment process in promulgating the Suspension Rule, and Plaintiffs do not demonstrate otherwise. 5 U.S.C. § 553. NGO Plaintiffs allege BLM did not afford a meaningful comment opportunity, citing *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 762 (4th Cir. 2012). That

[5] Plaintiffs' motions do not even attempt to show a likelihood of success on their other claims under the MLA, the Federal Land Policy and Management Act, Federal Oil and Gas Royalty Management Act, the Indian Mineral Leasing Act of 1938, the Indian Mineral Development Act of 1982, and NEPA.

inapposite case affirmed summary judgment to plaintiffs challenging a Department of Labor suspension rule because the Federal Register notice soliciting public comment contained a "content restriction" affirmatively precluding agency consideration of comments on "the substance or merits" of either the old or new rules. *Id.* at 770.[6] By contrast, the Suspension Rule was promulgated with full, unrestricted opportunity for public comment, and BLM's Federal Register notice soliciting comments contained no such "content restriction."[7]

Every case relied upon by Plaintiffs that invalidated agency delay or suspension rules did so because the agency, unlike BLM here, failed to comply with required APA rulemaking procedures. Plaintiffs' reliance on *Clean Air Council v. Pruitt* is no exception. 862 F.3d 1 (D.C. Cir. 2017). EPA there issued an administrative suspension of newly-promulgated regulations under Section 307(d)(7)(B) of the CAA, a statutory provision not relevant here. 42 U.S.C. § 7607(d)(7)(B). In holding that EPA misapplied its Section 307(d)(7)(B) authority, the court endorsed APA-compliant notice and comment rulemaking as the preferred means to suspend rules or effect policy changes. *Id.* at 8-9 (while "[a]gencies obviously have broad discretion to reconsider a regulation at any time, they must comply with the [APA], including its requirements for notice and comment"). That is exactly what BLM did here.

Substantively, Plaintiffs are unable to demonstrate that the Suspension Rule is arbitrary and capricious. The simplest reason at this point is that Plaintiffs filed their motions before BLM could file the extensive administrative record, including

[6] Though not cited by Plaintiffs, API notes that a lower court decision in the same case issued a preliminary injunction of the suspension rule on the same distinguishable basis, i.e., that the "content restriction" likely violated APA notice and comment rulemaking requirements. *N.C. Growers' Ass'n, Inc. v. Solis*, 644 F. Supp. 2d 664 (M.D.N.C. 2009).

[7] NGO Plaintiffs' few cherry-picked citations to the final Suspension Rule Federal Register notice and separate BLM responses to comments do not show that BLM limited public comment. *See* NGO Br. at 17. Nor do they countermand the record exhibiting BLM's consideration of the issues germane to the Suspension Rule's effects and BLM's identification of issues to evaluate in any subsequent replacement of the 2016 Rule.

approximately 750 unique public comments. *See Florida Power & Light v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."); 82 Fed. Reg. at 58,052. In the absence of a BLM administrative record lodged with the Court, Plaintiffs cannot demonstrate that BLM presumptively lacks a rational basis for the Suspension Rule. In any event, even after BLM lodges its administrative record, Plaintiffs will be unable to show that the Suspension Rule is arbitrary and capricious, including for the reasons below.

Plaintiffs attempt to bootstrap their recent separate challenge in this Court to BLM's prior notice under 5 U.S.C. § 705 of the APA postponing implementation of the challenged 2016 Rule because "justice so requires." The Court there granted summary judgment soon after commencement of the litigation to decide what it viewed as a purely legal issue interpreting 5 U.S.C. § 705. That case is now before the Ninth Circuit. For present purposes, Plaintiffs cannot paint this case with the same brush. BLM's prior action under 5 U.S.C. § 705 was not a rulemaking, and did not involve the Suspension Rule or its administrative record. Simply put, the Court's ruling on the scope of 5 U.S.C. § 705 does not speak to whether the Suspension Rule followed APA procedures or has a rational basis under the APA. If anything, BLM here took the steps that the Court advised in the prior case. *California v. BLM*, 2017 WL 4416409, *9-10 (N.D. Cal. Oct. 4, 2017).

Plaintiffs further insist that the Suspension Rule represents a "new policy" that impermissibly delays a "statutorily mandated regulation" to prevent "waste." States Br. at 14. But Plaintiffs have it exactly backwards. It is the Suspension Rule that largely maintains the established 30-plus-year regulatory status quo, and the 2016 Rule that upends established practice in exceedance of BLM's authority to prevent waste. Nothing in BLM's waste prevention authority under the 1920 MLA compels the specific contents of the 2016 Rule. As recognized by the federal district court in Wyoming, BLM has been lawfully regulating actual prevention of waste under this authority for decades:

> BLM has been regulating oil and gas waste pursuant to NTL-4A for 30 years. The asserted need to update BLM's rules to account for technological advances does not seem so pressing that appreciable harm will result to BLM if the Rule's effective date is delayed pending this Court's ruling on the merits. The asserted benefits of the Rule are found largely in the social benefits of reducing emissions of methane and other pollutants, which is already subject to EPA and state regulations.

Wyoming, 2017 WL 161428, at *12. The Suspension Rule largely reinstates these longstanding waste prevention regulations for 12 months, with some additional requirements. These longtime waste prevention requirements comply with the MLA, and Plaintiffs do not contend otherwise. BLM's statutory waste prevention authority has not changed, and the 2016 Rule implements no new statutory authority. Therefore, in temporarily preserving existing waste prevention rules, BLM could not have, as Plaintiffs allege, "failed entirely to consider the impact of the Suspension on its statutorily-imposed mandates to [prevent undue] waste of [oil and gas]." States Br. at 18.

Plaintiffs also heavily rely on another inapposite case where a new statute mandated that the National Highway Traffic Safety Administration ("NHTSA") promulgate uniform tire quality grading requirements. *Public Citizen v. Steed*, 733 F.2d 93, 96 (D.C. Cir. 1984). Years after promulgating the required regulations, NHTSA suspended those now-"settled rules," with the effect of reverting to no tire grading requirements at all. The D.C. Circuit invalidated NHTSA's suspension in part because it effectively deregulated an area Congress expressly directed the agency to regulate. *Id*. at 101, 105 ("In light of the express statutory command that a tire grading program be established by 1968, NHTSA's 'indefinite suspension' of the most meaningful component of that program was arbitrary and capricious."). Here, there is no intervening statutory directive, no deregulation in contravention of an express statutory mandate, and no default to zero regulation. Rather, because the Suspension Rule preserves longstanding BLM regulations implementing the MLA's waste prevention authority, it is a presumptively legitimate exercise of BLM's statutory mandate. *Id.* at 97-98 ("There is . . . at least a

presumption that [Congressionally-mandated policies] will be carried out best if the settled rule is adhered to.").

Instead, it is the 2016 Rule which represents the new, major shift in policy, raises serious questions regarding the scope of BLM's authority under the MLA, and intrudes upon EPA's and the States' exclusive jurisdiction to regulate air quality. *See Wyoming*, 2017 WL 161428, at *8 ("BLM has hijacked the EPA's authority under the guise of waste management"); *id.* (the 2016 Rule "upends the CAA's cooperative federalism framework and usurps the authority of Congress expressly delegated under the CAA to the EPA, states, and tribes to manage air quality"); *id*. at *9 ("Portions of BLM's stated rationale for the 2016 Flaring Rule undermine [BLM and environmental] Respondents' insistence that the Rule is foremost a waste prevention regulation."). The preoccupation with environmental impacts in Plaintiffs' motions reveals BLM's underlying overreach in the 2016 Rule. This is particularly true for existing operations, as BLM's 2016 Rule purports to regulate existing sources immediately while EPA legally must undertake a series of steps, including regulating new sources, before it may turn to existing sources. 42 U.S.C. § 7411(d)(1)(A)(ii). Thus, Plaintiffs' aim to immediately apply the full 2016 Rule by enjoining the Suspension Rule assumes that the entirety of the 2016 Rule is sacrosanct when it is not.

In requiring operators to make significant investments in equipment to capture gas that could only be marketed at a loss, the Rule impermissibly violates the very concept of "waste" as that term has been understood from the inception of the oil and gas industry, through enactment of the MLA and promulgation of NTL-4A, and as incorporated as a material term of thousands of BLM oil and gas lease contracts. *See* Milito Decl. ¶ 28. Consequently, it is the 2016 Rule that is at greatest risk of invalidation. *Wyoming*, 2017 WL 161428, at *10 ("The Court questions whether the 'social cost of methane' is an appropriate factor for BLM to consider in promulgating a resource conservation rule pursuant to its MLA authority. Moreover, it appears the asserted costs benefits [sic] of the

Rule are predominantly based upon the emissions reductions, which is . . . not attributable to the purported waste prevention purpose of the Rule. The question then becomes whether the Rule is arbitrary and capricious because it imposes significant costs to achieve *de minimus* [sic] benefits."). Plaintiffs cannot demonstrate likelihood of success to warrant emergency implementation of such novel and legally infirm regulations, particularly where the Suspension Rule they seek to defeat retains legally authorized regulations in effect for over 30 years.

Plaintiffs' disagreement with the result of BLM's APA rulemaking process, which comprises the majority of their motions, is insufficient to vacate the Suspension Rule, let alone on an emergency basis. Plaintiffs have cited nothing indicating that their challenge of an APA-compliant notice and comment rulemaking effectuating a partial suspension of new regulatory requirements warrants immediate re-imposition of those requirements while the Court decides the merits of their challenge.

V. A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST.

Finally, Plaintiffs' motions fail to separately examine the independent public interest criterion. Rather, they conflate it with the above balance of harms, and merely rehash their earlier unavailing arguments.

"Generally, the public interest is best served when an injunction is granted in favor of the party suffering the most harm by the denial or grant of the injunction." *Hodges v. Abraham*, 253 F. Supp. 2d 846, 874 (D.S.C. 2002), *aff'd*, 300 F. 3d 432 (4th Cir. 2002)). Here, as explained above, the parties that would suffer the most harm are federal and Indian oil and gas lessees, including API members. At the same time, the status quo will not harm the public interest for similar reasons that it will not harm Plaintiffs. As discussed above, Plaintiffs' repeated conclusions of interim "waste" do not actually implicate waste within BLM's purview. Paradoxically, given BLM's waste-prevention objectives, the suspended 2016 Rule's effect of shutting in wells or cancelling otherwise productive leases would result in actual waste by forcing the premature abandonment of

producible mineral resources. *See* 81 Fed. Reg. at 83,014 (estimating that the 2016 Rule will reduce production from federal leases by up to 3.2 million barrels per year); Milito Decl. ¶ 23.

Other public interest considerations likewise foreclose a preliminary injunction. First, Plaintiffs – like the 2016 Rule – tout regulatory certainty, while the effect of the 2016 Rule increases regulatory uncertainty. Rather, the Suspension Rule promotes certainty via its rational interim preservation of the longstanding status quo – coupled with non-suspended provisions of the 2016 Rule – while BLM works to rectify the 2016 Rule. Second, BLM's adherence to the law, including suspension of legally suspect provisions of the 2016 Rule's legal violations, serves the public interest. Indeed, any interim enforcement of the suspended 2016 Rule provisions likely would suffer from the same infirmities as the Rule itself. Third, judicial economy weighs against premature injunctive relief, particularly given multiple pending motions to transfer this case to the District of Wyoming in view of its close substantive relationship to more advanced proceedings there involving the same parties and issues. Finally, an injunction of the Suspension Rule could, by depriving regulated entities of their negotiated-for lease benefits, potentially expose the federal government to breach of contract and substantial damages claims. *See Mobil*, 530 U.S. 604.

CONCLUSION

Plaintiffs' policy disagreement with the Suspension Rule does not warrant a preliminary injunction to achieve their preferred policy result. For the above reasons, as well as the reasons explained by the Federal Defendants and other proposed intervenors, the Court should deny Plaintiffs' preliminary injunction motions.

Dated this 16th day of January, 2018.

Respectfully submitted,

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