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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, by and through **XAVIER BECERRA, ATTORNEY GENERAL,** and the **CALIFORNIA AIR RESOURCES BOARD;** and **STATE OF NEW MEXICO,** by and through **HECTOR BALDERAS, ATTORNEY GENERAL,**

Plaintiffs,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT; KATHARINE S. MACGREGOR, Acting Assistant Secretary for Land and Minerals Management, United States Department of the Interior; and **RYAN ZINKE,** Secretary of the Interior,

Defendants.

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

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

PLAINTIFF STATES' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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

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INTRODUCTION

Plaintiff States seek to enjoin the latest unlawful action by Defendants U.S. Bureau of Land Management ("BLM"), to effectively revoke key provisions of its 2016 regulations governing the waste of natural gas and royalty payments from oil and gas operations on federal and Indian lands ("the Waste Prevention Rule"). In its opposition, BLM makes two contradictory arguments. First, BLM contends that the Suspension Rule was necessary to allow the agency to reconsider various alleged deficiencies in the Waste Prevention Rule. Simultaneously, BLM claims that it need not provide any reasoned analysis of these supposed deficiencies because the agency has not yet determined what, if any, changes it may make to the Rule until it undertakes the requisite notice and comment rulemaking. These arguments are clearly at cross-purposes and therefore fail.

Fundamentally, BLM has its processes reversed: terminating application of the Waste Prevention Rule, albeit temporarily, while it works on coming up with the analysis and reasoning to justify doing so permanently. BLM's previous attempt to halt the Waste Prevention Rule by fiat, without bothering to take notice and comment, was thrown out by this district court. BLM has now unequivocally changed its position by suspending key requirements of the Waste Prevention Rule, and is thus obligated by Administrative Procedure Act ("APA") to provide a reasoned basis for this reversal of course. Because BLM has failed—and indeed refused—to do so, the Suspension Rule must be invalidated as an arbitrary and capricious agency action. Moreover, BLM has failed to overcome Plaintiff States' significant showing of irreparable harm that will result from the Suspension Rule, including harm from increased air pollution and related health impacts, as well as increased methane emissions and the exacerbation of climate harms. These harms, as well as the public interest in preventing the waste of billions of cubic feet of natural gas that belongs to the People, clearly outweigh the marginal increase in compliance costs that operators face from implementation of the Waste Prevention Rule.

For these reasons, BLM's Suspension Rule should promptly be enjoined so that the 2016 Waste Prevention Rule's requirements remain in effect and the status quo is preserved while this litigation proceeds.[1]

STANDARD OF REVIEW

The proper standard for evaluating Plaintiff States' request for preliminary injunctive relief is the well-established four-factor test articulated in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit has further held that "a plaintiff may also obtain an injunction if he has demonstrated 'serious questions going to the merits,' that the balance of hardships 'tips sharply' in his favor, that he is likely to suffer irreparable harm, and that an injunction is in the public interest." *Animal Legal Defense Fund v. United States Dep't of Agric.*, 2017 WL 2352009, *3 (N.D. Cal. May 31, 2017) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011)).

BLM and Proposed-Intervenors incorrectly argue that this Court must apply a "stricter standard" applicable to mandatory injunctions. Defendants' Opposition to Plaintiffs' Motions for a Preliminary Injunction, Dkt. No. 67 ("BLM Opp.") at 9-10; WEA Opp. at 10; API Opp. at 3-4. That standard does not apply here. Plaintiff States do not seek to compel action, but rather to maintain the regulatory status quo. "A prohibitory injunction," which Plaintiff States request here, "preserves the status quo." *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994). "The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to 'the last uncontested status which preceded the pending controversy.'" *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (citing *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963)). Further, the "last uncontested status" is measured "from the time the complaint was filed." *Animal Legal Def. Fund*, 2017 WL 2352009, at *3 (citations omitted).

[1] This reply brief also responds to the three opposition briefs filed by Proposed-Intervenors, although none are yet parties to this action. *See* [Proposed] Intervenor-Defendant American Petroleum Institute Opposition to Plaintiffs' Motions for Preliminary Injunction, Dkt. No. 64 ("API Opp."); Proposed-Intervenors North Dakota and Texas's Response to Plaintiffs' Motions for Preliminary Injunction, Dkt. No. 66 ("ND Opp."); Intervenors Western Energy Alliance and Independent Petroleum Association of America's Response in Opposition to Plaintiffs' Motions for Preliminary Injunction, Dkt. No. 68 ("WEA Opp.").

When this lawsuit was filed, the Waste Prevention Rule was in full effect. The Rule was finalized on November 18, 2016, and became effective on January 17, 2017. 81 Fed. Reg. 83,008. On June 15, 2017, BLM published a notice in the Federal Register attempting to postpone the effectiveness of certain provisions of the Rule, 82 Fed. Reg. 27,430 (June 15, 2017), which this district court vacated three months later. *See State of California v. U.S. Bureau of Land Mgmt.*, --- F. Supp. 3d ---, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017) ("*California v. BLM*"). BLM published the Suspension Rule on December 8, 2017, but it did not take effect until January 8, 2018. 82 Fed. Reg. 58,050. Plaintiff States filed the instant action on December 19, 2017, three weeks before the Suspension Rule took effect.

Defendants offer no reasoned basis for defining the status quo as the regulatory landscape that preceded the Waste Prevention Rule. BLM Opp. at 10; API Opp. at 19; ND Opp. at 12. And, indeed, this formulation contravenes the definition of "status quo." *See GoTo.com,* 202 F.3d at 1210; *California v. BLM,* 2017 WL 4416409 at *8 (rejecting BLM's argument that the postponement "maintained the status quo because compliance was not mandatory until January 17, 2018"). Plaintiff States are not asking the Court to mandate the implementation of a "new regulatory regime," BLM Opp. at 10, but rather to vacate the Suspension Rule and, in so doing, reinstate the existing regulatory regime that was in effect when this lawsuit was filed. Thus, Plaintiff States' Motion for Preliminary Injunction is not subject to a heightened standard of review, but rather to the four-factor test articulated in *Winter,* 555 U.S. at 20. As demonstrated below, Plaintiff States satisfy each prong of this test.

ARGUMENT

I. PLAINTIFF STATES ARE LIKELY TO SUCCEED ON THE MERITS.

BLM developed the Waste Prevention Rule with extensive stakeholder input over the course of three years. BLM has now suspended the key requirements of that Rule for the express purpose of reconsidering and rescinding it. The APA requires BLM to "cogently explain why it has exercised its discretion in a given manner," and the agency has not done so. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("*State Farm*"); *see also Organized Village of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 968 (9th Cir.

2015) ("[E]ven when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation."). Plaintiff States are therefore likely to succeed on the merits of their claim that the Suspension Rule was an arbitrary and capricious agency action.

A. The Suspension Rule Is Not Subject to a Lesser Standard of APA Review.

BLM appears to admit that the perfunctory analysis in the Suspension Rule does not satisfy the APA's "reasoned analysis" standard, *State Farm*, 463 U.S. at 43, but argues that a more limited standard of review somehow applies because BLM has not yet rescinded the Waste Prevention Rule *in toto*. However, BLM offers no authority for its claim that an agency's "decision to consider changing its position is not subject to the same standard of review as its decision to actually reverse course." BLM Opp. at 26. This contention is wrong. The alleged alternative standard for amending a duly promulgated rule does not exist, and such a standard would threaten the rule of law by hobbling the ability of courts to engage in effective judicial review of agency decision-making.

There is no lessened standard to apply here. The Suspension Rule, just like every other final agency action, is subject to review under the APA's arbitrary and capricious standard. *State Farm*, 463 U.S. at 43 ("the agency must examine the relevant data and articulate a satisfactory explanation for its action"). BLM fails to cite any relevant authority for their argument that some more lenient standard should apply here, and the cases that it does cite are inapposite. In *Nat'l Ass'n of Broadcasters v. F.C.C.*, the question was whether an agency could defer the resolution of problems, raised in a rulemaking, which were not central but were related to the main ones being considered. 740 F.2d 1190, 1210 (D.C. Cir. 1984). The case did not address either a suspension or a reconsideration of an agency action. *See id*. And while the D.C. Circuit recognized that "incremental rulemaking" is appropriate in some circumstances, the court warned that a "rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale" would be legally infirm. *Id*. The Fifth Circuit's decision in *State of La., ex rel. Guste v. Verity* similarly has no persuasive merit, as it dealt not with a suspension of an already-

effective rule, but rather with an "agency's decision to attack one of the major causes of sea turtle mortality through regulation." 853 F.2d 322, 332 (5th Cir. 1988). Here, the validity of the Suspension Rule hinges upon "future resolution of crucial issues" which BLM has not even attempted to resolve, instead choosing to lift regulatory obligations while punting its APA obligations to a later date. *See Nat'l Ass'n of Broadcasters*, 740 F.2d at 1210.

The D.C. Circuit explicitly rejected BLM's proposed lesser standard in *Pub. Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (finding that suspension of validly-promulgated rule was not subject to a "less stringent standard of review"). BLM's attempt to differentiate *Steed* is unavailing. As in that case, the Suspension Rule "is a paradigm of a revocation"—it is designed to be in effect until the agency completes a notice-and-comment rulemaking to reconsider the Waste Prevention Rule and marks a "180 degree reversal" of the agency's "former views as to the proper course." *See id.* (internal quotations omitted). The fact that *Steed* dealt with an "indefinite suspension" does not make its reasoning or holding any less applicable. BLM Opp. at 18. As that court made clear: "However permanent or impermanent the suspension, the reasoning asserted reflects a complete reversal of [the agency's] prior position" and thus required explanation. *Id.*[2] Where, as here, an agency amends a duly-promulgated rule by suspending or delaying its key provisions, full compliance with the APA is required. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017) (agencies "have broad discretion to reconsider a regulation at any time. To do so, however, they must comply with the Administrative Procedure Act"); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (APA requires that "agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

The practical implications of applying a lessened standard of review in this case are troubling to say the least. In essence, BLM is asking for *carte blanche* to upend existing regulations on a whim with a promise to provide reasoned explanations at a later date. This

[2] Nor is *Steed* distinguishable on the basis that "Congress expressly directed the agency to regulate." API Opp. at 20. As BLM has acknowledged, the Waste Prevention Rule was designed to carry out BLM's Congressionally-mandated directive to ensure that lessees of federal lands "use all reasonable precautions to prevent waste of oil or gas developed in the land… ." 81 Fed. Reg. at 83,009 (citing 30 U.S.C. § 225).

approach would eviscerate the ability of courts to review agency actions. The necessity to determine whether agencies are acting in accordance with the rule of law is no less acute when an agency suspends its earlier action. *See Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 760 (3d Cir. 1982) (judicial review of shifts in agency policy must "involve a scrutiny of the reasons given by the agency for the change"). In fact, the requirement that agencies thoroughly explain their reasoning is a prerequisite for judicial review of abrupt policy reversals such as this one. *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where, as here, the area under consideration is one wherein the [agency's] policies are in flux."). Thus, "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored," and may not "gloss[] over or swerve[] from prior precedents without discussion." *Id.*; *see also N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring) ("Changes in course…cannot be solely a matter of political winds and currents" but rather require "a measure of deliberation" and "some fair grounding in statutory text and evidence."). BLM has not offered this Court sufficient facts to demonstrate that the agency's action was rational.

There is only one standard for the "reasoned analysis" required by the APA, and BLM has blatantly failed to meet that standard by relying on unsubstantiated guesswork to justify the Suspension Rule. *See* BLM Opp. at 25 ("BLM cannot be expected to evaluate fully its concerns with the 2016 Rule—including marshalling the facts and data to assess those concerns—until it undertakes the requisite notice and comment rulemaking"); 30 ("BLM has reasonably determined…that the Rule *may* not be the most effective or efficient way to regulate the waste of federal and Indian oil and gas resources.") (emphasis added). As discussed below, because BLM did not cogently explain its rationale for its complete reversal of course, its action was arbitrary and capricious. *See State Farm*, 463 U.S. at 48.

B. BLM Failed to Adequately Justify the Suspension Rule.

BLM has failed to explain its rationale for the Suspension Rule because it provides no reasoned analysis for the alleged need to reconsider the Waste Prevention Rule. Plaintiff States are not "putting the cart before the horse" by arguing that BLM must provide this analysis. BLM Opp. at 25. Far from a "strawman" concocted by Plaintiff States, BLM Opp. at 2, 19, BLM's intention to repeal or modify the Waste Prevention Rule is the agency's *only* stated justification for the Suspension Rule. *See, e.g.*, 82 Fed. Reg. at 58,050 ("Reexamination of the 2016 final rule is warranted to reassess the rule's estimated costs and benefits."); 58,051 ("The BLM also believes that a number of specific assumptions underlying the analysis supporting the 2016 final rule warrant reconsideration."); 58,052 ("The BLM is currently reviewing concerns raised by operators"); 58,053 ("This final delay rule will allow the BLM sufficient time to more thoroughly explore through notice-and-comment rulemaking whether the capture percentage requirements should be rescinded or revised"); BLM Opp. at 30 ("Instead of requiring the regulated community to invest significant time, money, and resources into complying with a rule that the agency is in the midst of reconsidering, BLM reasonably chose to temporarily suspend the Rule pursuant to its broad authority to regulate oil and gas development.").

BLM claims to have provided adequate justification for the Suspension Rule by "identify[ing] a range of concerns" with the Rule that the agency had finalized just a year prior to suspending it. BLM Opp. at 20, 26 (BLM "has merely identified concerns with the 2016 Rule that it intends to investigate through the revision rulemaking process"). However, this is blatantly insufficient, as the APA requires an agency to "offer a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 52 (internal citation omitted). BLM has offered no such rational connection. *See Action for Children's Television v. F.C.C.*, 821 F.2d 741, 746 (D.C. Cir. 1987) ("The [agency] offered neither facts nor analysis to the effect that its earlier concerns … were overemphasized, misguided, outdated or just downright incorrect."). Instead, BLM simply points to selected complaints from oil and gas industry operators,[3] and

[3] WEA and IPA acknowledge that they "have consistently raised" these concerns, WEA Opp. at 18, further begging the question of why BLM now considers them to be a basis for suspending its earlier action.

hypothesizes that it "may have" overestimated the benefits of the Waste Prevention Rule, without attempting any analysis of these concerns. BLM Opp. at 20-21. For example, BLM provides no basis for questioning its previous assumption that marginal wells would receive exemptions. BLM Opp. at 32; 82 Fed. Reg. at 58,081 ("[T]he BLM is reconsidering whether it was appropriate to assume that all marginal wells would receive exemptions from the rule's requirements and whether this assumption might have masked adverse impacts of the 2016 final rule on production from marginal wells."). Nor does BLM analyze whether the Waste Prevention Rule aligns with the policy set forth in Executive Order 13,783, 82 Fed. Reg. 16,093, § 7(b) (Mar. 28, 2017). Instead, BLM admits that it declined to evaluate the merits of these concerns because the agency decided that the process would take too long. BLM Opp. at 20 (justifying Suspension Rule in light of "the time necessary for the agency to fully reconsider the 2016 Rule").

Nor does the Regulatory Impact Analysis ("Final RIA") accompanying the Suspension Rule shed any light on why BLM now feels it is necessary to suspend and reconsider the Waste Prevention Rule. BLM provides no analysis as to whether a 0.17% profit increase to small producers is significant when balanced with the established benefits of the Rule. AR 115 (Final RIA at 61 n.32).[4] In fact, the RIA completely ignores BLM's justification for the Suspension Rule, and instead "analyzes the effects of the one-year suspension and the effects of *implementing the 2016 Rule thereafter*." BLM Opp. at 38 (emphasis added). BLM makes repeated reference to an alleged $110 million in cost savings to operators, but by the agency's own calculations, these expenditures will merely be delayed by one year. AR 91-92 (Final RIA at 37-38); BLM Opp. at 15 ("regulated entities will delay incurring compliance costs of $114 million…or $110 million…"). Because the RIA merely shifts costs one year into the future, it does not provide any analysis as to the underlying rationale of the Suspension Rule. Thus, it remains unclear why BLM now believes that the Waste Prevention Rule *may* be unduly burdensome to regulated entities, after reaching the opposite conclusion just over one year ago.

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

Furthermore, BLM fails to provide a reasoned explanation for its use of a new "interim domestic Social Cost of Methane" metric that, unlike its analysis of the 2016 Rule, ignores the global impacts of increased methane emissions that will occur as a result of the Suspension Rule. BLM Opp. at 39-40. While BLM claims that OMB Circular A-4 "does not mandate that agencies consider global impacts," BLM Opp. at 40, that Circular specifically recognizes that a regulation may "have effects beyond the borders of the United States," and provides that an agency's economic analysis should encompass "all the important benefits and costs likely to result from the rule," including "any important ancillary benefits." AR 16551, 16558. BLM also ignores the fact that OMB Circular A-4 provides guidance for the implementation of Executive Order 12866, which specifically directs agencies to assess "*all* costs and benefits" of regulatory actions. AR 16543; Executive Order 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (emphasis added).

Further, BLM fails to even address the impact of the Suspension Rule on the fulfillment of the agency's statutory mandates. Plaintiff States concur with BLM that Congress, through a range of statutes, has delegated to BLM the obligation to manage mineral development on federal lands. BLM Opp. at 28. In fact, BLM invoked this statutory authority when it promulgated the Waste Prevention Rule.[5] *See* 81 Fed. Reg. at 83,009 ("In particular, the [Mineral Leasing Act] requires the BLM to ensure that lessees 'use all reasonable precautions to prevent waste of oil or gas developed in the land.'"). Citing seven different statues—including the Mineral Leasing Act, Indian Mineral Development Act of 1982, and Federal Land Policy and Management Act of 1976—BLM stated that it was updating its "decades-old" requirements related to waste of natural resources in order to "advanc[e] those mandates." *Id*. BLM has now moved to suspend and reconsider the Waste Prevention Rule without any consideration of whether or how these statutory mandates will be achieved.

BLM portrays Plaintiff States as advocating for a particular method of preventing waste, BLM Opp. at 32; ND Opp. at 11, but omit the fact that it was the agency itself which determined

[5] Proposed-Intervenors argue that BLM lacked authority to promulgate the Waste Prevention Rule. WEA Opp. at 21; API Opp. at 21; ND Opp. at 9-10. However, the Court should not consider these arguments because they are not relevant to this action, which challenges only the validity of the Suspension Rule.

that the Waste Prevention Rule was the appropriate way to implement its statutory mandates. *See, e.g.*, 81 Fed. Reg. at 83,009. Because BLM has now chosen to suspend and revise a fully-promulgated, thoroughly-analyzed Rule, the agency is "obligated to supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 43; *see also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."). BLM has entirely failed to do so. Therefore, Plaintiff States are likely to succeed on the merits of their claims that BLM contravened the APA in promulgating the Suspension Rule.

II. PLAINTIFF STATES HAVE DEMONSTRATED THAT IRREPARABLE HARM IS LIKELY TO RESULT FROM THE SUSPENSION.

Plaintiff States have demonstrated a likelihood that they "will suffer irreparable harm in the absence of preliminary relief," *Winter*, 555 U.S. at 20, including harm from increased air pollution and related health impacts, increased methane emissions and the exacerbation of climate harms, and other environmental injury such as noise and light pollution. Dkt. No. 3 at 21-24; Dkt. No. 3-1 (Declaration of Elizabeth Scheehle); Dkt. No. 3-2 (Declaration of Sandra Ely). These harms include additional air pollution from increased emissions of volatile organic compounds ("VOCs") and hazardous air pollutants in areas of California and New Mexico, some of which are already failing to meet several federal and state air quality standards. These emissions intensify related health impacts such as heart disease, lung disease, asthma, and other respiratory problems, increase cancer risks, and exacerbate the significant climate impacts that Plaintiff States are already experiencing. *Id.*

Rather than contesting this showing, BLM instead claims that such harm is not "imminent" because operators will be unable to "immediately" comply with the Rule, and that there is no presumption that such environmental harms are irreparable. BLM Opp. at 11-13. BLM also disputes its own admissions regarding the increased pollution that will result from the Suspension Rule, and claims that Plaintiff States had no right to submit "extra-record expert testimony" in order to demonstrate harm. *Id*. at 13-14. The Court should reject these assertions.

First, Plaintiff States note that the Suspension Rule effects both requirements of the Waste

Prevention Rule that already took effect on the January 17, 2017 effective date, as well as other provisions that were set to take effect on January 17, 2018. *See* 82 Fed. Reg. 58,050; AR 58-59 (RIA at 4-5). BLM fails to explain why operators would be unable to "immediately" meet requirements for which compliance was mandatory starting on January 17, 2017. Moreover, with regard to compliance with the January 17, 2018 deadlines, operators have had over a year to prepare—including nearly nine months during 2017 when the Rule was in effect—to meet these obligations. In vacating BLM's Postponement Notice, the district court rejected the argument that the January 17, 2018 compliance deadlines have had no effect on pre-deadline behavior, noting that "the Rule imposed compliance obligations starting on its effective date of January 17, 2017 that increased over time but did not abruptly commence on January 17, 2018." *California v. BLM* at *8 (internal quotation marks omitted).

The record is consistent with this view. BLM has stated that operators likely "start[ed] undertaking compliance activities in advance of the compliance date including investing in capital equipment." AR 86 (Final RIA at 32); *see* AR 90 (Final RIA at 36) ("operators likely started undertaking compliance activities in advance of" the compliance deadline). The Final RIA also demonstrates that additional emissions of methane and VOCs will result from both the suspension of existing requirements and the delay of requirements set to take effect on January 17, 2018. AR 97 (Final RIA at 43, Table 4.2b). Consequently, the fact that some operators "are not likely poised" to fully comply with the January 2018 deadlines, or may be unable to do so "immediately" upon an order enjoining the Suspension Rule (BLM Opp. at 11), does not undermine Plaintiff States' demonstration that irreparable harm will result absent injunctive relief. An injunction will ensure that operators comply with the Rule's requirements in a timely fashion.[6]

Citing to various pages of its Environmental Assessment ("EA"), BLM claims that the Suspension "will not result in significant emissions." BLM Opp. at 12 (citing AR 40-41, EA at

[6] Defendants' further contentions that the Suspension does not result in irreparable harm because it merely "preserves the status quo" or only delays provisions that "were not in effect prior to his litigation" (BLM Opp. at 14; API Opp. at 6, 9; ND Opp. at 12) is false and must be rejected for the same reasons discussed above. *See supra* at 2.

16-17); *id*. at 2 (citing AR 48, EA at 24); *see* API Opp. at 7. As an initial matter, the EA confirms that the Suspension will result in 175,000 tons of methane emissions during the first year (0.61 percent of the total U.S. methane emissions in 2015), 250,000 tons of VOCs and 1,860 tons of hazardous air pollutants, as well as additional noise and light impacts. AR 40-42 (EA at 16-18). BLM's assertion that these impacts are not "significant," and thus do not require the preparation of an environmental impact statement under the National Environmental Policy Act ("NEPA"), *see* 42 U.S.C. § 4332(2)(C), is a separate question from whether such impacts constitute irreparable harm.[7] *See, e.g.*, *Sierra Club v. Martin*, 933 F. Supp. 1559, 1570–71 (N.D. Ga. 1996) (finding that "the question of irreparable injury does not focus on the significance of the injury, but rather, whether the injury, irrespective of its gravity, is irreparable—that is whether there is any adequate remedy at law"), *rev'd on other grounds*, *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997). Moreover, in the NEPA context, the Ninth Circuit has found that irreparable injury can result from an agency's "'failure to evaluate the environmental impact of a major federal action.'" *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007) (quoting *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004)).

BLM also asserts that Plaintiff States' showing only amounts to a "mere possibility" of harm because "there will be essentially no increase [in air pollution] over the 11-year evaluation period." BLM Opp. at 13-14 (citing 82 Fed. Reg. at 58,062 and AR 96 (Final RIA at 42)). Yet again, the very pages cited by BLM admit that there will be an "increase in the amount and VOCs emitted during the 1-year delay." 82 Fed. Reg. at 58,062; AR 96 (estimating "additional methane emissions of 175,000 tons in Year 1" and "additional VOC emissions of 250,000 tons in Year 1"). BLM's contentions regarding the "11-year evaluation period" is based on its contradictory assumption that the Waste Prevention Rule will be fully implemented starting on January 17, 2019, AR 59, 86 (Final RIA at 5, 32), which flies in the face of BLM's justification for the Suspension Rule, and undermines earlier contentions that only immediate or imminent harms should be considered. *See* BLM Opp. at 11. Far from being a "mere possibility" of harm,

[7] Plaintiff States dispute these conclusions. *See* Complaint for Declaration and Injunctive Relief, Dkt. No. 1, ¶¶ 70-74.

Plaintiff States have identified immediate, specific air pollution impacts that will result from the Suspension Rule, which are confirmed by the record.

Proposed-Intervenors Western Energy Alliance and Independent Petroleum Association of America contend that Plaintiff States make only "general, unspecific claims of harm from air pollution," yet then dispute specific allegations regarding the methane "hot spot" in New Mexico's San Juan Basin and California's calculation of additional air pollution that will result from the Suspension. WEA Opp. at 13. With regard to the San Juan Basin, Proposed-Intervenors' citation to a news article to allege there is "scientific uncertainty" regarding the cause of the methane "hot spot" (WEA Opp. at 13 n.12) has already been discredited by further scientific research confirming that the primary source of these methane emissions is oil and gas operations. *See* Dkt. No. 3-2, ¶ 8 (citing Frankenberg, Christian, *et al*., "Airborne methane remote measurements reveal heavy-tail flux distribution in Four Corners region," Proceedings of the National Academy of Sciences of the United States of America, 2016, Vol. 113, No. 35, pp. 9734–9739, *available at*: http://www.pnas.org/content/113/35/9734.full; s*ee also* Smith, Mackenzie L., *et al*., "Airborne Quantification of Methane Emissions over the Four Corners Region," Environ. Sci. Technol., 2017, 51 (10), pp. 5832–5837, *available at*: http://pubs.acs.org/doi/full/10.1021/acs.est.6b06107). Moreover, California's assertions that additional pollution from the Suspension Rule will worsen air quality for already overburdened communities is appropriate to show irreparable harm. *See, e.g., Sierra Club v. U.S. Dep't of Agric*., 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (finding that coal plant expansion would "emit substantial quantities of air pollutants that endanger human health and the environment and thereby cause irreparable harm"); *South Camden Citizens in Action v. New Jersey Dept. of Envtl. Prot.*, 145 F. Supp. 2d 446, 499-500 (D.N.J. 2001) (holding that additional air pollution "impose[d] on an already environmentally burdened community" constituted irreparable harm).

While BLM is correct that any potential environmental injury does not "automatically" merit an injunction, BLM Opp. at 11-13, the Ninth Circuit has affirmed that "[e]nvironmental 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." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (internal quotations and citations omitted); *see Souza v. California Dep't of Transp.*, 2014 WL 1760346, *7 (N.D. Cal. May 2, 2014) (same). Plaintiff States have demonstrated such injury here.

Finally, contrary to BLM's suggestion that Plaintiff States' declarations are "improper in a record-review action," BLM Opp. at 14, it is entirely appropriate for a party to submit such declarations in order to demonstrate the likelihood of irreparable harm for purposes of injunctive relief. *See, e.g., International Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) (district court erred in failing to consider declarations alleging irreparable harm); *Conservation Congress v. U.S. Forest Serv.*, 2015 WL 3467025, *2 (E.D. Cal. June 1, 2015) (finding that "[t]he Ninth Circuit has repeatedly considered declarations in its analysis of whether the plaintiff has demonstrated the likelihood that it will suffer irreparable harm without a stay" and citing cases); *Oster v. Lightbourne*, 2012 WL 691833, *18 (N.D. Cal. Mar. 2, 2012) ("The substantial evidence submitted by Plaintiffs, as exemplified by Mr. Thurman's and Ms. Stern's declarations, demonstrates the likelihood of irreparable harm.").[8]

Thus, Plaintiff States have met their burden of showing that irreparable harm is likely in the absence of an injunction.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING AN INJUNCTION.

The balance of equities and consideration of the public interest strongly favor an injunction of the Suspension Rule.[9] As this Court noted in vacating BLM's previous attempt to delay the Waste Prevention Rule, compliance with the Rule is anticipated to result in "a net positive financial and environmental benefit, according to the agency's analysis, because compliance will reduce the waste of public resources, curb the emission of harmful environmental pollutants, increase royalty payments, and, for many of the new requirements relating to reducing

[8] Moreover, this evidence was not before the Wyoming court when it rejected Petitioners' request to enjoin the Waste Prevention Rule, and that ruling has no relevance here. *See* API Opp. at 6.

[9] As BLM correctly notes, the balance of equities and public interest factors merge where the government is a party. BLM Opp. at 9 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d. 1073, 1092 (9th Cir. 2014)). API's complaint that Plaintiff States improperly conflate the tests is therefore without merit. API Opp. at 22.

the waste of valuable resources, pay for itself over time." *California v. BLM*, 2017 WL 4416409, at *14.

BLM's analysis of these issues suffers from the same faulty reasoning that infects the entirety of the Suspension Rule. In particular, BLM's rationale is premised on the notion that the harms of forgoing the Waste Prevention Rule are temporary. *See* BLM Opp. at 16 ("*In light of the short time period involved*, BLM also concluded that the potential adverse impacts on operators ... outweighed these harms") (emphasis added). Thus, BLM presents a regulatory impact analysis based on a one-year suspension of the Waste Prevention Rule, followed by 10 years of full implementation of the Rule, and insists that the Court should look only to the impacts during the one year of suspension. *Id.* In the same breath, BLM admits that it has already "*concluded*"—before completing a substantive notice and comment rulemaking—that certain (unspecified) provisions of the Waste Prevention Rule "add considerable regulatory burdens that do not align with the President's policies." *Id.* (emphasis added). Given that BLM is determined to substantially revise or rescind the rule, its impacts analysis — based on a purportedly temporary suspension — is incurably flawed.[10]

Even putting aside this fatal flaw in BLM's reasoning, the conclusions drawn from the Final RIA by BLM and Proposed-Intervenors are not persuasive. BLM makes much of the estimated $110 to $114 million in compliance costs for the first year of implementation, but this aggregate cost is divided among some 1,828 entities (AR 115 (Final RIA at 6)), and does not have a significant impact on any individual business. In fact, BLM determined that even for the smallest companies, the estimated per-entity compliance cost reduction from the Suspension Rule would equate to an increase in the profit margin of 0.17%. AR 115 (Final RIA at 61). BLM also found that this fraction-of-a-percent profit margin increase was not large enough to be significant.

[10] In fact, a cursory examination of the RIA reveals fundamental problems caused by BLM's rush to suspend the Rule. The RIA simply shifts projected costs and benefits for the years 2017-2026 forward by one year. *See* AR 86 (Final RIA at 32) ("[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."). This results in the $110 million compliance costs for 2017 being shifted to 2018 (AR 94 (Final RIA at 40, Table 4.1(c))—despite the fact that the Suspension Rule was finalized near the end of 2017 (on December 8), when nearly all of the 2017 compliance costs should have already been expended. The $110 million compliance costs savings estimate is thus inherently unreliable.

AR 59 (Final RIA at 5). BLM now makes a post-hoc attempt to reinterpret this finding of insignificance as being somehow relevant only to the requirements of the Regulatory Flexibility Act rather than being a "general" determination, (BLM Opp. at 23), but this argument is unavailing. *See United States v. Trident Seafoods Corp*., 60 F.3d 556, 559 (9th Cir. 1995) ("No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position."). BLM points to no quantitative or other information in the record to support its new-found belief that such small impacts may be "very significant" to any businesses. *See* BLM Opp. at 23. And the supposed cascading financial impacts of the Waste Prevention Rule alleged by Proposed-Intervenors are largely based on their objections to BLM's assumptions about future events, which have already been raised and rejected by BLM. *See* WEA Opp. at 18 (noting that WEA has consistently raised objections to BLM's assumptions regarding permit approval delays, temporary well shut-ins, impacts to small businesses, and cost-benefit analysis).

In any event, "it is well settled that economic loss does not, in and of itself, constitute irreparable harm. Financial injury is only irreparable where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation." *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015). It is also well established that compliance costs do not typically constitute irreparable harm for purposes of a preliminary injunction. *See, e.g., Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm"); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm."); *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc*., 2009 WL 2047635, *4 (C.D. Cal. July 8, 2009) (same).

Moreover, as BLM acknowledges in the Final RIA, to the extent industry has already incurred expenses in anticipation of the January 2018 deadline, using first year compliance costs as an estimate of the "benefits" of the Suspension Rule results in an overstatement of compliance costs reductions. AR 87 (Final RIA at 33). It is reasonable to expect that responsible companies

have begun to prepare for compliance, as they have long been on notice that they fail to do so at their own risk. *See* supra at Part II. As this court previously observed:

> "If 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 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 and is not a sufficient reason for the Court to decline vacatur [of BLM's delay of the Rule]."

California v. BLM, 2017 WL 4416409, at *14. Thus, Proposed-Intervenors' complaints that they should not now be held accountable for compliance with the Rule because it was (illegally) "postponed" between June and October of last year should be discounted. And, to the extent affected entities have expended money to prepare for the January 17, 2018 compliance requirements, such expenses could not be attributed to an injunction of the Suspension Rule and thus could not be considered irreparable harm. *See Chamber of Commerce of U.S. v. Hugler*, 2017 WL 1062444, *2 (N.D. Tex. Mar. 20, 2017). ("[c]ompliance costs already incurred cannot constitute the irreparable harm Plaintiffs must show because the standard is inherently prospective.").

BLM's and Proposed-Intervenors' complaints about the financial harm to industry also fail to recognize that capital expenditures for compliance purposes—largely for equipment improvements such as pneumatic controllers, diaphragm pumps, storage vessels, flare meters, etc. (BLM Opp. at 15) —may produce future savings to industry in the form of improved gas recovery, even if the Rule is revised or repealed. *See* 81 Fed. Reg. at 83,014 (estimating additional natural gas production of 9-41 billion cubic feet per year). Given that compliance costs were determined not to be significant for even the smallest regulated entities, and that these compliance expenditures would result in benefits previously identified by BLM, the cases cited by API with respect to the harm of the costs of regulatory compliance are not on point. *See* API Opp. at 14. In *Am. Trucking Ass'ns, Inc. v. City of L.A.*, the regulatory scheme at issue went beyond imposing costs to include requirements such as a mandate to change the structure of affected businesses from an independent contractor to an employee model, and thus would "change the whole nature of its business in ways that most likely cannot be compensated with

damages alone." 559 F.3d 1046, 1049, 1058 (9th Cir. 2009). *City of L.A. v. County of Kern* involved an outright ban on an activity (land application of biosolids) that comprised either the sole or a large part of the business of the private plaintiffs affected. 462 F. Supp. 2d 1105, 1120 (C.D. Cal. 2006). Similarly, *Doran v. Salem Inn, Inc*. involved a ban on an activity (in that case, topless dancing) that was at the heart of the business of the bars who successfully sought to enjoin the ban. 422 U.S. 922, 932 (1975). None of these cases are remotely comparable to a regulation that imposes marginal compliance costs to industry that are insignificant in context.

Proposed-Intervenors North Dakota and Texas argue against a preliminary injunction because, in their view, reinstatement of the Waste Prevention Rule would constitute a "federal power-grab [that] seizes regulatory authority over almost half of the non-federal oil and gas operating units" in North Dakota and "a significant number of oil and gas units" within Texas "that contain private property or minerals." ND Opp. at 6. But while North Dakota and Texas employ alarmist language, they fail to explain—much less substantiate—their vague concerns about "state sovereignty." This Court should reject Proposed-Intervenors' attempt to weigh the balance of the equities and the public interest based on legal arguments about the Waste Prevention Rule that BLM does not rely on as a rationale for the Suspension Rule.

North Dakota's and Texas's sovereignty arguments are entirely directed at the merits of the Waste Prevention Rule itself—a matter not at issue in the instant challenge to the Suspension Rule. *See* ND Opp. at 8 ("the validity of the underlying Venting and Flaring Rule is not at issue in this case"). North Dakota and Texas present the Court with distractions such as their claims that the Waste Prevention Rule would harm their "sovereign interests in regulating oil and gas operations on state and private land within their borders," *id*. at 13, and will "usurp[ ] the authority congressionally delegated to the states and [Environmental Protection Agency] to regulate air quality." *Id*. But North Dakota and Texas do not, and cannot, plausibly invoke "sovereignty" to defend BLM's decision to suspend and revise a fully-promulgated Rule without providing the "reasoned analysis" required by the APA. *See State Farm*, 463 U.S. at 43.

In sum, the public interest in preventing the waste of public resources and avoiding

emissions of harmful volatile organic compounds, hazardous air pollutants, and irreparable climate change impacts far outweighs any interest in avoiding an insignificant increase in compliance costs to regulated entities. Consequently, the balance of equities and the public interest overwhelmingly favor an injunction.

CONCLUSION

For the reasons stated above, this Court should grant Plaintiff States' motion for a preliminary injunction and enjoin BLM's Suspension of the Waste Prevention Rule.

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