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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; EARTHWORKS; ENVIRONMENTAL DEFENSE FUND; NATURAL RESOURCES DEFENSE COUNCIL; THE WILDERNESS SOCIETY; NATIONAL WILDLIFE FEDERATION; CITIZENS FOR A HEALTHY COMMUNITY; DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT; ENVIRONMENTAL LAW AND POLICY CENTER; FORT BERTHOLD PROTECTORS OF WATER AND EARTH RIGHTS; MONTANA ENVIRONMENTAL INFORMATION CENTER; SAN JUAN CITIZENS ALLIANCE; WESTERN ORGANIZATION OF RESOURCE COUNCILS; WILDERNESS WORKSHOP; WILDEARTH GUARDIANS; and WYOMING OUTDOOR COUNCIL,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; and UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 3:17-cv-07187-WHO

Related to Case No. 3:17-cv-07186-WHO

Date: February 7, 2018
Time: 2:00 p.m.
Courtroom: 4, 17th Floor
Judge: Hon. William H. Orrick

CONSERVATION AND TRIBAL CITIZEN GROUPS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This case is about the rule of law—whether an agency may change the law, here removing significant public protections, without first considering its statutory authorities, explaining and supporting its changed position in the record, and engaging the public in this effort. The Administrative Procedure Act ("APA") requires agencies to follow these procedural obligations for a reason. They promote regulatory certainty and assure the regulated community and the public alike that rules will not change based upon the political whims of the Secretary. Elections surely have consequences, but the APA's requirements ensure that any regulatory changes that result are the product of careful examination and explanation.

Secretary Zinke and Movant-Intervenors hang their case on the flawed argument that the Amendment is not a revision because it temporarily maintains the status quo, and that it is therefore subject to a lower standard for reasoned decision-making. They are wrong. The status quo is the duly-promulgated Waste Prevention Rule, which went into effect on January 17, 2017 after years of careful deliberation—imposing some obligations immediately and requiring companies to ready themselves for others—and that has not been lawfully revised or rescinded since. Moreover, the APA contains no lower standard for "temporary" revisions. Under the APA, regulations may only be modified after an agency does the work to examine the authority Congress has granted, taken a hard look at the relevant facts, and considered public input. The Secretary failed to comply with the APA when he removed the Waste Prevention Rule's protections after "merely identif[ying] concerns"—through a secret internal review that was "mainly via oral communications" and not included in the administrative record—and without providing critically necessary explanations and factual support.

The Secretary and the industry protest that without the Amendment companies will have to make "potentially unnecessary" expenditures to comply with a regulation that is subject to change. But this approach knows no limits: agencies could suspend any regulation that imposes compliance costs, no matter how reasonable, by simply expressing "concerns" and a desire to reconsider the regulation. Furthermore, these expenditures are in no way unnecessary. They are required by a duly-promulgated regulation completed after a deliberative, multi-year process, and will advance the goals of that regulation and the statute under which it was promulgated—reducing the amount of

publicly-owned gas that is currently wasted through venting, flaring and leaking equipment. A possible future revision does not render compliance with the current regulations a nullity.

The unlawful Amendment irreversibly wastes 9 billion cubic feet of publicly-owned natural gas and increases emissions of climate-endangering methane and smog-forming volatile organic compounds by hundreds of thousands of tons. It yanks away critical protections that Americans like Don Schreiber—a rancher in New Mexico who is suffering from congestive heart failure and lives with 120 Bureau of Land Management ("BLM") managed oil and gas wells on and adjacent to his land—have expected and depended upon. The Secretary does not even try to rebut the detailed declarations from the Conservation and Tribal Citizen Groups (the "Citizen Groups") and their members demonstrating that every day that companies do not comply with the Waste Prevention Rule, they are irreparably harmed by air pollution that cannot be reversed and that the law does not allow. To remedy this harm, this Court should preliminarily enjoin the Secretary's eleventh-hour bid to remove public protections without first complying with the law.

ARGUMENT

I. A Preliminary Injunction Would Maintain, Not Disrupt, the Status Quo.

Plaintiffs laid out the correct standard of review in their motion for a preliminary injunction. Conservation & Tribal Citizen Groups' Mem. of P. & A. in Supp. of Mot. for Prelim. Inj. 6 (Dec. 19, 2017), ECF No. 4-1 ("Citizen Groups' PI"). Secretary Zinke and Movant-Intervenors argue that Plaintiffs should be held to a higher standard because, they contend, Plaintiffs request an injunction that would upend, rather than preserve, the status quo. Defs. Opp'n to Pls.' Mot. for Prelim. Inj. 9–10 (Jan. 16, 2018), ECF No. 59 ("BLM Br."); Intervenor-Def. Am. Petrol. Inst. Opp'n to Pls.' Mots. for Prelim. Inj. 3–4 (Jan. 16, 2018), ECF No. 57 ("API Br."); Intervenors W. Energy All. & Indep. Petrol. Ass'n of Am. Resp. in Opp'n to Pls.' Mots. for Prelim. Inj. 10 (Jan. 16, 2018), ECF No. 60 ("WEA Br."). They are wrong.

Plaintiffs' requested relief would preserve the status quo. The status quo here is the regulatory regime created by the Waste Prevention Rule, which went into effect on January 17, 2017, and was in effect for nearly a year before the Secretary issued the Amendment. 81 Fed. Reg. 83,008, 83,008 (Nov. 18, 2016) (VFD_002671). When the Secretary issued the Amendment,

operators had already been complying with many of the Rule's provisions—like the obligation to develop waste management plans and to reduce waste of gas during liquids unloading operations—for a year. *See* 82 Fed. Reg. 58,050, 58,051 (Dec. 8, 2017) (VFD_000002) (explaining that the Amendment suspends effectiveness of certain requirements that "are currently in effect"); BLM Br. 5 (acknowledging that the Amendment "suspend[s] for one year the effectiveness of certain provisions that were already in effect"). For other provisions, the Waste Prevention Rule set compliance deadlines of January 2018, and operators were well aware of their responsibilities to prepare for compliance before the deadline. It is the Amendment that now upends the status quo.

Enjoining the Amendment will not create new requirements, but will simply revert back to the status quo at the time the Amendment was promulgated, in which the Waste Prevention Rule applies. Thus, Plaintiffs do not seek a "mandatory" injunction. *See Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, --F. Supp. 3d--, No. C 17-05211 WHA, 2018 WL 339144, at *28 n.20 (N.D. Cal. Jan. 9, 2018) (holding request to set aside federal defendants' rescission of Deferred Action for Childhood Arrivals ("DACA") was not a mandatory injunction because the status quo was that DACA was in place).

This Court has acknowledged this exact distinction. When considering the Secretary's previous attempt to suspend the Waste Prevention Rule's compliance dates, this Court stated:

> After years of developing the Rule and working with the public and industry stakeholders, the Bureau's suspension of the Rule five months after it went into effect plainly did not "maintain the status quo." To the contrary, it belatedly disrupted it. Regulated entities with large operations had already needed to make concrete preparations after the Rule had not only become final but had actually gone into effect.

California v. BLM, --F. Supp. 3d--, Nos. 3:17-cv-03804-EDL & 3:17-cv-03885-EDL, 2017 WL 4416409, at *9 (N.D. Cal. Oct. 4, 2017).

Indeed, the Secretary and Movant-Intervenors concede as much when they explain that the Waste Prevention Rule "cannot be simply switched on and off." BLM Br. 2; *see* API Br. 5. The fact that the Secretary and industry have done everything in their power to create uncertainty about the status of the Waste Prevention Rule does not make it any less a part of the Code of Federal Regulations or the status quo. *See Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979

F.2d 227, 234 (D.C. Cir. 1992) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.").

In fact, it is entirely unclear what "status quo" the Secretary believes he is preserving. The Amendment does not put back into place the prior regulatory regime contained in the Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases ("NTL-4A"). 82 Fed. Reg. at 58,063 (VFD_000014). Instead it creates a new regulatory regime. The Amendment removes all of the Rule's requirements that BLM estimated would result in gas savings, i.e., reduce waste, *id.* at 58,051 (VFD_000002), while leaving in place a limited suite of the Rule's provisions, which the Secretary admits are "updates to its prior policy" contained in the NTL-4A (not the NTL-4A itself). BLM Br. 22; *see also id*. at 7. As the Amendment institutes a regulatory regime that *never* previously existed, it does not preserve the status quo.

Furthermore, enjoining the Amendment would—by automatic operation of the law—reinstate the Waste Prevention Rule. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."); *see also Regents of Univ. of Calif.*, 2018 WL 339144, at *27–28 (issuing preliminary injunction setting aside rescission of DACA and reinstating DACA); *Open Cmtys. All. v. Carson*, --F. Supp. 3d--, No. 17-2192 (BAH), 2017 WL 6558502, at *1 (D.D.C. Dec. 23, 2017) (issuing a preliminary injunction setting aside suspension of a rule and requiring the Secretary of Housing and Urban Development ("HUD") to implement the rule). For this reason, this case is distinguishable from those cited by the Secretary and Movant-Intervenors, in which the court concluded an injunction was mandatory because it required a party to take some affirmative action. *E.g.*, *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) ("Garcia's requested injunction required Google to take affirmative action—to remove (and to keep removing) *Innocence of Muslims* from YouTube and other sites under its auspices."); *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, No. 17-cv-00949-WHO, 2017 WL 2352009, at *4 (N.D. Cal. May 31, 2017) ("Because plaintiffs are seeking to compel the USDA to do something affirmative—repost thousands of documents to the APHIS databases—their preliminary injunction is mandatory."); *Berndt v. Cal. Dep't of Corr.*, No. C03-3174-VRW, 2010 WL 11485028, at *4 (N.D. Cal. June 3, 2010) ("Plaintiffs here … seek an injunction that would require defendants to take some

affirmative action."). If enjoining an unlawful regulation was "mandatory" simply because it reinstated the prior regulatory regime, then in almost any challenge to a regulation a party would have to meet the higher burden for a "mandatory" injunction. Because Plaintiffs do not seek to change the status quo, a higher standard does not apply.

II. Plaintiffs Are Likely to Succeed on the Merits.

The Secretary substantively revised the Waste Prevention Rule by removing public protections for the next year. In doing so, the Secretary did not explain how the Amendment is permissible under BLM's waste prevention mandate, did not explain the change in position upon which he justified the Amendment or support that change in the record, and did not engage the public meaningfully in the process—all in violation of the APA. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) ("*Fox Television*"). Although the Secretary claims the Amendment is subject to a lesser standard because it is limited in duration, there is no legal support for this position. Indeed, such a rule would create a giant loophole in the APA, allowing agencies to effectively nullify regulations by promulgating a series of "suspensions" and promising to reconsider other changes to the regulations in the future.

A. The Amendment substantively *revises* BLM's waste prevention regulations and is subject to the standard for revisions, not some lesser standard.

Secretary Zinke agrees that the Amendment is a "substantive" rule, one that has "palpable effects on the regulated industry." BLM Br. 17. But he nevertheless argues that it is not a "revision" and should not "be held to all the same requirements" as other revisions. *Id.* at 18, 19. He is wrong.

Secretary Zinke confusedly attempts to have it both ways. He repeatedly insists that the Amendment "is not a revision of the [Waste Prevention] Rule." *Id.* at 19; *see also id.* at 34 (explaining that BLM "did not provide its reasons for 'revising' the [Waste Prevention] Rule because the proposed suspension was not a revision"); *id.* at 37 (similar). At the same time, however, he explicitly relies on his statutory authority to *revise* regulations to promulgate the Amendment. 82 Fed. Reg. at 58,059 (VFD_00010). Regardless of the Secretary's inconsistent position, the Amendment revises the Waste Prevention Rule. *See* 82 Fed. Reg. at 58,072–73 (VFD_00023–24) (*amending* Parts 3160 and 3170 of the Code of Federal Regulations). While it has "palpable effects

on the regulated industry," as the Secretary acknowledges, it also has palpable effects on the public, especially those who live near affected oil and gas wells—a reality the Secretary largely ignores. As Secretary Zinke concedes, the Amendment removes the obligation to comply with *all* of the provisions that "generate benefits of gas savings or reductions in methane emissions" for one year. *Id.* at 58,051 (VFD_00002). As a result, the Amendment will lead to 9 billion cubic feet of wasted gas and emissions of hundreds of thousands of tons of climate-disrupting and health-endangering pollutants. *Id.* at 58,056–57 (VFD_00007–08). Contrary to the Secretary's suggestion, "the action [he] actually took," BLM Br. 2, is a substantive revision of the Rule.

Secretary Zinke appears to believe that he has not revised the Waste Prevention Rule because the Amendment "does not alter the contents of the … Rule." BLM Br. 18. But that is false: the Amendment changes the dates when operators must comply with the Rule's requirements, allowing significant waste of natural resources and air pollution that would not otherwise have occurred. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) ("EPA's [3-month] stay, in other words, is essentially an order delaying the rule's effective date, and this court has held that such orders are tantamount to amending or revoking a rule."); *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 761–62 (3d Cir. 1982) (noting the effective date of a regulation is an "essential part of any rule"); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 579 n.26 (D.C. Cir. 1981) (holding agency order deferring a compliance deadline for six months "was in effect an amendment to a mandatory safety standard").

The Secretary further contends that "the fact that BLM is separately undertaking a rulemaking to revise the [Waste Prevention] Rule is evidence that the Suspension Rule is a separate, discrete agency action," and that Plaintiffs are conflating the two actions. BLM Br. 18. Plaintiffs do not disagree that the Amendment is a discrete agency action. But it is a logical fallacy to say that because the Secretary intends to do *another* revision of the Rule, the Amendment itself is not a revision. Under the Secretary's logic, an agency could promulgate serial "suspensions" for years so long as it was planning to consider some other change to the regulation in the future. In fact, it is the Secretary who conflates these two rulemakings in a misplaced attempt to justify today's *revision* (the

action he "actually took") with "concerns" that—at most—justify his separate decision to *reconsider* the Rule through a future rulemaking process.

Instead of applying the APA's long-standing reasoned decision-making standards, the Secretary asks this Court—without any legal support—to create a new, lesser, and amorphous standard for "temporary" rules.[1] But "temporary" rules may have meaningful impacts and constitute substantive revisions that are subject to the APA's standards, as *Donovan* and *Clean Air Council*, *supra* p. 6, demonstrate. Although the Secretary repeatedly objects that the Amendment should not be held to these standards because the action is "temporary," he fails to provide *any* meaningful standard for such revisions by which this Court and the public can assess his action. He claims—without any support in the case law—that to temporarily suspend a duly-promulgated regulation, he must simply identify "serious and legitimate concerns," and then express his desire to avoid imposing compliance costs while he investigates those concerns. *Id.* at 25.[2] But this standard is meaningless. The Secretary argues that he has demonstrated that his concerns are "serious and legitimate" here, but at the same time he claims that he need not "marshal[] the facts and data to assess those concerns." *Id.* at 25. In other words, this Court must simply take the Secretary's word for it. Moreover, even if the concerns identified by the Secretary could be considered "serious and legitimate," the Secretary cannot bootstrap concerns that might justify *reconsideration* of the Rule into the entire basis for a *revision*—putting his preferred policy into place *before* complying with the APA's reasoned decision-making requirements.

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[1] Plaintiffs dispute Secretary Zinke's characterization of the Amendment as temporary because he has no intention that industry will ever comply with these provisions. *See* Citizen Groups' PI 8 n.4. The Amendment's effects certainly are *not* temporary. *See infra* pp. 25, 28.

[2] The Secretary cites *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984), for this standard, but that case includes no such rule. *Broadcasters* merely identifies the conditions under which an agency may defer consideration of a relevant issue to a future rulemaking—where the agency is regulating against a "background of rapid technical and social change," and when an "agency's initial decision as a practical matter is reversible" and the deferred issues are "not the central element [of the initial rulemaking]." *Id.* at 1211. These conditions are not present here: the Amendment is not set against a background of rapid technical and social change, there is no way to reverse the waste of gas and emissions of dangerous pollution that will occur as a result of the Amendment, and the Secretary's promised future rulemaking is a central element of the Amendment—indeed, it is the *raison d'être* for the Amendment.

Although he fails to cite to any case in which a court has upheld a suspension for the purposes of reconsideration, the Secretary wrongly asserts that under Plaintiffs' theory, an agency could *never* do so. BLM Br. 36–37. That is not true. Plaintiffs simply argue that a "temporary" revision is subject to all of the APA's requirements, not some lesser standard. Moreover, merely giving notice and accepting comment does not satisfy the APA's requirements, as the Secretary appears to believe. BLM Br. 17 & n.12. While some of the cases Plaintiffs cite for the proposition that the Amendment is subject to APA requirements involved instances in which an agency failed to do notice and comment *at all*, undertaking notice and comment does not itself absolve the agency from meeting the APA's other requirements for reasoned decision-making detailed in *Fox Television*, 556 U.S. at 515. Indeed, the agency actions invalidated in *Public Citizen v. Steed*, 733 F.2d 93 (D.C. Cir. 1984), and *North Carolina Growers' Association v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012), were subject to notice and comment, but the courts still held that the agencies did not comply with APA requirements.[3]

If this Court adopts the Secretary's lesser standard, anytime a new President issues an executive order and an agency "merely identifie[s] concerns," BLM Br. 26, and a wish to avoid imposing compliance costs, it could temporarily remove important public (or industry) protections, ousting the public (or industry) from that process, virtually eliminating judicial review by promising to substantiate the concern *later*, *see* Citizen Groups' PI 14–15. This would create a major loophole in the APA for temporary actions, despite the fact that those actions—as is the case here—may have significant irreversible consequences, and it would undermine the very "regulatory certainty" that the Secretary claims this action promotes, BLM Br. 31. *See Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 197 (2d Cir. 2004) ("unfettered" discretion to amend standards would "completely undermine any sense of certainty on the part of manufacturers").

[3] *Public Citizen* is directly on point. *Contra* BLM Br. 18. That case stands firmly for the proposition that an agency cannot *suspend* a regulation merely because it has "concerns" about it, but must fully justify its decision to suspend the regulation while it investigates those concerns. *Pub. Citizen*, 733 F.2d at 100–03. Moreover, while some statutes specifically provide for stays pending reconsideration without satisfying all of the APA's requirements, *see, e.g.*, 42 U.S.C. § 7607(d)(7)(B), BLM's enabling statutes do not.

The Secretary's approach is even more untenable here where the Secretary claims that his concerns are the result of a review that "occurred mainly via oral communications that cannot be produced," or on the basis of documents he is withholding under the deliberative process privilege. BLM Br. 33 n.20. This attempt to shield the fundamental basis for the Amendment from the public's and this Court's review runs afoul of the APA, which compels agencies to support their decisions in the administrative record. *See Am. Petrol. Inst. v. EPA*, 862 F.3d 50, 66 (D.C. Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) ("*State Farm*").

The APA prevents "[c]hanges in course" that are "solely a matter of political winds and currents," *N.C. Growers' Ass'n*, 702 F.3d at 772 (Wilkinson, J., concurring), such as the Secretary's action here, which flaunts years of examination and public engagement and suspends critical public protections based upon unsubstantiated and unexamined concerns. While agency views are certainly not "immune from electoral mandates," the APA "requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process," "a measure of deliberation," and "some fair grounding in statutory text and evidence." *Id*. Because the Secretary failed to meet those standards here, this Court should set aside the Amendment.

B. The Secretary has not demonstrated that the Amendment is permissible under BLM's statutory authorities mandating waste prevention.

BLM adopted the Waste Prevention Rule to fulfill its statutory obligation to prevent waste of publicly-owned natural gas under section 225 of the Mineral Leasing Act ("MLA"), which requires BLM to ensure that operators take "all reasonable precautions to prevent waste of oil and gas." 30 U.S.C. § 225; 81 Fed. Reg. at 83,009 (VFD_002672). Although the Amendment yanks away the Rule's protections for one year—resulting in the waste of 9 billion cubic feet of natural gas—the Secretary fails to even mention his statutory mandate to prevent waste, much less explain how the Amendment is consistent with that obligation. This failure violates the APA, which requires agencies to show that any "new policy is permissible under the statute." *Fox Television*, 556 U.S. at 515; *Am. Petrol. Inst.*, 862 F.3d at 66 (changes to regulations must "meet[] the requirements of

showing consistency with the statute"); *see also* BLM Br. 37 n.25 (conceding that under *Fox Television* an agency must demonstrate that a "new policy is permissible under the statute").

Instead of focusing on the relevant statutory waste reduction mandate, the Secretary argues that the Amendment achieves "other statutory objectives," and that "not every regulation the agency promulgates must achieve th[e] particular goal [of waste reduction]." BLM Br. 31.[4] But for the Secretary to claim that his waste prevention mandate is irrelevant when he is removing protections deemed necessary to meet that mandate is the definition of arbitrary decision-making. *See All. for the Wild Rockies v. Zinke*, 265 F. Supp. 3d 1161, 1181 (D. Mont. 2017) ("[T]here is no evidence in the administrative record … to suggest that the agency found that the change in policy was permissible under the [Endangered Species Act]"). Indeed, the entire purpose of the Waste Prevention Rule was to fulfill BLM's statutory duty to prevent waste of publicly-owned natural gas. In promulgating the Rule, BLM relied on independent oversight reports documenting a pervasive problem of waste and an extensive administrative record to conclude that its prior waste prevention regulations were inadequate, and that new standards were necessary. 81 Fed. Reg. at 83,009–10 (VFD_002672–73). The Secretary hardly acknowledges this extensive record, let alone offers an explanation for how removal of these necessary protections complies with BLM's statutory obligations to prevent waste.

Secretary Zinke points to the royalty provisions that are still in effect, and concludes that these provisions "discourage the waste of natural gas." BLM Br. 31. This explanation—which lacks an evidentiary basis in the record—is a far cry from determining that these provisions constitute "all reasonable precautions to prevent waste" under MLA section 225. As the Secretary noted in the Amendment's preamble, the Amendment "temporarily suspends or delays all of the requirements in the [Waste Prevention Rule] that the BLM estimated would … generate benefits of gas savings," i.e., reduce waste. 82 Fed. Reg. at 58,051 (VFD_000002). Thus, by BLM's own admission the royalty

[4] Although the Secretary previously relied on his supposed "inherent authority" to justify the Amendment, *see* 82 Fed. Reg. at 46,460 (VFD_000235), he appears to have abandoned that argument, for a good reason, because agencies have no inherent authority to suspend a duly-promulgated regulation, *see Clean Air Council*, 862 F.3d at 9.

provisions that remain in place will not "generate benefits of gas savings." Before removing the Rule's crucial waste prevention requirements, the Secretary must address his statutory mandate.

Instead of acknowledging on the MLA's relevant waste prevention mandate, in the Amendment the Secretary merely listed a suite of statutes as ostensibly providing authorization, without identifying or interpreting any specific provisions of these statutes. *Id.* The Secretary's attorneys for the first time here identify a list of specific statutory provisions that they argue provide seemingly unlimited authority to "regulate the development of federal and Indian oil and gas in a manner that the agency deems efficient and in the public interest." BLM Br. 28.[5] But this post-hoc explanation of the Secretary's statutory authority cannot be considered. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943); *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010) ("Defendants' post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself."). Moreover, even in this post-hoc recitation, the agency fails to show how the Amendment is permissible under the listed provisions. For example, the Secretary cites to his obligations to ensure that royalties are collected, but the Amendment *decreases* the amount of royalties paid to states, tribes, and local governments in the next year. *Compare* BLM Br. 29 (citing 30 U.S.C. § 1711(a)) *with* 82 Fed. Reg. at 58,057 (VFD_000008) (acknowledging reduction in royalties). This Court cannot defer to the Secretary's attorneys' mere listing of statutory authorities without any explanation of how these provisions authorize the Amendment. *See Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010) ("We cannot defer to a void."). Moreover, simply pointing to *other* authorities cannot excuse the Secretary's complete failure to acknowledge the statutory authority under which the Waste

[5] The Secretary's expansive view of his own authority under the MLA and other statutes undercuts his claim that a revision of the Rule is necessary because of concerns over BLM's legal authority to promulgate the Rule in the first place. BLM Br. 21; 82 Fed. Reg. at 58,050 (VFD_000001). Indeed, the Secretary claims he has broad authority to "do any and all things necessary" to "prevent … waste," regulate in the "public interest," protect the "safety and welfare" of workers, protect the "interests of the United States," and "aggressively carry out his trust responsibility in the administration of Indian oil and gas." BLM Br. 28–29.

Prevention Rule was promulgated or explain how the Amendment is consistent with that authority.[6] The Secretary's failure to do so renders his decision arbitrary and capricious. *Fox Television*, 556 U.S. at 515.

C. The Secretary has not adequately explained his changed position.

The Amendment is also arbitrary and capricious because, in attempting to give "good reasons" for it, the Secretary has failed to supply a "reasoned explanation … for disregarding facts and circumstances that underlay … the prior policy." *Id*. at 515–16. The Secretary largely relies on his (allegedly) "serious and legitimate" concerns about the Waste Prevention Rule to justify the Amendment. BLM Br. 20 (exalting the preamble's "section-by-section" analysis, which raises concerns without providing factual support or analysis). But while these concerns may, at most, justify the Secretary's decision to *reconsider* the Rule, they do not justify *revising* the Rule to remove critical protections in the meantime—the "separate, discrete agency action" challenged here. *Id*. at 18. The Secretary must separately justify why he has decided to *revise* the Rule while he further investigates his concerns, rather than allowing the Rule to remain in place. *See Pub. Citizen*, 733 F.2d at 98–101. For *this* explanation, the Secretary relies on a fundamental and unexplained changed in position—that keeping the Rule in effect during the reconsideration would "unnecessarily burden[]" operators. 82 Fed. Reg. at 58,053 (VFD_000004).

As Secretary Zinke admits, the Amendment is the product of a change in position by the new administration. BLM Br. 5 (stating that the Secretary determined that the Rule "does not align with the policy set forth in Executive Order 13,783"). BLM previously determined that the Waste

[6] Movant-Intervenor WEA's contention that Plaintiffs have taken inconsistent positions with respect to the deference owed BLM decisions, WEA Br. 17 & n.17, is simply wrong. Through the Amendment the Secretary has not determined (and does not claim to be determining) what constitutes reasonable waste prevention precautions as that term is used in the MLA, so there is nothing to defer to here. Nor, as the Secretary and State Movant-Intervenors assert, do Plaintiffs argue that "BLM has no discretion to prevent 'waste' from oil and gas operations except in the manner set forth in the" Waste Prevention Rule. Proposed-Intervenors N.D. & Tex.'s Resp. to Pls.' Mots. for Prelim. Inj. 5, *California v. BLM.*, No. 3:17-cv-07186-WHO (N.D. Cal. Jan. 16, 2018), ECF No. 66 ("N.D. Br."); BLM Br. 32 n.19. Rather, Plaintiffs argue that the Secretary cannot substantively amend the standards in the Waste Prevention Rule without demonstrating how that amendment is permissible under the statute.

Prevention Rule included "economical, cost-effective, and reasonable measures … to minimize gas waste," and was therefore not unnecessarily burdensome. 81 Fed. Reg. at 83,009 (VFD_002672). But in response to the Executive Order, the Secretary conducted a secret internal review, and he now he claims that certain provisions "add considerable regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." 82 Fed. Reg. at 58,050 (VFD_000001).[7] It is upon this change in position that the Secretary justifies *revising* the Rule while he reconsiders it. The Secretary has entirely failed to provide a "reasoned explanation" for this change in position that is supported by the record, in violation of the APA. *Fox Television*, 556 U.S. at 515–16; *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc) ("[E]ven when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.").

The Secretary's attempt to distinguish *Organized Village of Kake* falls flat. As the Secretary recognizes, the court there invalidated a Forest Service decision because the agency "reached contradictory factual findings in support of each decision, but did not explain why its findings had changed though the underlying data and information had not." BLM Br. 26 (citing 795 F.3d at 968–69). That is exactly what the Secretary has done here: he has failed to explain why he determined that compliance costs that BLM—just months earlier—considered to be "cost-effective and reasonable" are now "unnecessarily burdensome" even though those costs and the effects they will have on operators have not changed. The Secretary asserts that he need not explain this change because a lesser standard applies to this case as he is simply "consider[ing] changing [his] position" and has not "actually reverse[d] course." *Id*. But the alleged burden on operators is the fundamental reason the Secretary gives for *revising* the Rule *now* rather than awaiting the end of his review, and

[7] Notably, the Amendment actually *decreases* gas production, 82 Fed. Reg. at 58,057 (VFD_000008), and thus even if promoting generation is a "valid objective," the Amendment violates *Fox Television* because that objective is "not accomplished" by the Amendment. *See City of Phila. v. Sessions*, No. CV 17-3894, 2017 WL 5489476, at *31 (E.D. Pa. Nov. 15, 2017).

he cannot hide behind a future revision to avoid explaining why he is changing position now. Citizen Groups' PI 12.

As his reason for concluding that the Waste Prevention Rule is unnecessarily burdensome, Secretary Zinke relies heavily on the estimated compliance costs that industry will have to expend in 2018, arguing—without citation—that "clearly the expenditure of $110 million to comply with a rule that is ultimately revised would be an unnecessary burden." *See, e.g.*, BLM Br. 23. There is nothing "clear" about this, and the Secretary has not demonstrated how these costs are either a "burden" or an "unnecessary" one. Moreover, if the bare fact that a regulation imposes compliance costs, regardless of how reasonable, is a sufficient justification for suspending it during a reconsideration, agencies could easily withdraw any important public protections merely by pointing to their costs.

Indeed, in promulgating the Waste Prevention Rule, BLM analyzed these same costs and determined that they do not impose a burden on operators. 81 Fed. Reg. at 83,069 (VFD_002732) (analyzing the cost to small companies and determining that on average compliance costs would be around $55,000 and constitute approximately 0.15% of per company profits); *id.* at 83,070 (VFD_002733) (concluding that because these compliance costs represent only a small fraction of the net incomes of the companies likely to be affected, "the rule would not alter the investment or employment decision of firms or significantly adversely impact employment"). The Secretary's new analysis for the Amendment continues to confirm these modest impacts. BLM Br. 23; 82 Fed. Reg. at 58,058 (VFD_000009) (Amendment will only reduce compliance costs by $60,000 per entity during 2018, which represents only 0.17% of per-company profits); VFD_000121 (concluding based on this analysis that the Amendment "would not have a significant economic impact on a substantial number of small entities"). As Secretary Zinke states in the Amendment, in 2016 he "determined that the [the Waste Prevention Rule] would not substantially alter the investment or employment decisions of firms, and so therefore delaying the [Rule] would likewise not be expected to impact

those decisions." 82 Fed. Reg. at 58,057 (VFD_000008).[8] In direct conflict with this record, the Secretary's attorneys now argue in their brief that the Rule's impact on small businesses is "very significant." BLM Br. 23. Because there is no support for this new and post-hoc rationale in the record (or anywhere else), this Court must reject it. *Chenery Corp.*, 318 U.S. at 94–95.

Also without offering any support in the record, the Secretary now asserts that compliance would be especially burdensome for low-producing or "marginal" wells. BLM Br. 24; *see also* 82 Fed. Reg. at 58,050 (VFD_000001). Yet the Secretary recognizes that, in the Waste Prevention Rule, BLM concluded the impacts to marginal wells would be minor because operators could take advantage of the Rule's exemptions if a particular requirement was likely to lead to a shut-in of the well. BLM Br. 24. Without any evidence or analysis, he nonetheless now "questions" whether this assumption was appropriate. *Id.* at 21. This second-guessing contravenes prior BLM findings and lacks any basis in the record. In fact, the Secretary deemed comments regarding the impact on marginal wells to be outside the scope of the rulemaking. *See* VFD_000151.

Likewise, Secretary Zinke points to statements in the 2017 Environmental Assessment that marginal wells are "less likely to support additional compliance costs associated with the [leak detection and repair] requirements." BLM Br. 24 (quoting VFD_000047). But the Secretary fails to provide any explanation for why these costs standing alone would support his decision to remove compliance obligations for numerous other provisions. In any event, the statement in the Environmental Assessment about leak detection and repair costs is unsupported and represents an unexplained departure from BLM's previous analysis. *See* 81 Fed. Reg. at 83,029–30 (VFD_002692–93) (thoroughly explaining why the leak detection and repair costs are "modest").

[8] The Secretary attempts to discount this conclusion by arguing that it was made to determine whether to prepare a regulatory flexibility analysis under the Regulatory Flexibility Act. BLM Br. 23. This is irrelevant. Regardless of its purpose, the analysis confirms the that the Rule will not have a significant impact on small companies. Indeed, an agency may forgo the required regulatory flexibility analysis required by section 603 and 604 only when "the agency certifies that the rule will not … have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b).

To the extent the Secretary argues that his change in position is fully justified by his new cost-benefit analysis—which employs a novel, and hastily concocted method for assessing the cost of climate change to the public—he has not adequately explained or supported this fundamental change in position. Although this new cost-benefit analysis played only a minor role in his justification for the Amendment at the time he promulgated it, the Secretary's attorneys now rely heavily upon it to justify the Amendment. BLM Br. 1, 2–3, 7–8, 16–17, 20–21, 22–23, 26 n.15, 39–40. But the revised cost-benefit analysis is premised on a contrived "interim" "domestic" value for the social cost of methane, quickly developed to justify the Amendment, "while estimates of the impacts of climate change to the U.S. are being developed." 82 Fed. Reg. at 58,060 (VFD_000011); VFD_000146. Indeed, this is the first time an agency has relied upon the "interim" social cost of methane in a final rule. This new analysis eschews the already-developed social cost value used by BLM to justify the Rule—a value that was developed by an Interagency Working Group of experts drawn from twelve federal agencies during an extensive seven-year, peer-reviewed process, involving multiple rounds of public comment.

The only reasons the Secretary gives for this fundamental change in position is that "Section 5 of Executive Order 13783 withdrew the technical support documents" supporting the original social cost of methane, and that the Executive Order further stated that "agencies must ensure that analyses are consistent with … OMB Circular A–4, including with respect to the consideration of domestic versus international impacts." BLM Br. 39–40 (quotation omitted). But the fact that the President has made a political decision does not justify the Secretary's failure to analyze and explain why he is disregarding the rigorous scientific and economic basis underlying the original social cost of methane, as well as recent literature suggesting a higher social cost of methane may be appropriate. *See* VFD_002540–46, VFD_010846–901. The Secretary cannot insulate his "interim" value from the APA's requirements for reasoned decision-making merely by pointing to an Executive Order.

Nor does Circular A–4 justify the interim value. Putting to the side the question of whether Circular A–4 requires agencies to use a domestic rather than global lens to calculate the "interim" social cost of methane (it does not, *see* VFD_010855–60), the Secretary arbitrarily excluded

significant effects that "accrue to U.S. citizens," including spillover effects on international trade that will directly affect the U.S. *domestically*. *See* VFD_011482–90. To use an analogy, the Secretary's "interim" social cost of methane essentially argues that a homeowner who dumps trash in his neighbor's yard incurs no costs himself even though that might attract pests, generate noxious odors, or affect his own property value. While commenters explained these and other deficiencies in detail to the Secretary, he declined to offer any meaningful response. VFD_000165–71; *see also State Farm*, 463 U.S. at 43 (an agency may not offer a justification "that runs counter to the evidence before the agency"). Because the Secretary has not adequately explained or supported his changed position, the Amendment violates the APA.

D. The Secretary has prevented meaningful comment on the Amendment.

Despite asserting that the Amendment is justified by his "concerns" about the Waste Prevention Rule and desire to reconsider and potentially revise it, the Secretary concedes that he did not consider "comment[s] on whether the [Waste Prevention] Rule should be revised." BLM Br. 34. Instead, betraying his view of the purpose of the notice and comment period, he claims that providing a 30-day comment period in which he received more than 150,000 comments and responded to them satisfied the agency's obligation under the APA. *Id.* at 32–33; *see also* WEA Br. 19 (suggesting that the fact that "BLM went through notice and comment rulemaking" ends the inquiry). But simply going through the motions is not enough. The comment period must be *meaningful*: commenters must have a real opportunity to convince the Secretary to take a different path, or else there is no reason to take comment at all. Citizen Groups' PI 15–16.

As plaintiffs explained in their motion for a preliminary injunction, *id.* at 15–18, the comment period for the Amendment was anything but meaningful. The Secretary disregarded comments that went directly to his reasons for revising the Rule *now*, instead of awaiting the conclusion of his reconsideration. *E.g.*, VFD_000151. Even with respect to the unsubstantiated "concerns" that he wrongly claims justify revising the Rule before reconsidering it, the Secretary deemed comments attempting to explain why those concerns were not "sufficiently serious and legitimate that they merit a temporary suspension," BLM Br. 25, outside the scope of this rulemaking. *E.g.*, VFD_000181. The "imprecise wording by [the Secretary's] counsel," BLM Br. 34,

simply confirmed that commenters never had a chance of persuading the Secretary to change his mind, and the comment period was "provided only in an effort to do the minimum necessary to squeak by judicial review." *N.C. Growers' Ass'n*, 702 F.3d at 772 (Wilkinson, J., concurring).

The Secretary cites a number of cases that discuss predetermination in the context of reviews under the National Environmental Protection Act ("NEPA"). BLM Br. 33. But in their motion for a preliminary injunction, Plaintiffs did not brief their NEPA claim. Rather, Plaintiffs alleged a violation of the APA's requirement for a meaningful comment period. Citizen Groups' PI 16 (citing *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008)). In *Nehemiah*, as here, the Secretary of HUD provided a comment period (in fact, a 90-day one) and responded to "28 categories of issues raised in the public comments." 546 F. Supp. 2d at 837–8. But that alone did not render the comment period meaningful. Rather, because the plaintiffs provided "clear and convincing" evidence that the HUD Secretary had made up his mind and would not change it even in the face of critical comments, the Court concluded that the comment period did not satisfy the APA's requirements. *Id.* at 847–48 ("Allowing the public to submit comments to an agency that has already made its decision is no different from prohibiting comments altogether."). Here, the Secretary's history of outspoken opposition to the Waste Prevention Rule combined with his statements to the Wyoming court provide such "clear and convincing" evidence. Citizen Groups' PI 16 & n.6. The Secretary does not so much as mention *Nehemiah* in his response.

The Secretary's response to Plaintiffs' related contention that the comment period was not meaningful because the Secretary deemed comments going to the heart of his decision "outside the scope of this rulemaking," Citizen Groups' PI 17, fares even worse. The Secretary's concession that he did not consider comments about whether the Waste Prevention Rule should be revised is doubly problematic. BLM Br. 34. For one thing, the Amendment *is* a revision of the Rule. *See supra* pp. 5–7. For another, the Secretary makes clear that the whole purpose of the Amendment is to afford him the time to revise the Rule—but if there are not good reasons to undertake a revision process, then the very basis for the Amendment falls away and, even under the Secretary's incorrect view of the APA standard, the Amendment should not have been finalized.

For example, although the Secretary's chief motivation for the Amendment was his alleged

concern that the Rule is unnecessarily burdensome, he asserts that a comment contending that the Waste Prevention Rule "is not burdensome to operators because jobs have not been lost and drilling activity is increasing" was correctly deemed outside the scope of the rulemaking except "[t]o the extent [it] could be read to argue that the [Amendment] would not be beneficial." BLM Br. 34–35. This, according to Secretary Zinke, is because the Amendment did "not substantively change" the Waste Prevention Rule. *Id.* at 35. But, in addition to the fact that the Amendment *did* substantively change the Rule, the Secretary's answer ignores the substance of the comment, which goes directly to the heart of the matter—the veracity of the Secretary's contention that the Amendment is necessary because the Waste Prevention Rule "unnecessarily encumber[s] energy production, constrain[s] economic growth, and "prevent[s] job creation"—and is a *separate* point from the Secretary's new cost-benefit analysis. 82 Fed. Reg. at 58,050 (VFD_000001); *see* N.D. Br. 11.

This case is on all fours with the deficient notice and comment rulemaking in *North Carolina Growers' Association*. Citizen Groups' PI 16–18. There, as here, the Department of Labor promulgated a time-limited (nine-month) suspension of a rule while it undertook "further review and reconsideration." *N.C. Growers' Ass'n*, 702 F.3d at 760. There, as here, the Department provided notice and sought comment about whether to suspend the rule. *Id.* at 768. There, as here, the Department deferred consideration of any comments on the merits of the rule until a future rulemaking. *Id*. There, as here, the Department based this limitation on its view that the merits of the rule were not "actually at issue" because the suspension was only "temporary." *Id.* Under those circumstances, the Fourth Circuit "had no difficulty concluding" that "because the Department did not provide a *meaningful* opportunity for comment," and did not solicit "relevant comments regarding the substance or merits," "the Department ignored important aspects of the problem." *Id.* at 770 (quotation omitted) (emphasis added).

The Secretary attempts to distinguish *North Carolina Growers'* because there, the agency specifically stated that it would not consider merits comments in its notice. BLM Br. 36. But there is no meaningful difference between refusing comments at the outset and deeming them "outside the scope" of the rulemaking at the back end. The critical similarity is that in both cases the agency did not consider comments on the substance or merits of the rule it was suspending, comments that were

"integral to the proposed agency action and the conditions that such action sought to alleviate." *N.C. Growers' Ass'n*, 702 F.3d at 769–70. The Secretary's claim that he "confronted those important issues head-on and explained [his] position," BLM Br. 36, is belied by the record, which repeatedly documents his (incorrect) view that the Amendment did not substantively revise the Waste Prevention Rule and therefore comments on the substance of that Rule or urging him not to remove the Rule's protections were "outside the scope" of his review, *see* Citizen Groups' PI 5.

Finally, the Secretary does not dispute that his failure to disclose the "initial review" underpinning the Amendment prevented Plaintiffs from providing meaningful comment. Instead, he claims that this initial review "occurred mainly via oral communications that cannot be produced," and "[t]o the extent any internal BLM documents discuss the initial review, they are subject to the deliberative process privilege." BLM Br. 33 n.20. As discussed above, the Secretary's attempt to shield the basis for his decision from review defeats the APA's purpose of providing the public assurance that a decision has been reached through due deliberation and process, not by fiat. *See supra* p. 9. "Private parties and reviewing courts alike have a strong interest in fully knowing the basis and circumstances of an agency's decision." *Nat'l Courier Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975). Moreover, the Ninth Circuit has stressed that all materials "directly or *indirectly* considered by agency decisionmakers" should be included in the administrative record. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).[9] Because the Secretary precluded meaningful public comment, the Amendment should be set aside.

[9] Even the case the Secretary cites, *Desert Survivors v. U.S. Dep't of the Interior*, 231 F. Supp. 3d 368, 386 (N.D. Cal. 2017), BLM Br. 33 n.20, found that there "can be no doubt that under some circumstances, pre-decisional deliberative communications may go to the heart of the question of whether an agency action was arbitrary and capricious," and therefore must be included in the administrative record. 231 F. Supp. 3d at 382. That is the case here. The Secretary justifies the Amendment by his desire to reconsider the Waste Prevention Rule in light of his "conclu[sion]" following the initial review, "that certain provisions of the [Rule] add considerable regulatory burdens that do not align with the President's policies of promoting energy production, jobs, and economic growth." BLM Br. 16. Without being able to understand how the Secretary arrived at his conclusion, commenters were substantially constrained in their ability to convince him not to promulgate the Amendment.

III. The Citizen Groups' Members Will Suffer Irreparable Harm Absent a Preliminary Injunction.

Secretary Zinke admits that the Amendment will cause emissions of 175,000 additional tons of methane, 250,000 additional tons of volatile organic compounds ("VOCs"), and 1,860 additional tons of hazardous air pollutants ("HAPs") over the next year. VFD_000048–49. The Secretary does not controvert that once such pollutants enter the air, they cannot be removed; nor does the Secretary dispute the clear, well-documented linkages between these air pollutants and health and climate harms. VFD_000182–88, VFD_002446–50, VFD_002452. The Citizen Groups have presented detailed evidence about how additional air pollution attributable to the Amendment will affect their members' health, as well as climate change, meeting their burden to prove irreparable injury is "sufficiently likely." *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."); Citizen Groups' PI 19–23.

Furthermore, the Secretary does not challenge the showing of substantial, specific, and imminent harm faced by the Citizen Groups' members who live in close proximity to oil and gas facilities managed by BLM. Each day the Amendment is in place, these members breathe harmful pollution that creates and exacerbates health issues—pollution that would not occur if the Amendment were enjoined. The Citizen Groups' members include individuals like Don Schreiber, a New Mexican rancher suffering from congestive heart failure who lives with over 120 BLM-managed wells on and adjacent to his ranch, *see* Conservation & Tribal Citizen Groups' App'x to Mot. for Prelim. Inj. ("Citizen Groups' PI App'x") 477–80, and Camille King, a Three Affiliated Tribes member with Chronic Obstructive Pulmonary Disease, whose home on the Fort Berthold Reservation in North Dakota is surrounded by BLM-managed wells, *see id.* at 562–64. For people like Mr. Schreiber and Ms. King, and the Citizen Groups' other members who must live with the air pollution now allowed by the Amendment, the health risks and environmental effects caused by the

Amendment are anything but "inconsequential." BLM Br. 14. These effects are significant and ongoing every day that the Amendment remains in effect.[10]

The Secretary and Movant-Intervenors attempt to dismiss the significant, irreparable, and imminent harms the Citizen Groups' members face by arguing: (1) that air pollution allowed by the Amendment merely represents the status quo, (2) that the health and environmental harms caused by the hundreds of thousands of tons of pollutants at stake here are insignificant, (3) that operators' unpreparedness to implement the Waste Prevention Rule renders the Citizen Groups' harms not immediate, and (4) that the record for the Amendment does not demonstrate the Citizen Groups' irreparable harm. None of these assertions rebut the Citizen Groups' strong showing of irreparable harm.

First, Secretary Zinke and Movant-Intervenors suggest that the Citizen Groups cannot be harmed by the emissions that will result from the Amendment because the Amendment represents the status quo. This line of reasoning is both irrelevant and wrong. As an initial matter, the relevant question for determining irreparable harm is whether the Citizen Groups' members will suffer irreparable harm if the Amendment is not enjoined. *League of Wilderness Defs./Blue Mountains Biodiversity Proj. v. Connaughton*, 752 F.3d 755, 759 (9th Cir. 2014) ("A motion for a preliminary injunction requires that a plaintiff show that "he is likely … to suffer irreparable harm." (quotation omitted)). That hundreds of thousands of tons of pollutants will be emitted that would not have been

[10] Secretary Zinke does not dispute *any* of the declarations submitted by the Citizen Groups. Instead, he makes the untenable claim that the Court can give "no weight" to declarations and may not "second-guess" the Secretary's determinations of what constitutes irreparable harm. BLM Br. 14 & n.10. But the cases the Secretary cites, *id.*, stand only for the proposition that a court should not look outside the record to assess a party's likelihood of success on the merits when the party is seeking injunctive relief or to assess the wisdom of an agency's judgment more generally. Courts routinely consider extra-record declarations to assess claims of irreparable harm, the balance of equities, and the public interest. *E.g.*, *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1137 (N.D. Cal. 2017) (determining plaintiffs demonstrated they will suffer irreparable harm absent injunctive relief, and citing to plaintiffs' declarations as support for their claims of harm); *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972, 994–96 (N.D. Cal. 2013) (relying on declarations submitted by both plaintiffs and federal defendants in assessing irreparable harm, balance of equities, and consideration of public interest). Indeed, limiting plaintiffs to only any harm the agency may have considered in the rulemaking would deprive plaintiffs of their ability to seek an injunction in the face of real, imminent threats to public health and the environment.

absent the Amendment is indisputable. Moreover, as explained *supra* pp. 2–5, the status quo *is* the Waste Prevention Rule, which became effective in January 2017 and had not been validly suspended, revised or rescinded at the time Secretary Zinke promulgated the Amendment.[11] The Secretary's own admission that the Amendment eliminates compliance obligations for "all of the requirements" in the Waste Prevention Rule that would "generate benefits of gas savings or reductions in methane emissions" (in other words, that would reduce waste) for one year, 82 Fed. Reg. at 58,051 (VFD_000002), further underscores that Amendment has changed the status quo. Without the Amendment, the emissions the Citizen Groups face as a result of the Amendment would not occur.

Second, both Secretary Zinke and WEA claim that the hundreds of thousands of tons of methane, VOCs, and HAPs that will be emitted if the Amendment is allowed to remain in force are too small to constitute irreparable harm. BLM Br. 12; WEA Br. 11.[12] But this ignores the very real threats faced by the Citizen Groups' members living near these polluting facilities. Furthermore, courts have not established quantitative thresholds for emissions levels that constitute irreparable harm. *See, e.g.*, *Sierra Club v. U.S. Dep't of Agric., Rural Utils. Serv.*, 841 F. Supp. 2d 349, 359

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[11] The Secretary is wrong even under his own flawed view of the status quo, in which the status quo does not change until a compliance deadline passes. As the Secretary concedes, the Amendment removed certain protections that the industry had been complying with for a year, including standards for liquids unloading. 82 Fed. Reg. at 58,051 (VFD_000002); *id.* at 58,055–56 (VFD_000006–7). BLM estimated that these standards would result in nearly half of the VOC reductions and approximately two thirds of the HAP reductions attributable to the Waste Prevention Rule. VFD_002618, VFD_002486. Because of the Amendment, operators can now cease compliance activities at these sources.

[12] In the same vein, API argues that Plaintiffs failed to challenge BLM's Finding of No Significant Impact ("FONSI"), which they allege indicates that emissions caused by the Amendment are not significant. *See* API Br. 7–8. This is a red herring. BLM's own determination about whether the environmental impacts of the Amendment are significant has no bearing on whether the harms suffered by the Citizen Groups' members are irreparable. Moreover, the Citizen Groups *do* contest BLM's FONSI, arguing that BLM "discounted the significance" of the emissions caused by the Amendment, and alleging that BLM's failure to complete an environmental impact statement violates NEPA. Compl. for Declaratory & Inj. Relief ¶¶ 107–11, 143–45, 149 (Dec. 19, 2017), ECF No. 1. That the Citizen Groups chose not to highlight their likelihood of success on this claim in their page-limited preliminary injunction motion does not mean that they have retreated in any way from this claim.

(D.D.C. 2012) (finding irreparable harm based on unquantified emissions of "other pollutants" from a single coal plant); *Cmtys. for a Better Env't v. Cenco Ref. Co.*, 179 F. Supp. 2d 1128, 1148 (C.D. Cal. 2001), *aff'd*, 35 F. App'x 508 (9th Cir. 2002) (finding irreparable harm based on failure to take action that "would lower the Refinery's emissions of air pollutants" of unspecified quantity). And courts have found irreparable harm from lower or comparable emissions than are at stake here. *See Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, No. CV 15-106-M-DWM, 2017 WL 5047901, at *3 (D. Mont. Nov. 3, 2017) (explaining that plaintiffs demonstrated irreparable harm because of agency's failure to consider "the effects of the estimated 23.16 million metric tons of greenhouse gas emissions" as well as diesel emissions); *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 145 F. Supp. 2d 446, 461, 466, 489–500 (D.N.J. 2001) (finding irreparable harm from facility emitting 59.1 tons of particulate matter and unquantified amounts of VOCs).

In fact, in the only case the Secretary cites to support his position, BLM Br. 12, the Ninth Circuit *reversed* a district court's denial of a preliminary injunction against a proposed ore processing facility, recognizing the "high" "likelihood of irreparable environmental injury without adequate study of the adverse effects." *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (per curiam). Rather than imposing some numerical threshold for emissions levels to be considered irreparable, the court recognized as irreparable "some quantity" of hazardous air pollutant emissions from processing ore from a single facility, and unquantified emissions from trucks transporting ore to the facility. *Id.* at 725–26.

Secretary Zinke and WEA further argue that the methane emissions at stake are small compared to global or national levels, rending them not "significant." BLM Br. 12; WEA Br. 11. The Ninth Circuit has squarely rejected this position. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1223 (9th Cir. 2008) ("[I]t is hardly 'self-evident' that a 0.2 percent decrease in carbon emissions … is not significant."); *cf. Massachusetts v. EPA*, 549 U.S. 497, 524–26 (2007) (rejecting "erroneous assumption" that a failure to take a "small incremental step" to address greenhouse gas emissions cannot cause injury and noting that a "reduction in domestic emissions would slow the pace of global emissions increases"). Indeed, because methane is a greenhouse gas 84 times more powerful than carbon dioxide over a 20-year period, the 175,000

tons of methane emitted is equivalent to 14.7 million tons of carbon dioxide, equaling the greenhouse gas emissions of over three million cars being driven for one year. *See* Citizen Groups' PI App'x 495, 499.

Third, Secretary Zinke claims—without any actual evidence—that because of the "regulatory uncertainty" that he has created over the status of the Waste Prevention Rule, operators will not be able to "immediately" comply with the Rule, making Plaintiffs' injuries not "imminent." BLM Br. 11. This argument is illogical—Plaintiffs' harms will begin to be redressed as soon as operators begin measures to reduce waste and emissions. Whether operators begin that process now, or several months from now, matters. Furthermore, evidence from states like Colorado that have implemented similar standards and announcements from major operators that they are complying suggests that companies will be able to come into compliance quickly. VFD_003688–89, VFD_011443–44. The Secretary's assertion that none of the suspended measures in the Waste Prevention Rule can "plausibly immediately ameliorate air pollution," BLM Br. 12, is similarly absurd. For example, once a leak at a gas well is detected and repaired, as required by the Rule, that well is no longer emitting harmful air pollution from that leak.[13] Moreover, as explained *infra* pp. 29–30, it is fundamentally inequitable for the Secretary to point to regulatory uncertainty that he *created* (at the urging of the very industry actors who now claim whiplash) by illegally staying the Rule in June, as a reason for why Plaintiffs should not receive swift relief from his second unlawful attempt.

Finally, the Secretary alleges that the administrative record for the Amendment does not show irreparable harm. This is irrelevant. It is not the role of the Secretary to determine whether his actions will cause irreparable harm, it is the role of the courts. As discussed, *supra* n.10, the

[13] Contrary to WEA's contention, WEA Br. 10–11, Plaintiffs' consistent position that the standards in the Waste Prevention Rule are reasonable and achievable (as evidenced by the successful state-level regulations on which they were based) is in no way "irreconcilable" with Plaintiffs' members suffering harm from emissions from BLM-managed wells in states that *lack* rigorous standards and from companies that are *not* implementing the standards. Indeed, Plaintiffs' declarations carefully separated impacts of the Amendment in states with rigorous standards and those without. *See* Citizen Groups' PI App'x 773–806. Similarly, compliance exemptions in the Rule for *some* facilities based on economic issues do not mean that Plaintiffs will not benefit from emissions reductions occurring at *other* facilities that do not qualify for economic exemptions.

Secretary does not dispute the detailed declarations and analysis that Citizens Groups have submitted, which establish irreparable harm. Furthermore, nothing in the record controverts the health or climate impacts established by Plaintiffs. *Contra* WEA Br. 14 (claiming, without citation, that Plaintiffs' health and environmental harms "conflict with … evidence on the record"). In fact, the record affirmatively acknowledges the hundreds of thousands of tons of harmful air pollution that will be emitted as a result of the Amendment. VFD_000048–50.[14] The Citizen Groups' members will continue to suffer immediate, irreparable harm from these emissions unless the Amendment is enjoined.

IV. The Public Interest and Balancing of Equities Weigh Decisively in Favor of a Preliminary Injunction.

The Citizen Groups' preliminary injunction motion included a detailed and comprehensive demonstration of how enjoining the Amendment is in the public interest, and why the harmful effects of the Amendment on the public outweigh the modest additional costs to industry from an injunction. Citizen Groups' PI 23–25.[15] The Citizen Groups pointed to the significant environmental and public health consequences of the Amendment. *See All. for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1056 (9th Cir. 2010) (emphasizing the "well-established public interest in preserving nature and avoiding environmental injury" (quotation omitted)). The Citizen Groups also submitted declarations from a wide range of stakeholders beyond their members, like government officials and elected officials of Navajo Nation chapters, who explained the ways in which the Amendment will harm their constituents and communities, including through loss of critical royalty payments, and increased noise and harmful air pollution. Citizen Groups' PI App'x at 709–15, 749–71.

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[14] BLM's reference to emissions over the 11-year period used for analysis in the Amendment's Regulatory Impact Analysis ("RIA"), BLM Br. 14, does not change the immediate harms faced by Plaintiffs due to emissions during *this* year while the Amendment is in effect. *Cf. infra* p. 28. And as described in the record, comparing an 11-year period in the Amendment RIA to the 10-year period used for analysis in the Waste Prevention Rule RIA is fundamentally misleading. VFD_011443.

[15] API suggests that Plaintiffs erred by discussing the balance of equities and public interest factors as one factor instead of examining them separately. API Br. 22. But, as the Secretary notes, "[w]hen the government is a party, the public interest and balance of equities factors merge." BLM Br. 9 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

In their responses, the Secretary and Movant-Intervenors utterly fail to acknowledge, much less respond to, the demonstration Plaintiffs made on the balance of equities and public interest prongs, focusing exclusively on the impacts an injunction would have on industry. This is especially troubling coming from the Secretary, who is entrusted to manage the public's resources for the public benefit. The Secretary neglects to even *mention* public health in his evaluation of these factors, and fails to explain why it is not in the public interest for operators to "bear the financial burden of complying," while it is in the public interest for the public to "bear … the burden" of the waste, increased emissions and lost royalties that will result from the Amendment. BLM Br. 15. Plaintiffs do not dispute that the Secretary is "entitled to give weight to … economic considerations," *id.* at 16, but he may not do so to the exclusion of all other considerations.[16]

The closest the Secretary comes to actually balancing the equities is his assertion that his Regulatory Impact Analysis shows that the monetized harm to Plaintiffs is outweighed by the financial benefit to operators. *Id.* at 16–17. But, in addition to being based on a highly dubious "interim" value for the social cost of methane, *see supra* pp. 16–17, the Secretary's focus on *monetized* values omits critical harms upon which Plaintiffs base their request for preliminary relief, specifically the health harms posed by the additional emissions of VOCs and HAPs, which BLM did not monetize.

Remarkably, the Secretary chiefly relies upon capital expenditures "that would not be recovered" to support his side of the scale. But in the very next paragraph, he emphasizes that the Amendment will result in only a "temporary reduction in royalties and an increase in emissions," and asserts that increased emissions "are appropriately assessed based on the annual impacts of the

[16] Even with respect to his favored "economic considerations," the Secretary does not account for the economic burden the Amendment will impose on businesses and members of the public, burdens that would be avoided if an injunction issues. *See, e.g.*, VFD_003688 (public comments on Amendment submitted by coalition representing members of the methane mitigation industry, discussing ways in which Amendment "will slow the development of a robust domestic market for methane mitigation technologies" and "cause further uncertainty in the marketplace, penalizing companies that are making the investment to … reduce their methane emissions"); Citizen Groups' PI App'x 812–14 (Decl. of Pete Eschallier, Kokopelli Bike and Board) (describing negative economic impact of Amendment on outdoor recreation industry).

suspension, not the predicted impact of the proposed Revision Rule." BLM Br. 15–16; *see* API Br. 5, 10–11 (claiming an injunction would require operators to make an "irretrievable investment in equipment and infrastructure"). The Secretary cannot apply a different standard to the costs borne by industry and the costs borne by the public. Indeed, the Amendment itself does not prevent the capital expenditures necessary to comply with the Waste Prevention Rule. Rather, it simply delays them for one year, requiring operators to pay them in 2018 in order to be in compliance with the Waste Prevention Rule by 2019. *See* VFD_000300 ("[T]he impacts that we previously estimated would occur in Year 1 are now estimated to occur in Year 2, impacts that we previously estimated would occur in Year 2 are now estimated to occur in Year 3, and so on."), VFD_000305–06. The Secretary cannot downplay the impact of the Amendment on taxpayers and human health on the grounds that it is a discrete action from a later revision, *see* BLM Br. 2, while simultaneously conflating the Amendment and the potential subsequent revision to argue that his action would serve the public interest by removing the need for certain capital expenditures.

API also overstates the effect an injunction would have on the economic viability of oil and gas operations, asserting that it will trigger shut-ins and abandonment of wells. API Br. 13–15. But API points to no specific examples of wells that allegedly will be forced to be abandoned or shut in, nor any detailed economic analysis to support these allegations of production curtailments. And, based on the Secretary's own analysis, these claims are highly dubious. The Secretary's analysis shows a reduction in profit margin of just 0.15% for the average *small* producer complying with the Waste Prevention Rule, BLM Br. 23, and API does not explain how such a small reduction in profits would trigger significant abandonment. Indeed, a recent independent study indicates that the impacts of the Rule on small entities would be even more limited than projected, finding that overall compliance costs represent less than 3% of annual costs for an average marginal well, and the smallest producers will see less than 0.1% decrease in annual profit margin. VFD_014931.

Furthermore, industry hardly acknowledge that the Waste Prevention Rule provides for several economic exemptions when an operator demonstrates to BLM that compliance with the Rule's requirements would "impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease." VFD_002674 (discussing BLM's

ability under Rule to adjust capture target if cost would cause operator to cease production).[17] Nor does API's bald claim that the feasibility of these exemptions is "uncertain," API Br. 14, pass muster, given the lack of evidence regarding any difficulty securing such waivers.

The Secretary and Movant-Intervenors' arguments that an injunction would harm the public interest by contributing to regulatory uncertainty are as unconvincing as they are brazen. As Plaintiffs explained, Citizen Groups' PI 14–15, regulatory certainty is *advanced* by adhering to a regulation that was the product of years of public engagement, a massive record, and a thorough explanation until an agency has completed a similarly thorough process to revise or rescind it. Hasty efforts to temporarily suspend a rule based upon the "mere[] identifi[cation of] concerns," BLM Br. 26, and "interim" values, VFD_000087–88, promote regulatory *un*certainty. Unless "regulatory certainty" is code for "no regulations," the Waste Prevention Rule, not the Amendment, clearly exhibits the reasoned, thorough deliberation that creates regulatory certainty.

Furthermore, the Secretary's argument that the Waste Prevention Rule will "unavoidably be delayed anyway due to the regulatory uncertainty that has surrounded" it, BLM Br. 12, conveniently omits that the Secretary's own unlawful actions are the source of that uncertainty. Industry's hands are likewise unclean: Industry actively sought and encouraged BLM's unlawful delays.[18] As this court stated last October in its order invalidating the Secretary's previous unlawful attempt to postpone the Waste Prevention Rule's implementation, "[i]f some of the regulated entities of the oil and gas industry will not be able to meet the January 17, 2018 compliance date because they

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[17] *See also* 43 C.F.R. §§ 3179.102(c) (exemption from requirements related to well completion), 3179.201(b)(4) (exemption from pneumatic controllers requirements), 3179.202(f) (exemption from pneumatic diaphragm pump requirements), 3179.203(c)(3) (exemption from storage vessels requirement), 3179.303(c) (operator may request approval of a leak detection program that does not meet criteria specified in § 3179.303(b)).

[18] Both API and WEA sent letters to Secretary Zinke in the spring of 2017 urging him to delay the Waste Prevention Rule. Letter from Kathleen M. Sgamma, WEA, to Secretary of the Interior Ryan Zinke (Apr. 4, 2017), https://www.blm.gov/sites/blm.gov/files/WEA_Letter_VF.pdf (last visited Jan. 23, 2018); Letter from Jack N. Gerard, API, to Secretary of the Interior Ryan Zinke (May 16, 2017), https://www.blm.gov/sites/blm.gov/files/API_Letter_VF.pdf (last visited Jan. 23, 2018); *see also* VFD_014987–91 (WEA comments in support of Amendment); VFD_003250–638 (API comments in support of Amendment).

suspended compliance efforts after the District of Wyoming denied the preliminary injunction and the Bureau issued the Postponement Notice, that is a problem to some extent of their own making." *California*, 2017 WL 4416409, at *14. That industry has willingly dragged its feet is even more evident now given the clear implication that it failed to resume compliance efforts after this Court's October 2017 order reinstating the Waste Prevention Rule, including the Rule's January 2018 deadline. The Secretary and Movant-Intervenors should not be permitted to use their repeatedly unsuccessful attempts to thwart the Waste Prevention Rule as a reason to keep this latest attempt in place. *Id.* (allowing such a justification "could be viewed as a free pass for agencies to exceed their statutory authority and ignore their legal obligations under the APA, making a mockery of the statute").

The Secretary and Movant-Intervenors fail to rebut Plaintiffs' strong showing that the balance of equities and public interest weigh in favor of an injunction, and instead make claims about the economic impacts of an injunction that are irrelevant, inaccurate, and misleading. In light of the substantial economic, environmental, and public health benefits that will result from an injunction of the Amendment and that will outweigh any costs of an injunction, this Court should conclude that the balance of equities and public interest favor enjoining the Amendment.

CONCLUSION

Plaintiffs Conservation and Tribal Citizen Groups respectfully request that this Court preliminarily enjoin the Amendment and thereby immediately reinstate the Waste Prevention Rule's January 17, 2018 compliance deadline.

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