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9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 **STATE OF CALIFORNIA**, by and
12 through **XAVIER BECERRA**, Attorney
13 General, and the **CALIFORNIA AIR**
14 **RESOURCES BOARD**; and **STATE OF**
15 **NEW MEXICO**, by and through
16 **HECTOR BALDERAS**, Attorney General,
17 **et al.**,

18 Plaintiffs,

19 v.

20 **DAVID BERNHARDT**, Secretary of the
21 Interior; **JOSEPH R. BALASH**, Assistant
22 Secretary for Land and Minerals
23 Management, United States Department of
24 the Interior; **UNITED STATES BUREAU**
25 **OF LAND MANAGEMENT**; and
26 **UNITED STATES DEPARTMENT OF**
27 **THE INTERIOR**,

28 Defendants.

Case No. 4:18-cv-05712-YGR

Consolidated with No. 4:18-cv-05984-YGR

Judge: Hon. Yvonne Gonzalez Rogers

**CITIZEN GROUPS' MOTION FOR
SUMMARY JUDGMENT**

Date: January 14, 2020

Time: 10:00 a.m.

Location: Courtroom 1, Fourth Floor
1301 Clay Street, Oakland, CA 94612

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on January 14, 2020, at 10:00 a.m., or as soon thereafter as
3 possible, this motion will be heard before the Honorable Yvonne Gonzalez Rogers. Plaintiffs Sierra
4 Club, et al. (Citizen Groups) move for summary judgment pursuant to Federal Rule of Civil
5 Procedure 56(a). As set forth in the accompanying memorandum of points and authorities,
6 Defendant Bureau of Land Management's (BLM) decision to rescind its Waste Prevention Rule, 83
7 Fed. Reg. 49,189 (Sept. 28, 2018) (Rescission), violated the Mineral Leasing Act, 30 U.S.C. § 225,
8 the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 706, and the National Environmental
9 Policy Act (NEPA), 42 U.S.C. § 4332. Because there are no genuine issues of material fact and
10 Plaintiffs are entitled to judgment as a matter of law, *see* Fed. R. Civ. P. 56(a), this Court should
11 enter summary judgment for the Citizen Groups, set aside the Rescission, and reinstate the Waste
12 Prevention Rule. 5 U.S.C. § 706(2)(A).¹

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 The Citizen Groups challenge BLM's unlawful rescission of the Waste Prevention Rule's
15 crucial waste prevention and public health protections that applied nationwide to federal and tribal
16 oil and gas drilling. Despite an extensive record demonstrating a pervasive and preventable problem
17 of waste of public resources by private companies, the Rescission largely reverts to the pre-2016
18 status quo BLM previously determined led to unacceptable waste and health and environmental
19 harms. In doing so, BLM runs roughshod over its statutory duty to prevent waste, fails to base its
20 changed positions on evidence or rationally explain them, and ignores significant environmental
21 impacts.

22 The Government Accountability Office and other independent reviewers have repeatedly
23 concluded that the federal public lands oil and gas program is plagued by a pervasive problem:
24 private companies wasting publicly owned natural gas through direct venting or combustion (flaring)
25 of the gas to the atmosphere and leaks in infrastructure. In response, BLM promulgated standards to
26

27 _____
28 ¹ The Citizen Groups have standing to bring this suit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000); Exhibit A (standing declarations).

1 fulfill the Mineral Leasing Act’s mandate that it ensure private operators “use all reasonable
2 precautions to prevent waste.” 30 U.S.C. § 225. Those standards would have reduced venting of gas
3 by 35% and flaring by 49%. AR915.² BLM also recognized that reducing gas loss would benefit
4 public health and the environment by reducing air pollution and greenhouse gases. AR910, 915, 970.

5 BLM, purportedly in response to an Executive Order aimed at *increasing* energy production,
6 has now rescinded “almost all of the requirements” in the Waste Prevention Rule that would have
7 resulted in actual “gas savings,” i.e., reduced natural gas loss. AR21. BLM admits the Rescission
8 *decreases* energy production by 299 billion cubic feet (thereby increasing waste) and will have *no*
9 *effect* on jobs or investment. AR 22, 24. This illogical reversal is just the latest in a string of unlawful
10 actions BLM has taken to rid private companies of their obligation to conserve public resources.

11 BLM’s Rescission is premised on a new “policy” that redefines waste as occurring only
12 when a private operator would profit from capturing the public gas. *See* AR7. But Congress adopted
13 the Mineral Leasing Act’s waste prevention mandate to protect the *public’s* interest in *public*
14 resources, not the profit-motivated interests of private companies. Moreover, contrary to its newly
15 minted policy, BLM rescinds even those provisions that would be profitable because BLM claims
16 operators would do them anyway. If BLM cannot require operators to take any actions that are not
17 profitable and need not require operators to take actions that are, there is nothing left of the agency’s
18 obligation to ensure operators take any (let alone *all*) reasonable precautions to prevent waste.

19 Based upon the flimsiest assessment, BLM further abdicates its responsibility to prevent
20 waste by unlawfully delegating control over gas flaring for approximately 99% of federal oil and gas
21 development to a patchwork of state regulations regardless of how much (or whether) those state
22 regulations prevent waste. AR20. In the face of a massive, documented problem of waste of public
23 resources and explicit Congressional mandate, BLM has abandoned the field.

24 In an effort to support this abdication, BLM ignores its prior, extensive findings and puts its
25 thumb on the analytical scales. For instance, BLM claims the Rule would have unduly burdened
26

27 ² In this brief, “AR” refers to administrative record documents with the Bates label “WPRR_AR”,
28 “XR” refers to documents labeled “WPRR_XR,” and “VF” refers to documents labeled “VF.” *See*
ECF No. 106 at 2; ECF No. 106.1 ¶ 10.

1 private companies, but bases this claim solely on an erroneous analysis that BLM did not make
2 available for public comment (or, indeed, until over six months into this litigation) in violation of the
3 APA. *See* 5 U.S.C. § 553(b), (c). Similarly, the agency changes its earlier position that the Waste
4 Prevention Rule’s benefits outweigh its costs by a “significant margin” by undercounting and
5 ignoring the Rescission’s costs to public health and the environment while inflating compliance
6 costs to industry.

7 Its haste to rescind the Waste Prevention Rule, BLM also shortchanged its analysis of the
8 environmental impacts of the Rescission in violation of our country’s environmental Magna Carta,
9 NEPA. *See* 42 U.S.C. § 4332. BLM failed to take the legally required “hard look” at the Rescission’s
10 public health, environmental justice, and climate impacts, and ignored cumulative impacts. For
11 example, BLM discounts the significant public health impacts to Native American communities
12 living in the midst of oil and gas development by claiming they are “sparsely populated.” Wrongly
13 deeming the Rescission’s impacts insignificant, BLM relied on a cursory Environmental Assessment
14 (EA) even though it was obliged to prepare a far more comprehensive Environmental Impact
15 Statement (EIS).

16 This Court should vacate the Rescission and reinstate the Waste Prevention Rule.

17 **FACTUAL BACKGROUND**

18 **I. BLM Promulgates the Waste Prevention Rule in Response to Independent Reports** 19 **Demonstrating Pervasive Waste of Publicly Owned Gas.**

20 The Mineral Leasing Act requires BLM to ensure that private companies exploiting publicly
21 owned energy resources “use all reasonable precautions to prevent waste of oil or gas.” 30 U.S.C.
22 § 225. In 2008 and 2010, the Government Accountability Office raised concerns that BLM’s
23 “insufficient and outdated” waste prevention regulations were leading to the loss of “around 40
24 percent of natural gas” that “could be economically captured with currently available control
25 technologies,” criticized BLM’s failure to provide operators “clear guidance,” and “recommended
26 that the BLM update its regulations to require operators to augment their waste prevention efforts.”
27 AR910–11, 918. The Interior Department did its own review and estimated that federal oil and gas
28

1 lessees vented or flared more than 462 billion cubic feet of natural gas on public and tribal lands
2 between 2009 and 2015—enough gas to serve over 6.2 million homes for a year. AR916.

3 BLM then embarked on a multi-year process consisting of extensive outreach and careful
4 consideration of stakeholder feedback. On this basis, BLM determined new regulations were
5 necessary because its 35-year-old existing policy, Notice to Lessees and Operators 4A (NTL-4A),
6 AR3010–15, did “not reflect modern technologies, practices, and understanding of the harms caused
7 by venting, flaring, and leaks of gas,” and was not “particularly effective in minimizing waste of
8 public minerals,” AR916, 918. The Waste Prevention Rule, promulgated in response under BLM’s
9 statutory waste prevention mandate, would have reduced venting of natural gas by 35% and flaring
10 by 49%, all the while costing even small operators only an average of 0.15% of per company profits.
11 AR911–15. BLM modeled the Waste Prevention Rule on cost-effective standards that have been
12 required in some states for years and that some operators do voluntarily, and included reasonable
13 exemptions where compliance would lead operators to abandon resources. *See, e.g.*, AR918–20, 925,
14 929, 952. BLM recognized that in addition to preventing waste, the Rule would reduce greenhouse
15 gas emissions and protect communities from smog and carcinogenic air toxins. AR910–15, 1266.
16 Based on its Regulatory Impact Analysis (2016 RIA), BLM concluded the Waste Prevention Rule’s
17 benefits outweighed its costs “by a significant margin.” AR914.

18 **II. Industry, Some States, and BLM Attempt to Block the Waste Prevention Rule.**

19 Shortly after BLM finalized the Waste Prevention Rule, industry groups and states requested
20 that a district court preliminarily enjoin the Rule, a request that the court denied, concluding that the
21 challengers were not likely to succeed on the merits. *See* ECF No. 98 at 3–4. When the Trump
22 Administration came into office, the American Petroleum Institute (API) sent Interior Department
23 officials a memo stating that the Waste Prevention Rule was its number one “[p]riority target for
24 repeal.” XR1264. BLM began working in March 2017 to determine what provisions of the Waste
25 Prevention Rule to “drop.” XR1. On March 28, 2017, the President issued Executive Order 13,783,
26 directing BLM to consider rescinding the Rule. 82 Fed. Reg. 16,093 (Mar. 31, 2017). Together,
27 industry groups and newly appointed Secretary of the Interior Ryan Zinke lobbied members of
28 Congress to repeal the Rule using the Congressional Review Act, AR16931, XR1165, an effort that

1 was blocked when a majority of Senators voted against the motion to proceed to debate on the
2 resolution on May 10, 2017, 163 Cong. Rec. S2851, S2853 (May 10, 2017). The next week, through
3 a flurry of emails, BLM staff were directed to generate a list of comments that opposed the proposed
4 Waste Prevention Rule because it was “overly burdensome,” AR180289–94, and a timetable and
5 options for rescinding or replacing the Rule, *e.g.*, XR162–69, 176–78.

6 Meanwhile, with its internal review not yet finished, Secretary Zinke took two actions to stay
7 or suspend the effectiveness of the Waste Prevention Rule in an effort to ensure operators would
8 never have to comply fully with the Rule. Both efforts faltered when courts concluded that they
9 violated the APA. ECF No. 98 at 3–5.

10 **III. BLM Rescinds the Waste Prevention Rule.**

11 Despite these court losses and the fact that wasteful flaring of gas from federal and Indian
12 leases continued to increase, XR1204, BLM expedited the Rescission rulemaking, *see, e.g.*,
13 AR166946, 166962. Although it had held eight public hearings and listening sessions in
14 promulgating the Waste Prevention Rule, BLM held none prior to rescinding it. AR911, 84043.

15 The final Rescission “remove[s] almost all of the requirements in the 2016 rule that [BLM]
16 previously estimated would ... generate benefits of gas savings or reductions in methane
17 emissions”—*i.e.*, the provisions that prevent waste. AR21. It “in large part, re-establishes the
18 longstanding requirements that the 2016 rule replaced,” AR1, even though in 2016 BLM concluded
19 those longstanding requirements were outdated and failed to stem pervasive waste problems,
20 AR910–11. BLM itself estimates that the Rescission will result in an additional 299 billion cubic
21 feet of publicly owned natural gas being released into the atmosphere in the next decade, completely
22 erasing the gains it predicted would result from the Waste Prevention Rule. AR22, 91–92. Based
23 largely on the same factual record, and a revised Regulatory Impact Analysis (2018 RIA), BLM also
24 now concludes that the costs of the Waste Prevention Rule outweigh its benefits. AR1.

25 To support its decision, BLM prepared a 26-page EA that did not consider impacts to public
26 health, tribal communities or climate change, nor cumulative impacts. AR295–331. Based on the
27 EA, BLM concludes that rescinding the Waste Prevention Rule’s nationwide protections has no
28 significant environmental impacts, and a more comprehensive EIS is not required. AR332–39.

ARGUMENT

Faced with an extensive record documenting the pervasive waste of federal and tribal minerals, BLM removed virtually all the protections designed to address the problem. Instead, BLM largely reverts to the pre-2016 status quo—a situation it previously concluded led to “unacceptably high” levels of waste. AR916. BLM’s flawed rationales for doing so violate the Mineral Leasing Act and APA, and BLM’s cursory review of the Rescission’s environmental impacts violates NEPA.³

I. BLM Unlawfully and Arbitrarily Defines Its Statutory Duty to Prevent Waste Out of Existence (Issue A).

A. The Rescission fails to ensure that operators “use all reasonable precautions to prevent waste” and “safeguard the public welfare” (Issues A-1, A-2).

Rather than preventing waste, the Rescission will lead to the loss of 299 billion cubic feet of publicly owned gas. In an attempt to justify how this loss constitutes “all reasonable precautions to prevent waste,” the Rescission relies primarily a new policy, advocated by API, AR104026, under which releasing this gas into the atmosphere is only “waste” if capturing the gas would have been profitable to the private company, AR7 (“The BLM has made the policy determination that it is not appropriate for ‘waste prevention’ regulations to impose compliance costs greater than the value of the resources they are expected to conserve.”).⁴ BLM’s fixation on operator profits to the exclusion of the public’s interest in waste prevention violates the Mineral Leasing Act and is arbitrary.

The text, context, and history of the Mineral Leasing Act demonstrate Congress intended BLM to actively prevent waste of publicly owned resources. Congress directed BLM to ensure that private operators exploiting public minerals “use all reasonable precautions to prevent waste.” 30 U.S.C. § 225. The use of the word “all” is unambiguous; BLM must comprehensively prevent the waste of public resources. *See Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014) (statutory term “all relief necessary” authorized broad remedies because “we think Congress

³ The Citizen Groups defer to State Plaintiffs’ motion for the standard of review, and argument related to BLM’s contentions that the Waste Prevention Rule exceeded its statutory authority (part of Issue A-1), and that the administrative burdens do not justify the Rescission (part of Issue C-3).

⁴ BLM does not assert that requirements of the Waste Prevention Rule are not “reasonable precautions,” nor could it. BLM based the Rule upon low cost proven technologies and practices already required in some states and used by many operators. *See supra* p. 4. Instead, BLM relies entirely on its new concept of “waste.”

1 meant what it said. All means all.” (quotation and citations omitted)). BLM’s waste prevention
2 mandate fulfills Congress’ intent to protect and fairly develop the public’s resources.

3 In addition to preventing waste, BLM has a duty to “protect[] ... the interests of the United
4 States ... and ... safeguard[] ... the public welfare.” 30 U.S.C. § 187. Likewise, under the Federal
5 Land Policy and Management Act (FLPMA) BLM must “protect ... air and atmospheric” resources
6 and “prevent unnecessary or undue degradation of the [public] lands.” 43 U.S.C. §§ 1701(a)(8),
7 1732(b). Through these provisions, Congress mandated that BLM take into account impacts to the
8 public beyond waste, including environmental impacts.

9 The Mineral Leasing Act’s legislative history demonstrates Congress’ overriding concern
10 was to “reserve to the *Government* the right to supervise, control, and regulate the ... [development
11 of public natural resources].” AR21815 (H.R. Rep. No. 65-1138, at 19 (1919) (Conf. Rep.))
12 (emphasis added). Indeed, it was enacted in response to the “monopoly and waste and other lax
13 methods that ha[d] grown up in the administration of our public-land laws.” *Id.*; see also AR21728
14 (H.R. Rep. No. 65-206, at 6 (1917)) (“Careful provisions relative to continued development to
15 prevent waste and speculation are inserted in the bill that will ... practice conservation of this
16 resource that is so universally used and in which we all feel a keen interest in the prevention of its
17 waste in any form.”). Rather than leaving it to private companies to manage the exploitation of
18 public resources, Congress explicitly directed BLM to ensure public oil and gas resources are
19 developed to further the public interest—including the specific duties to prevent waste and protect
20 public welfare. See, e.g., *Boesche v. Udall*, 373 U.S. 472, 481 (1986) (“Conservation through control
21 was the dominant theme of the [Mineral Leasing Act] debates.”); *Union Oil Co. of Cal. v. Morton*,
22 512 F.2d 743, 747 (9th Cir. 1975) (“Oil and gas deposits ... are precious resources belonging to the
23 entire nation. Congress, although encouraging the extraction of these resources by private
24 companies, provided safeguards to insure that their exploitation should inure to the benefit of all.”).

25 By fixating on the operator’s bottom line, BLM has abdicated *its* obligation to ensure
26 operators take “all reasonable precautions to prevent waste,” protect the “interests of the United
27 States” and the “public welfare,” and prevent “undue degradation” of public lands. 30 U.S.C.
28 §§ 225, 187; 43 U.S.C. § 1732(b). Contrary to its mandate to protect the *public’s* resources, the

1 Rescission explicitly “allows operators to continue implementing waste reduction strategies and
2 programs that *they* find successful and to tailor or modify their programs in a manner that makes
3 sense for *their* operations.” AR1 (emphasis added). Because BLM holds minerals in trust for the
4 public, it must consider the broader *public* perspective, including public health, environmental, and
5 climate damages, and not just the operator’s bottom line.

6 Indeed, BLM fails to mention its Mineral Leasing Act obligation to protect public welfare or
7 its FLPMA obligations to protect air resources and prevent undue degradation, despite its previous
8 recognition that the Mineral Leasing Act “rests on the fundamental principle that the public should
9 benefit from mineral production on public lands,” and that BLM’s legal obligations include
10 “regulating the physical impacts of oil and gas development on public lands.” AR920–21; *see also*
11 AR1014 (BLM explaining why “a decision to vent or flare that may make sense to the individual
12 operator may constitute an avoidable loss of gas and unreasonable waste when considered from a
13 broader perspective”). BLM’s failure to explain its change in position or how the Rescission is
14 consistent with its statutory duties to protect the public violates the APA. *See Or. Nat. Desert Ass’n*
15 *v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019) (finding agency’s course reversal arbitrary and
16 capricious where the agency “did not explain ... what led it to alter its earlier decision or why the
17 new approach was more consistent with the text of the [relevant statute]”); *FCC v. Fox Television*
18 *Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (*Fox*) (requiring agency to fully explain changes in
19 position and demonstrate the new policy is permissible under governing statutes).

20 BLM claims that looking beyond the operator’s economic interests would violate the
21 common law “prudent operator standard,” incorporated into the Mineral Leasing Act through its
22 “reasonable diligence” requirement, citing a treatise and *Brewster v. Lanyon Zinc Co.*, 140 F. 801,
23 814 (8th Cir. 1905). AR3. However, the Mineral Leasing Act contains *both* a reasonable diligence
24 *and* a waste prevention requirement, and BLM’s reading would render the latter superfluous. *See*
25 *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (recognizing the “cardinal principle of statutory
26 construction” that “no clause, sentence, or word shall be superfluous, void, or insignificant”
27 (quotations and citations omitted)). Moreover, *Brewster* involved private, not public, resources, and
28 demonstrates that the prudent operator standard has long protected lessors (like the United States)

1 from the “business judgment” of lessees (like private operators). 140 F. at 813 (rejecting idea that the
 2 lessee can be trusted to make decisions “in good faith on business judgment”). The court held “an oil
 3 and gas lease cannot be said to make the lessee the arbiter of the extent to which, or diligence with
 4 which, the exploration and development shall proceed.” *Id.* at 813–14.

5 Likewise, the treatise BLM cites reinforces *Brewster*’s caution regarding the judgment of
 6 lessees, explaining that a “view that measures the performance of the operator by his subjective good
 7 faith” is an “extreme” view rejected by most courts. AR15597. Indeed, a more recent version of that
 8 treatise specifically states that while commentators (and now BLM) have “seized on” the language in
 9 *Brewster* to “support the proposition that there can be no violation of the prudent-operator standard
 10 unless the operations demanded by the lessor will be profitable to the lessee ... the courts have not
 11 read the language so broadly.” Patrick F. Martin & Bruce M. Kramer, 5 *Williams & Meyers, Oil &*
 12 *Gas Law* § 806.3 (LexisNexis 2018).⁵ Thus, neither *Brewster* nor the treatise support BLM’s
 13 operator profit policy.

14 Despite the foregoing, BLM attempts to defend its new operator profit policy by saying it is
 15 the “historic approach” or “longstanding concept.” AR1, 3. As just explained, that is not the case.
 16 Notably, BLM fails to mention its existing (even now) regulatory definition of “waste of oil or gas”
 17 as used in the Mineral Leasing Act, which makes no mention of an operator’s profits:

18 Waste of oil or gas means any act or failure to act by the operator that is not sanctioned
 19 by the authorized officer as necessary for proper development and production and
 20 which results in: (1) A reduction in the quantity or quality of oil and gas ultimately
 producible from a reservoir under prudent and proper operations; or
 (2) avoidable surface loss of oil or gas.

21 43 C.F.R. § 3160.0-5. BLM’s new definition of waste mimics this language exactly but *adds* the
 22 language “where compliance costs are not greater than the monetary value of the resources they are
 23

24 ⁵ The Supreme Court has repeatedly recognized the important role of regulation in protecting
 25 resources from operators only concerned with profit. For example, in 1937, it upheld a Texas statute
 26 that forbid operators from selling natural gas for use in the manufacture of carbon black (a filler)
 27 because the legislature had deemed that use wasteful, even though it was profitable for the operators.
 28 *Henderson Co. v. Thompson*, 300 U.S. 258, 264 (1937). In 1950, the Supreme Court declared: “It is
 now undeniable that a state may adopt reasonable regulations to prevent economic *and physical*
 waste of natural gas ... even though the uses to which property may be profitably put are restricted.”
Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 185–86 (1950) (emphasis added).

1 expected to conserve.” *Id.* § 3179.3; AR14 (noting the new definition “incorporated the definition of
2 ‘waste of oil or gas’ from the BLM’s operating regulations at 43 C.F.R. § 3160.0-5, but *added* an
3 economic limitation” (emphasis added)). That BLM’s definition did not previously include this
4 limitation undercuts its argument that it is longstanding.⁶

5 **B. BLM’s application of its operator profit policy reads BLM’s Mineral Leasing**
6 **Act duty to prevent waste out of the statute, and is arbitrary and capricious**
7 **(Issue A-2).**

8 Even if it were not plainly contrary to the language, context, and legislative history of the
9 Mineral Leasing Act, this Court should reject BLM’s new operator profit policy because, as applied,
10 it unlawfully reads the waste prevention mandate out of the statute entirely. Indeed, in the same
11 breath that BLM announces the new policy, it declines to follow it if doing so would result in
12 retaining portions of the Waste Prevention Rule.

13 Specifically, with respect to the requirement that operators use pneumatic controllers that
14 waste less gas (called “low-bleed”), BLM concedes “this requirement ... would have imposed costs
15 of about \$12 million to \$13 million and would have generated cost savings from product recovery of
16 \$20 million to \$26 million.” AR12. Per its new policy, lost gas resulting from failure to use low-
17 bleed pneumatic controllers constitutes waste of oil or gas. Yet BLM rescinds this provision anyway
18 “[b]ecause low-bleed pneumatic controllers are often cost effective” and so “BLM does not believe
19 that it is necessary” to retain the provision “even though it was expected to result in overall cost
20 savings.” *Id.* By determining that a requirement only prevents waste when it is profitable, and then
21 saying that if it is profitable no requirement is necessary, BLM’s interpretation unlawfully renders
22 the Mineral Leasing Act’s mandate to prevent waste entirely superfluous. *See TRW, Inc.*, 534 U.S. at

23
24 ⁶ BLM also cites two Interior Board of Land Appeals decisions from the 1980s and 1990s for the
25 proposition that the test for whether loss of gas is avoidable is whether it would have been economic
26 to market. AR3 (citing *Rife Oil Properties, Inc.*, 131 IBLA 357, 376 (1994) and *Ladd Petroleum*
27 *Corp.*, 107 IBLA 5 (1989)). Notably, there are also Interior Board of Land Appeals decisions that
28 suggest the test is *not* economic. *See Lomax Expl. Co.*, 105 IBLA 1, 7 (1988) (flaring without prior
approval constitutes per se waste); *Maxus Expl. Co.*, 122 IBLA 190, 196–97 (1992) (charging
royalties for unapproved gas venting under NTL-4A). Thus, BLM’s cited cases do not demonstrate a
uniform policy or that the *only* factor is economic. Indeed, in *Rife*, BLM itself argued that an
economic test was *not* the relevant test for venting from gas wells. 131 IBLA at 367, 373.

1 31; *Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966, 974 (9th Cir. 2018) (rejecting interpretation that
2 would render provision “surplusage” and “meaningless”).

3 Moreover, it is the “hallmark of arbitrary action” for BLM to apply its operator profit policy
4 only where it leads to BLM’s preferred result. *Nat’l Parks Conservation Ass’n v. EPA*, 788 F.3d
5 1134, 1145 (9th Cir. 2015) (*NPCA v. EPA*) (finding similarly “internally inconsistent” explanation
6 arbitrary); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374–76 (1998) (“It is hard to
7 imagine a more violent breach of [the reasoned decisionmaking] requirement than applying a ...
8 standard ... which is in fact different from the ... standard formally announced.”). BLM’s incoherent
9 application of its new policy demonstrates that it is simply a means of achieving its predetermined
10 deregulatory outcome at the expense of BLM’s duty, as lessor of publicly owned oil and gas
11 resources, to protect the public’s interest in preventing waste. As BLM concedes, the new definition
12 of “waste of oil or gas” does not affect what operators are required to do under the regulation
13 because the term “waste of oil or gas” is not actually used anywhere else in the regulatory language.
14 *See* AR15, 29–31. BLM admits that “technical application of this definition” would never be
15 required and, if it were, the new definition would not control. AR15. Indeed, if the definition
16 controlled, BLM would be unable to eliminate the profitable pneumatic controller requirement.
17 Moreover, as BLM concedes, if the term were operative, it would be impermissibly vague. AR192
18 (declining to specify a time frame for determining profitability, but at the same time recognizing “it
19 would be absurd to apply the definition without taking into account a time frame” because different
20 equipment may capture enough gas to pay for itself over different periods of time); AR84052. These
21 statements show that BLM’s new definition and its inconsistent application are not aimed at
22 preventing the waste of public resources, but instead simply a means to a deregulatory end.

23 **C. BLM’s blanket delegation of flaring controls to the states reads BLM’s duty to**
24 **prevent waste out of the statute and is arbitrary (Issue A-3).**

25 BLM also abdicates its affirmative duty to prevent waste of publicly owned oil and gas
26 resources by rescinding the gas capture requirements at the heart of the Waste Prevention Rule. The
27 Rule identified wasteful flaring of natural gas from oil wells as a significant and growing problem,
28 and found the Rule would reduce flaring by 49%. AR915. The Rescission, rather than squarely

1 address this pervasive problem, instead defers—with respect to 99% of production of federal
2 minerals—to a widely varying patchwork of state regulations (regardless of whether those
3 regulations align with BLM’s new concept of “waste”). *See* AR19–20. Based on the slightest of
4 factual records, *see infra*, BLM recognizes the regulations “vary from State to State” and will not
5 “necessarily reduce flaring rates in [a] State,” but nonetheless concludes that they constitute all
6 “reasonable precautions to prevent undue waste.” *Id.* BLM’s abdication of its own mandate leads to
7 the absurd result that “waste” of federal, public minerals will differ state to state, and contravenes the
8 agency’s affirmative duty to protect the public interest in the development of public minerals from
9 the profit-motivated decisions of private operators. *See supra* pp. 6–8.

10 In 2016, BLM recognized that it has an “independent legal responsibility” to minimize waste,
11 AR911, and that the Mineral Leasing Act, unlike other statutes, did not authorize delegations to state
12 agencies, AR937. The Rescission takes the opposite position, rescinding gas capture requirements
13 and “defer[ing] to State and tribal regulations for the flaring of associated gas.” AR14. BLM cites no
14 authority for this delegation and, “absent clear proof of legislative intent to relieve the Secretary of a
15 portion of his duties,” an intent *not* present here, BLM may not abandon its duty to the states.
16 *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation of*
17 *Mont.*, 792 F.2d 782, 795 (9th Cir. 1986).⁷ As with BLM’s new waste policy that forbids regulation
18 when it is not profitable and finds it unnecessary when it is, BLM’s blanket delegation to states
19 renders meaningless Congress’ express mandate for *BLM* to prevent waste of federal minerals. At a
20 minimum, BLM must explain its departure from its prior position, something it has failed to do. *See*
21 *Fox*, 556 U.S. at 515–16; *Cal. ex rel. Becerra v. U.S. Dep’t of the Interior*, --F. Supp. 3d--, No. C 17-
22 5948 SBA, 2019 WL 2223804, at *10 (N.D. Cal. Mar. 29, 2019) (*Becerra*) (agency acted arbitrarily
23 in “fail[ing] to satisfy its obligation to explain the inconsistencies between its prior findings in
24 enacting [a] Rule and its decision to repeal such Rule”).

25
26 ⁷ Indeed, the delegation here is even more stark than the one the Ninth Circuit deemed unlawful in
27 *Assiniboine*. There, BLM tried to delegate its authority over tribal lands to Montana by allowing
28 operators to apply for oil and gas permits with a state agency rather than BLM, reducing BLM’s role
to a mere “rubber stamp.” 792 F.2d at 786, 793–95. Here, BLM does not even have to rubber stamp
a state authorization for an operator developing publicly owned gas to allow flaring of that gas.

1 Moreover, even if BLM could defer to state rules, its analysis is “far too slender a reed on
2 which to base the sweeping conclusion that” those regulations constitute all reasonable precautions
3 to prevent waste. *Ecological Rights Found. v. FEMA*, --F. Supp. 3d--, No. 17-cv-02788-JD, 2019
4 WL 2124337, at *7–8 (N.D. Cal. May 15, 2019) (concluding three-page discussion of “complex
5 issue” insufficient). BLM previously found that only one of nine states with extensive oil and gas
6 operations on federal leases has comprehensive requirements to reduce flaring. AR920. Although
7 BLM offers a new overview of the flaring regulations of these states (plus one other), it is *less than*
8 *five pages* long and merely describes these regulations, rather than analyzing whether they
9 effectively prevent waste or are enforced. AR340–45. BLM provides no analysis of how the
10 regulations compare to the Waste Prevention Rule’s requirements or each other in terms of the
11 amount of gas captured. Indeed, while some states have gas capture requirements, three of the ten
12 states that BLM reviewed do not even require approval from a state regulatory agency before
13 operators can begin flaring, AR19, a practice previously found to be per se waste under NTL-4A, *see*
14 *Lomax Expl. Co.*, 105 IBLA at 7. Such an analysis cannot demonstrate that all ten states require “*all*
15 *reasonable precautions to prevent waste.*” 30 U.S.C. § 225. In fact, it proves they do not—regulation
16 that vary significantly in terms of effectiveness cannot all constitute *all* reasonable precautions.

17 The closest BLM comes to answering this obvious fault is to claim that state regulations
18 “account[] for the differing geological and infrastructure realities faced by operators in different
19 regions.” AR20. But BLM merely asserts these “realities” without providing any assessment of the
20 geology or infrastructure needs that allegedly support reliance on a patchwork of state standards.
21 Moreover, this explanation is undercut by the fact that for the same exact geologic basin crossing
22 two states, very different standards both constitute all reasonable precautions. *Compare* Mont.
23 Admin. R. 36.22.1220 (allowing operators in the Bakken shale basin to flare up to 100 thousand
24 cubic feet per day, approximately 65% capture, AR1016) *with* AR3333–35 (North Dakota state
25 regulation establishing gas capture goals for the Bakken that require up to 91% capture). BLM
26 provides no reasoned explanation for its blanket delegation.

1 **D. BLM arbitrarily fails to address the pervasive problem of waste and record**
2 **supporting the Waste Prevention Rule (Issue A-4).**

3 BLM predicated the Waste Prevention Rule upon independent government reports
4 documenting a pervasive and preventable waste problem, and their conclusions that BLM’s existing
5 regulations were inadequate. AR910–11, 918. In order to meet its Mineral Leasing Act obligations,
6 BLM found that additional waste regulation was necessary. *See* AR920. In a 180-degree change in
7 position, the Rescission “in large part, re-establishes the longstanding requirements that the 2016
8 rule replaced.” AR1. “Given that [BLM] was not writing on a ‘blank slate’ in connection with [the
9 Rescission], it was incumbent upon it to provide a reasoned explanation as to why” the findings it
10 relied upon in adopting the Waste Prevention Rule “now justified returning to the [prior] regulatory
11 framework.” *Becerra*, 2019 WL 2223804, at *8 (citing *Fox*, 556 U.S. at 515); *see also Organized*
12 *Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (*en banc*) (*Kake*) (requiring
13 “reasoned explanation” for disregarding prior factual findings). BLM failed to do so.

14 While BLM acknowledged in the Rescission that it promulgated the Waste Prevention Rule
15 in response to “oversight reviews,” AR2, BLM entirely ignored the content of these reviews, and
16 failed to explain why it disagrees with the reviews’ conclusions or recommendations. *See NPCA v.*
17 *EPA*, 788 F.3d at 1142–44. For example, in the Waste Prevention Rule, BLM expressly agreed with
18 the conclusions of these independent reviews that NTL-4A was “outdated,” was subject to
19 “inconsistent application,” and was not effective in minimizing waste and lost royalties. AR918,
20 939, 1935–36. In the Rescission, BLM “reinstates the NTL–4A standard for flaring in the absence of
21 applicable State or tribal regulations,” AR5, but does not mention any of these findings, much less
22 include “a reasoned explanation . . . for disregarding facts and circumstances that underlay” the Rule,
23 *Kake*, 705 F.3d at 966 (quotations and citations omitted).

24 Likewise, in the Waste Prevention Rule, BLM found that the patchwork of existing
25 Environmental Protection Agency (EPA) and other state oil and gas regulations did not obviate—
26 and indeed underscored—the need for uniform federal standards. AR919–20 (finding that EPA
27 regulations did not address flaring or already-existing sources and that no state or tribe had
28 comprehensive standards addressing venting, flaring and leaks). In the Rescission, BLM changes

1 course, claiming the Waste Prevention Rule created “unnecessary regulatory overlap” with EPA and
2 state regulations. AR5. But BLM ignores its previous findings, AR919–20, as well as a recent
3 analysis provided by the Citizen Groups showing that more than 80% of wells subject to the Waste
4 Prevention Rule are not subject to EPA or state leak detection standards, AR84119, 22624–33.
5 Likewise, BLM fails to address its previous findings that state regulations are wholly inadequate.
6 AR919. BLM’s wholesale failure to grapple with its previous factual findings violates the APA.
7 *Keake*, 795 F.3d at 966–68.

8 ***

9 At bottom, through the Rescission, BLM declines to execute its statutory obligation to
10 require operators to “use all reasonable precautions to prevent waste of oil or gas.” 30 U.S.C. § 225.
11 BLM limits its authority to those measures that are profitable for operators, but refuses to adopt any
12 such measures because it believes operators will do them anyway. It then delegates authority to the
13 states regardless of whether those state standards constitute all reasonable precautions to prevent
14 waste under any definition. And it walks away from its previous findings without adequate
15 explanation. The result (and the purpose) is a scheme wherein operators do not have to do anything
16 beyond what they are already doing despite a documented rampant, but unacknowledged, waste
17 problem. The Rescission expressly authorizes the very sorts of problems Congress intended the
18 Mineral Leasing Act to address. While this may be BLM’s policy preference, it falls far short of a
19 permissible, non-arbitrary interpretation of agency’s statutory obligations.

20 **II. BLM’s “Excessive Regulatory Burden” Justification Is Arbitrary (Issue B).**

21 **A. BLM’s “excessive regulatory burden” justification runs counter to the evidence**
22 **(Issue B-1).**

23 BLM concluded the Waste Prevention Rule contained “economical, cost-effective, and
24 reasonable” requirements and that compliance costs only represented 0.15% of even small
25 companies’ revenues. AR910, 914–15. Upon substantially the same factual record, BLM attempts to
26 justify the Rescission by claiming that “many provisions of the [Waste Prevention Rule] would have
27 added regulatory burdens that unnecessarily encumber energy production, constrain economic
28 growth, and prevent job creation.” AR1. BLM came to this conclusion in response to Executive

1 Order 13,783—with no supporting analysis—well before it proposed the Rescission or accepted
2 public comment. XR91–96. It is unexplained and contrary to the evidence. *See Ctr. for Biological*
3 *Diversity v. Zinke*, 900 F.3d 1053, 1069 (9th Cir. 2018) (*Zinke*) (vacating agency decision that came
4 to opposite conclusion “without providing any additional evidence”); *Kake*, 795 F.3d at 967–69
5 (agency must offer a “rationale to explain the disparate findings” (quotation omitted)).

6 Regarding encumbering energy production, BLM concedes that it “do[es] not expect that the
7 [Rescission] will significantly impact the price, supply, or distribution of energy,” and that, in fact,
8 the Rescission will cause 299 billion cubic feet *less* natural gas to be produced. AR22. Regarding
9 constraining economic growth, BLM admits that the Rescission will not “substantially alter the
10 investment ... decisions of firms” and will only increase average profit margins for small companies
11 by 0.19%, and that “the average reduction in compliance costs associated with [the Rescission] are a
12 small enough percentage of the profit margin for small entities[] so as not to be considered
13 ‘significant.’” AR23–24. Regarding preventing job creation, BLM acknowledges that the Rescission
14 will not “substantially alter the ... employment decisions of firms.” AR23. Accordingly, BLM
15 “failed to articulate a rational connection between the [facts] it relied upon and its conclusion” in
16 violation of the APA. *Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1015, 1024 (9th Cir. 2011).

17 Just last year, this Court rejected an identical argument used by BLM in an attempt to defend
18 its decision to suspend the Waste Prevention Rule, concluding that BLM failed to “point to any fact
19 that justifies its assertion that the Waste Prevention Rule encumbers energy production.” *California*
20 *v. BLM*, 286 F. Supp. 3d 1054, 1067 (N.D. Cal. 2018) (*California*). So too here. Because both the
21 Waste Prevention Rule and the Rescission “represent a fraction of a percentage point [of changes in
22 small entities’ profit margins] ... BLM’s concern that small operators’ ability to maintain or
23 economically operat[e] their wells would be jeopardized is unfounded.” *Id.* at 1066.

24 **B. BLM’s newly disclosed, non-transparent marginal wells analysis violates the**
25 **notice requirements of the APA and is entirely erroneous (Issue B-2).**

26 The only evidence that allegedly supports BLM’s burden conclusion is a supposed analysis
27 of compliance costs compared to revenue at individual marginal wells that it developed long after
28

1 concluding that the Waste Prevention Rule was unduly burdensome.⁸ Reliance on this analysis is a
2 violation of the APA, as BLM illegally withheld it from public comment. Even if BLM could rely on
3 it, the belatedly shared data demonstrates that the analysis was entirely erroneous. Moreover, BLM’s
4 deeply flawed marginal wells analysis does not support rescinding requirements for *all* wells.

5 *1. BLM unlawfully provided no notice of its marginal well analysis (Issue B-2a).*

6 In the Rescission, BLM prominently relies on its new analysis purporting to calculate
7 compliance costs as a percentage of marginal well revenues on a per-well basis. AR 1, 4 (claiming
8 revenue reductions would constitute 24–236% of a single year’s revenue for marginal oil well and
9 86–1,037% for a marginal gas well). *Nowhere* in the proposed rule did BLM even hint at such an
10 analysis, much less make any data, analysis, or conclusions pertaining to marginal wells available
11 for public comment. *See* AR417 (discussing marginal wells and concluding with no supporting
12 analysis that the Waste Prevention Rule would impose undue burdens on them), AR431. Indeed,
13 even the final Rescission did not disclose *how* BLM reached its new findings, which conflict with
14 BLM’s other conclusion that the compliance costs would not be significant even for small entities.
15 AR23–24. Nor did the initial administrative record shed any light on the matter. Winn Decl. ¶ 6
16 (Exhibit B). Only *after* the Citizen Groups asked BLM to confirm that all material upon which BLM
17 had relied for the new analysis were part of the administrative record did BLM belatedly provide
18 plaintiffs with a spreadsheet of the data BLM claims supports its new conclusions. *Id.* ¶¶ 7–8. The
19 Citizen Groups did not have access to this information until nearly seven months after BLM adopted
20 the final Rescission.

21 BLM’s failure to provide the public with notice and a meaningful opportunity to comment on
22 the marginal wells analysis violates the APA. 5 U.S.C. § 553(b), (c); *Idaho Farm Bureau Fed’n v.*
23 *Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) (holding failure to provide the public with “an
24 opportunity to review” a report “central” to the agency’s decision violated the APA); *see Cal. Cmty.*

25
26 ⁸ Per BLM, a well is “marginal” if it produces less than 10 barrels of oil or 60 thousand cubic feet of
27 gas per day. AR4. Over 75% of marginal wells on federal and tribal lands are owned by companies
28 that operate more than 100 wells on such lands—in other words, large companies. *See* AR96431
(companies with over 100 BLM-managed wells own 43,788 of the total 58,120 BLM-managed
marginal wells).

1 *Against Toxics v. EPA*, 688 F.3d 989, 993 (9th Cir. 2012) (an agency “must identify and make
 2 available technical studies and data that it has employed in reaching the decision to propose
 3 particular rules” (quotations and citations omitted)). Here, the new analysis “provided the only
 4 scientific information on the” alleged burdens to marginal wells, “unique information that was not
 5 duplicated” elsewhere, and was “critical to [BLM]s decision.” *Idaho Farm Bureau Fed’n*, 58 F.3d at
 6 1403. Had BLM made this analysis and documentation available for comment, as it was required to
 7 do, the Citizen Groups would have offered analyses demonstrating that BLM’s conclusions are
 8 deeply flawed and misleading, as explained in detail *infra*. BLM’s failure to allow comment on its
 9 critical analysis substantially prejudiced the Citizen Groups, and the Rescission should be vacated on
 10 this ground alone. *Id.*; *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety*
 11 *Admin.*, 494 F.3d 188, 202–203 (D.C. Cir. 2007) (vacating an agency action for failure to disclose
 12 model methodology).

13 2. *BLM’s marginal well analysis and conclusions are erroneous (Issue B-2b).*

14 Even if BLM could overcome this blatant procedural violation, BLM’s analyses and
 15 conclusions about the Waste Prevention Rule’s impact on marginal wells are erroneous and
 16 misleading.⁹ First, BLM arbitrarily inflates the costs to marginal wells by assuming *all* wells will
 17 require *all* controls mandated by the Waste Prevention Rule, when its own analysis elsewhere
 18 concedes various control measures will only be required at a *small fraction* of wells. *See* AR36, 88
 19 (explaining that some operators were already complying with some of the Waste Prevention Rule’s
 20 requirements voluntarily or due to state rules, and different sites will be subject to different parts of
 21 the Rule due to site characteristics).¹⁰ Indeed, only a small fraction of wells would experience *all* of
 22 the Rule’s costs, but BLM’s marginal well analysis assumes *all* wells would bear *all* costs.

23
 24 ⁹ What follows is a subset of critiques the Citizen Groups would have provided if they had been
 25 given the required notice and comment opportunity. After the Citizen Groups belatedly obtained the
 26 spreadsheet from BLM, they commissioned an assessment of the new data, which revealed a broad
 27 range of errors that the Citizen Groups would have presented to BLM but for BLM’s failure to
 28 include its data, analyses, or conclusions in the proposed Rescission. Winn Decl. ¶¶ 9–10.

¹⁰ BLM concedes that every Waste Prevention Rule requirement would not have required action at
 every well site. *See* AR88 (“Depending on the existing equipment at the wellsite, under the 2016
 rule, the operator *might have been* required to do one or more” actions (emphasis added)).

1 For example, BLM’s marginal well analysis assumes that all marginal gas wells will incur
2 the costs associated with installing plunger lift systems (which reduce venting when gas wells are
3 purged during liquids unloading, a process to get rid of liquid build up). AR180479. But BLM
4 elsewhere concedes that only a small fraction of marginal gas wells would be required to install
5 plunger lifts under the Waste Prevention Rule, and possibly none at all. AR70, 89. To calculate how
6 many wells the Waste Prevention Rule would require to install plunger lifts, the 2018 RIA uses two
7 alternative estimates. AR70. One scenario, drawn from the 2016 RIA, estimates 18% of gas wells.
8 AR1130. Another, new to the 2018 Rule, assumes 0% of gas wells. AR70. Both directly controvert
9 the assumptions in BLM’s marginal well analysis, which assumes 100% of gas wells would install
10 plunger lifts. AR180479. This is quintessential arbitrary and capricious decision making. *California*,
11 286 F. Supp. 3d at 1070 (finding “flawed and inconsistent assumptions” rendered analysis arbitrary).

12 BLM compounds these serious errors by expressing “the per-well reduction in revenue” in
13 terms of the *total* (ten years worth of) compliance costs per marginal well as a percentage of a *single*
14 *year’s* worth of revenue. AR4. This analysis is deeply misleading. First, it assumes that companies
15 incur all capital costs in one year, even though these costs are typically amortized over time. Second,
16 it appears to wrongly assume that future operating costs are also all realized in a single year. BLM’s
17 analysis is like a consumer deciding to get a cell phone based on the phone’s total cost, which is
18 generally financed over time, *plus* the sum of all future monthly service charges, as a percentage of a
19 single month’s paycheck. Indeed, BLM’s own data show that when costs are annualized—even
20 using BLM’s inflated and inaccurate cost figures—they are an order of magnitude lower: 1–21% of
21 marginal oil well revenues, and 2–39% of marginal gas wells revenues. AR180479. Through its
22 marginal well analysis, BLM fails to provide “a rational connection between the facts found and the
23 choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.
24 29, 43 (1983) (*State Farm*) (internal quotations and citations omitted).

25 BLM also arbitrarily fails to provide any evidence relating its new analysis to its alleged
26 concern that marginal wells “could” shut in prematurely, “jeopardiz[ing]” their economic output.

1 AR4–5.¹¹ In the Waste Prevention Rule, BLM found that the low cost of controls, additional
2 revenues from the sale of captured gas, and the exemptions available for when requirements would
3 render a well uneconomic made shut-in unlikely even for marginal wells. AR931. BLM’s new
4 conclusion regarding marginal well shut-ins is both an unexplained change and counter to the
5 evidence. BLM ignores its own data showing that the Waste Prevention Rule’s *total* net compliance
6 costs represent only “a small fraction [approximately 3%] of the economic activity associated with”
7 marginal wells. AR84087. BLM also disregards the Citizen Groups’ analysis demonstrating that an
8 operator’s decision to shut in a well relies more on absolute production levels than on revenue the
9 well generates, which fluctuates greatly depending on oil or gas prices. AR84086–87. BLM’s
10 “conclusory assertions” that the Waste Prevention Rule’s requirements *could* cause marginal wells to
11 prematurely shut in and its failure to provide a “reasoned explanation reconciling ... inconsistencies”
12 with its prior findings render its analysis arbitrary. *Becerra*, 2019 WL 2223804, at *11–12.

13 3. *BLM’s marginal well analysis does not support its blanket Rescission (Issue*
14 *B-2c).*

15 Finally, BLM arbitrarily fails to explain why its concern that a subset of the requirements of
16 the Waste Prevention Rule would have placed a “particular burden on marginal wells” justifies
17 rescinding *all* of the Rule’s key provisions for *all* wells. AR4. “When considering revoking a rule, an
18 agency must consider alternatives in lieu of a complete repeal, such as by addressing the deficiencies
19 individually.” *See Becerra*, 2019 WL 2223804, at *10 (collecting cases). Indeed, this Court recently
20 rejected BLM’s identical approach in its attempt to suspend the Rule, concluding that “even if BLM
21 had provided ... factual evidence [showing a disproportionate impact on small operators], by itself it
22 would not justify the Suspension Rule, as the rule is not properly tailored and does not merely
23 suspend the Waste Prevention Rule as applied to small operators, but instead is a blanket suspension
24 as to all operators.” *California*, 286 F. Supp. 3d at 1066–67. The same is true here. Indeed, BLM’s
25 refusal to consider tailoring the Rule demonstrates that its purpose was not to consider ways to
26

27 ¹¹ Well “shut ins” are a normal part of oil and gas operations. Production at a given well generally
28 declines over time, *see* AR96426, so a high producing well will become marginal over time as
resources are extracted, and eventually “shut-in” when the operator decides to cease production.

1 reduce regulatory burdens, but rather to implement a predetermined outcome of removing all
2 regulations that limit gas loss.¹²

3 **III. BLM Arbitrarily Justifies the Rescission on a Conclusion that the Costs of the Waste**
4 **Prevention Rule Exceed its Benefits (Issue C).**

5 In 2016, BLM concluded “that the benefits of [the Waste Prevention Rule] would outweigh
6 its costs by a significant margin”—between \$46 and \$204 million per year. AR914. BLM now
7 attempts to justify the Rescission on the opposite finding that the Rule’s “compliance costs for
8 industry and implementation costs for the BLM exceed the rule’s benefits.” AR3. BLM reaches this
9 new conclusion through a gerrymandered analysis that aims to undercount and ignore the
10 Rescission’s costs to public health and the environment, while inflating industry’s compliance costs.

11 **A. The record does not support BLM’s “interim” social cost of methane (Issue C-1).**

12 In order to slash the Waste Prevention Rule’s climate benefits, BLM declined to rely upon
13 the original social cost of methane, the Interagency Working Group (interagency) estimate,
14 developed through a multi-year inter-agency effort that included extensive opportunities for public
15 comment and peer review. *See* AR 7, 84091–92. Instead, BLM relies on an “interim” back-of-the-
16 envelope estimate that the new administration hastily developed in 2017 to justify its numerous
17 deregulatory actions, and that it claims represents a “domestic” damages estimate—something that is
18 impossible to estimate using the current models and methodologies.

19 BLM styles this estimate as “interim,” to be used only “until an improved estimate ... can be
20 developed.” AR7. But BLM cannot use its unsupported “interim” estimate indefinitely when there is
21 a scientifically supported and peer-reviewed estimate available, particularly where it forms such a
22

23 ¹² In fact, in its EA, BLM identified an “alternative” of retaining some of the Rule’s provisions for
24 “wells that sell gas to market, wells that would receive positive returns from compliance, or wells
25 that are not marginal.” AR306. BLM arbitrarily dismissed this alternative without any detailed
26 consideration because “in light of analogous EPA and State regulations, such an approach would not
27 meet its goal of eliminating unnecessary regulatory burdens.” *Id.* But EPA and state regulations have
28 no impact on whether a more tailored revision would address BLM’s (unfounded) burden concerns.
BLM’s failure to consider this alternative that satisfies its stated concerns violates NEPA.
Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 813 (9th Cir. 1999) (holding that
agency violated NEPA when it “failed to consider an alternative that was more consistent with its
basic policy objectives than the alternatives that were the subject of final consideration”).

1 critical underpinning of BLM’s justification. *See Becerra*, 2019 WL 2223804, at *12 (noting
2 “predicted future actions cannot be used to support a decision already made”). Moreover, BLM has
3 been promising to develop its “improved estimate” for almost two years. AR178220. Yet the Citizen
4 Groups have found no evidence in the record (or elsewhere) that BLM or the federal government
5 generally has done *anything* to move beyond the slapdash “interim” estimate. It is arbitrary and
6 capricious to rely on this “interim” estimate. *State Farm*, 463 U.S. at 43.

7 Critically, BLM justifies ignoring the interagency estimate in part by claiming that its “final”
8 estimate would “take into consideration the recent recommendations from the National Academies
9 of Sciences, Engineering, and Medicine for a comprehensive update to the current methodology to
10 ensure that the social cost of greenhouse gas estimates reflect the best available science.” AR128.
11 But the National Academies’ recommendations have been available since early 2017, well before
12 this rulemaking began, as commenters noted. AR22703, 84092. Yet BLM continues to ignore them.
13 BLM cannot “defer[] consideration of substantive comments regarding the regulations at issue.”
14 *Becerra*, 2019 WL 2223804, at *16.

15 More importantly, as commenters also pointed out, the National Academies’
16 recommendations completely undermine BLM’s “interim” estimate. AR84092–93. The National
17 Academies’ report critiques previous efforts to calculate a social cost of carbon based solely on U.S.
18 damages (precisely what BLM’s “interim” estimate purports to do) and concludes that an accurate
19 assessment of domestic-only impacts is *not possible* using the existing integrated assessment model
20 methodologies because they are designed to produce global estimates and do not model all relevant
21 interactions among regions. AR22770–72. The National Academies further emphasized that effects
22 that occur internationally can also have significant spill-over effects on the United States, such as
23 impacts on trade and migration, which must be considered in any attempt to estimate domestic only
24 impacts. *Id.* BLM concedes it did not do so. AR7, 206–07; *see also* AR84092 (raising 2017 National
25 Academies recommendation). BLM cannot “avoid its duty to confront these inconsistencies by
26 blinding itself to them.” *Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010).

27 In addition, evidence in the record since the development of the interagency estimate
28 suggests that even that estimate was *underestimated*, as methane is even more of a potent greenhouse

1 gas in the short term than previously thought. *See, e.g.*, AR15544–55. Although BLM acknowledges
2 this evidence, it does not take it into account. AR130. BLM’s failure to provide a “rational
3 connection between the best available science” and its “interim” estimate renders its decision to rely
4 upon that “interim” estimate arbitrary and capricious. *Turtle Island Restoration Network v. U.S.*
5 *Dep’t of Commerce*, 878 F.3d 725, 739 (9th Cir. 2017).

6 BLM’s reasoning for relying on this unsupported “interim” estimate is that Executive Order
7 13783 rescinded the technical support documents that formed the basis of the interagency estimate,
8 and that BLM allegedly followed the guidance in OMB Circular A-4. AR1–2, 4, 7. This response is
9 wholly insufficient. While Executive Order 13,783 may have withdrawn the relevant technical
10 support documents for political reasons, it did not and could not erase the scientific and economic
11 facts that formed the foundation for that estimate—facts that BLM now (when convenient) ignores.
12 *See Kake*, 795 F.3d at 969 (“The absence of a reasoned explanation for disregarding previous factual
13 findings violates the APA.”). Indeed, despite the “resci[ssion]” of the technical support documents,
14 AR7, BLM continues to rely on the “inputs and modeling” developed for the interagency estimate to
15 provide “discrete alternative scenarios that reflect the best available Federal agency estimates of
16 social costs” for its “interim” estimate. AR130. BLM cannot rely on the interagency
17 recommendations as the “best available Federal agency” estimates for certain aspects of developing
18 its “interim” estimate, including use of the integrated assessment models and methodology
19 recommended by the Group, but disregard findings from the same body of evidence elsewhere. This
20 “internally inconsistent” treatment of the interagency group’s findings is arbitrary and capricious.
21 *See General Chemical Corp. v. United States*, 817 F.2d 844, 846, 854 (D.C. Cir. 1987) (agency
22 “cannot have it both ways” by citing evidence as supportive of one conclusion, but disregarding the
23 same evidence when making another finding).

24 BLM also claims that its “interim” estimate, including its purported consideration of
25 domestic impacts, is consistent with OMB Circular A-4. AR74–75. As commenters on the proposed
26 Rescission noted, however, Circular A-4 does not require agencies to exclude consideration of
27 global impacts. AR83419–24. Moreover, the Rescission ignores, and by BLM’s own admission
28 underestimates, key *domestic* effects. AR128 (acknowledging BLM’s “interim” estimate “may

1 understate the U.S. share” of global damages from methane emissions); *see also* AR83422–31. Even
 2 if it were permissible for BLM to consider only domestic impacts from climate change (it is not), its
 3 “interim” estimate “fail[s] to consider ... important aspect[s] of the problem” and “runs counter to
 4 the evidence before the agency.” *State Farm*, 463 U.S. at 43.¹³

5 **B. BLM completely ignores other health and safety harms (Issue C-2).**

6 BLM utterly fails to consider the public health and safety harms that will arise due to the
 7 additional smog-forming volatile organic compounds (VOC) and hazardous air pollutants from the
 8 Rescission. Given that one of BLM’s rationales for the Rescission is that the newly calculated
 9 monetized costs of the Waste Prevention Rule outweigh the monetized benefits, BLM has an
 10 obligation not to exclude benefits that could be monetized. *High Country Conservation Advocates v.*
 11 *U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (“In effect the agency prepared half of
 12 a cost-benefit analysis, incorrectly claimed that it was impossible to quantify the costs, and then
 13 relied on the anticipated benefits to approve the project.”); *see also Ctr. for Biological Diversity v.*
 14 *NHTSA*, 538 F.3d 1172, 1198–1204 (9th Cir. 2008) (*CBD v. NHTSA*) (failure to consider the social
 15 cost of carbon because it was uncertain was arbitrary and capricious, in part because the agency
 16 monetized other uncertain benefits). At the very least, BLM was obligated to weigh health impacts
 17 before claiming that the costs of the Waste Prevention Rule outweighed its benefits. *See* Exec. Order
 18 No. 12,866 § 1(b)(6), 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993) (an “agency shall assess both the
 19 costs and the benefits of the intended regulation and, recognizing that some costs and benefits are
 20 difficult to quantify, propose or adopt a regulation only upon a *reasoned determination* that the
 21 benefits of the intended regulation justify its costs” (emphasis added)).

22 BLM only cursorily acknowledges the health harms associated with the Rescission, stating
 23 “VOC and hazardous air pollutants pose negative impacts on climate, health, and human welfare.”

24
 25 ¹³ BLM also relies upon this Court’s decision preliminarily enjoining BLM’s earlier attempt to
 26 suspend the Waste Prevention Rule, which concluded that BLM’s desire to look only at domestic
 27 impacts formed the “factual basis” for its change in position. *California*, 286 F. Supp. 3d at 1070.
 28 Even if as a policy matter BLM could prefer to look at purported domestic impacts, it still cannot use
 an estimate that that is unsupported by record evidence and fails to consider important aspects of the
 problem, like the spillover effect, while failing to respond to specific, material criticisms of that
 estimate—matters the *California* court did not consider.

1 AR82. BLM acknowledges the Rescission will eliminate the Waste Prevention Rule’s health
 2 benefits by foregoing emission reductions, but fails to “monetize” the costs to public health and the
 3 environment. AR75, 82. BLM fails to provide any explanation for its failure to do so. As the Citizen
 4 Groups pointed out, agencies routinely quantify similar health benefits in rulemakings, and there is
 5 no reason BLM cannot do the same here. AR84100–01.¹⁴ Even short of monetizing the benefits,
 6 BLM makes no attempt to evaluate these “negative impacts,” or weigh them against the purported
 7 benefits, and ignored requests from commenters to do so. AR220–21, 84100–01.

8 BLM attempts to discount the Rescission’s impacts by claiming “emissions ... will be
 9 dispersed across BLM-managed oil and gas operations nationwide.” *See, e.g.*, AR221. But some
 10 areas will feel the impacts more acutely. For example, BLM ignores evidence analyzing where
 11 pollution that the Waste Prevention Rule would have mitigated will now occur, including comments
 12 identifying 6,182 wells in 16 counties that violate federal air quality standards for ozone, and that are
 13 not subject to state or EPA leak detection requirements. AR22632–34. These wells will now be free
 14 to leak ozone-forming VOCs unchecked. Indeed, this Court previously recognized that suspending
 15 the Rule for just one year would “cause irreparable public health and environmental harm to
 16 [members of the public] who live and work on or near public and tribal lands with oil and gas
 17 development.” *California*, 286 F. Supp. 3d at 1073–74. BLM cannot ignore these impacts. *See*
 18 *Zinke*, 900 F.3d at 1074 (holding agency action ignoring “available ... data” was “arbitrary”); *see*
 19 *also infra* pp. 27–28 (discussing BLM’s NEPA violations for failure to consider air quality impacts).

20 **C. BLM overstates foregone compliance costs (Issue C-3).**

21 BLM’s analysis of the benefits of the Rescission also relies on flawed and unsupported
 22 assumptions. Notably, BLM assumes as the baseline for its cost analysis that *no* operators have taken
 23 steps to comply with the Waste Prevention Rule. This assumption is critical because if operators
 24

25 ¹⁴ That BLM did not monetize these benefits in the Waste Prevention Rule is irrelevant because in
 26 that rulemaking, BLM found that monetized benefits outweighed monetized costs even without
 27 accounting for health benefits. AR915. Considering those benefits without monetizing them made no
 28 difference to the outcome. By contrast, here, ignoring these costs has a significant effect upon
 BLM’s conclusion. And because at least some of the lost public health benefits are routinely
 quantified in other agencies’ rulemakings, they should be here as well. *See, e.g.*, AR25660–62.

1 have already made capital investments in equipment upgrades, foregone industry compliance costs
2 associated with the Rescission would be far lower. BLM’s entire explanation for its assumption is
3 that “we believe operators will be less likely to [begin compliance] in this case,” based on BLM’s
4 unlawful prior attempts to suspend the Rule and a single industry trade group claim that unnamed
5 operators were not prepared to comply. *See* AR67. BLM ignores that the Waste Prevention Rule
6 took effect on January 17, 2017, over a year and a half before it finalized the Rescission. AR909.
7 Operators were legally obligated to comply with the Rule for much of 2017 and 2018—with BLM
8 itself stating in March 2018 that it “expects operators to comply with all BLM regulations that are in
9 effect.” AR84093–95. BLM also disregards record evidence that undermines its noncompliance
10 assumption, including that major operators were complying with the Rule. *See, e.g.*, AR24151
11 (noting that XTO, the production subsidiary of ExxonMobil, is complying). Even the Interior
12 Department’s Chief Economist questioned BLM’s choice of baseline. AR177783 (“Is this the most
13 appropriate baseline? The ‘delay’ reg is not in place. It seems like the baseline should be the reg that
14 is in place now.”). In the context of BLM’s effort to suspend the Rule, this Court rejected BLM’s
15 identical assumption, explaining BLM’s “baseless calculation of industry cost savings is not a
16 ‘judgment call’ entitled to deference, but rather an estimated figure that lacks a reasonable basis.”
17 *California*, 286 F. Supp. 3d at 1069.

18 Because BLM arbitrarily understates the benefits and overstates the costs, its cost benefit
19 analysis cannot serve as a justification for the Rescission.

20 **IV. BLM Violates the National Environmental Policy Act by Ignoring Significant Public** 21 **Health and Climate Impacts (Issue D).**

22 In an attempt to justify its decision to eliminate nationwide regulations that significantly
23 protected public health and reduced greenhouse gas emissions, BLM prepared a cursory EA that
24 violates NEPA by failing to consider the Rescission’s serious consequences. *See Robertson v.*
25 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (holding NEPA’s fundamental purpose is
26 to ensure that “important effects will not be overlooked or underestimated”). NEPA is “our basic
27 national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). The statute provides
28 “procedural mechanisms that compel agencies ... to take seriously the potential environmental

1 consequences of a proposed action. [Courts] have termed this crucial evaluation a ‘hard look.’”
 2 *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005) (citation omitted).

3 Agencies must take a “hard look” at environmental impacts before “taking substantive
 4 environmental protections off the books.” *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999,
 5 1015 (9th Cir. 2009) (*Lockyer II*) (holding that agency violated NEPA by failing to analyze impacts
 6 of rescinding nationwide regulation); *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 632 F.
 7 Supp. 2d 968, 981 (N.D. Cal. 2009) (rejecting EIS for failure to “actually discuss the environmental
 8 consequences of eliminating the specific protections that are provided in the previous ...
 9 [nationwide] rules”). Here, in its haste to ensure that operators would never have to comply with the
 10 Waste Prevention Rule, BLM ignores the significant impacts of rescinding the Waste Prevention
 11 Rule. In particular, BLM ignores impacts to the people whose health would have directly benefited
 12 from the Rule—including Native Americans living in the midst of expanding oil and gas drilling on
 13 public and tribal lands—by dismissing their homes as “sparsely populated.” BLM also attempts to
 14 downplay the Rescission’s climate impacts by ignoring their cumulative significance and arbitrarily
 15 ignoring certain domestic and global impacts. In the end, the Rescission’s significant impacts—
 16 ignored by BLM—require preparation of a more comprehensive EIS, not an EA.

17 **A. BLM fails to take a “hard look” at the Rescission’s public health, environmental**
 18 **justice, and climate impacts (Issue D-1).**

19 *1. BLM ignores significant health impacts (Issue D-1a).*

20 Far from taking a hard look, BLM fails to seriously consider the impacts of the Rescission to
 21 public health, repeating the error it made in its 2018 RIA, *see supra* pp. 24–25. BLM does so despite
 22 this Court’s earlier conclusion that suspending the Waste Prevention Rule for just one year would
 23 cause health risks in “already at-risk communities ... leading to and exacerbating impaired lung
 24 functioning, serious cardiovascular and pulmonary problems, and cancer and neurological damage.”
 25 *California*, 286 F. Supp. 3d at 1073–74. BLM’s failure to examine these impacts violates NEPA.

26 To satisfy its hard look duty, BLM must consider “the direct, indirect, and cumulative”
 27 impacts of its proposed action, including “health” impacts. 40 C.F.R. §§ 1508.7, 1508.8,
 28 1508.27(b)(7). Here, BLM quantifies the tons of increased ozone precursor and hazardous air

1 pollutant emissions due to the Rescission, but it does not consider what those increased emissions
2 mean for human health and the environment. AR316. Indeed, the Rescission EA’s *entire* discussion
3 of air quality impacts is limited to the following:

4 The Proposed Action is expected to affect local air quality. Natural gas contains VOCs,
5 which are precursors to ozone and particulate matter, and various toxic air pollutants,
6 such as benzene. These air pollutants affect the health and welfare of humans, as well
7 as the health of plant and wildlife species.

8 AR315–16. BLM ignores important air quality information, including detailed analysis showing that
9 thousands of wells that would have been required to reduce emissions under the Waste Prevention
10 Rule are located in counties that are already suffering from ozone levels above federal public health
11 standards. *See supra* p. 25. BLM also ignores evidence showing that there are areas in Colorado,
12 Utah, and Wyoming where oil and gas development on public and tribal lands contributes
13 significantly to violations of federal standards. AR84145–46. The Rescission’s increased methane
14 emissions will only add to the health threat by leading to warmer temperatures, which increase ozone
15 formation. AR2193. By ignoring the effects of its decision on people living and recreating in these
16 regions, BLM fails to engage in the hard look that NEPA requires. *See S. Fork Band Council of W.*
17 *Shoshone v. U.S. Dep’t of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (holding BLM’s failure to
18 consider the air pollution associated with the transport and processing of gold mining ore “shows
19 that it did not take the requisite ‘hard look’ at the environmental impacts of the proposed project”).

20 BLM seeks to avoid its hard look obligations by claiming that it cannot predict precisely
21 where and how fast oil and gas development may progress. AR176–77. But this misses the point.
22 “Because speculation is implicit in NEPA, we must reject any attempt by agencies to shirk their
23 responsibilities under NEPA by labeling any and all discussion of future environmental effects
24 as crystal ball inquiry.” *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078–79
25 (9th Cir. 2011) (quotations and alterations omitted); *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459
26 F. Supp. 2d 874, 901 (N.D. Cal. 2006) (*Lockyer I*) (“Mere uncertainty about the precise contours of
27 the environmental impact of this major change in [federal regulations] ... does not excuse the
28 absence of any overall programmatic NEPA analysis.”).

1 Nor can BLM avoid its obligations by claiming that it will consider public health *later*.
 2 AR237, 321. Agencies cannot “postpone analysis of an environmental consequence to the last
 3 possible moment,” they must consider impacts “as soon as it can reasonably be done.” *Kern v. BLM*,
 4 284 F.3d 1062, 1072 (9th Cir. 2002) (rejecting agency’s attempt to defer analysis to later site-
 5 specific proposals); *Lockyer I*, 459 F. Supp. 2d at 907 (explaining that future site-specific NEPA
 6 analysis does not “excuse[] the failure to comply with NEPA where a nationwide Rule has been
 7 repealed and replaced with a less environmentally protective scheme”).¹⁵ In *Kern*, the Ninth Circuit
 8 required BLM to consider impacts in a NEPA document where the problem was “readily apparent”
 9 and there was enough information available to “permit productive analysis.” 284 F.3d at 1073.
 10 Those conditions are satisfied here. BLM knows there are existing air quality problems due to oil
 11 and gas development on public and tribal lands, *see* AR176–77, and that removing the Waste
 12 Prevention Rule’s protections will lead to additional ozone precursor emissions, *see* AR316.¹⁶ No
 13 crystal ball is necessary to take a hard look at the Rescission’s impacts to air quality. *See N. Plains*
 14 *Res. Council*, 668 F.3d at 1078–79 (rejecting agency’s argument that coal bed methane drilling was
 15 “too speculative” to analyze).

16 2. *BLM ignores impacts to tribal communities (Issue D-1b).*

17 BLM’s utter disregard for the Rescission’s environmental justice impacts, including
 18 significant public health impacts on tribal communities living in the middle of rampant oil and gas
 19 drilling, compounds the agency’s NEPA violation. Although the public comments on the Rescission
 20 were replete with evidence of the impact of drilling emissions on Native American’s daily lives and
 21

22 ¹⁵ *See also N. Plains Res. Council*, 668 F.3d at 1078–79 (rejecting agency’s attempt to “await the
 23 development of site-specific EISs” when sufficient information was available); *Sierra Club v.*
 24 *Bosworth*, 510 F.3d 1016, 1027–30 (9th Cir. 2007) (holding that agency must assess environmental
 impacts of changing nationally applicable regulation rather than deferring to a project level analysis).

25 ¹⁶ BLM also claims that areas with existing ozone violations are subject to state emissions standards.
 26 AR177. BLM, however, may not avoid its NEPA duty to take a hard look at its decision to increase
 27 air pollution just because oil and gas operators must also comply with state law. *S. Fork Band*
 28 *Council*, 588 F.3d at 726 (holding that a state air pollution permit “cannot satisfy a federal agency’s
 obligations under NEPA”). Moreover, BLM previously recognized that—despite existing State
 regulations—the Rule would have “*substantial* ... air quality benefits,” including reducing ozone
 precursors. AR1259 (emphasis added).

1 their health, BLM ignored these impacts in its EA. *See, e.g.*, AR83397–98, 83403–04, 96468,
2 104080–82, 159766–67, 163138, 163165–56, 163171–73, 180467–69. Commenters from the Fort
3 Berthold Indian Reservation described the “constant haze” and “seeing the night sky lit up every
4 night – for a decade now.” AR83397, 163171. During a formal government-to-government
5 consultation with the Navajo Nation, President Russell Begaye noted that health professionals have
6 noticed an increase in asthma and cancer on the Reservation, and that residents have reported smells
7 and residues on plants and soils around a school in the Nageezi/Counselor area—an area hard hit by
8 oil and gas drilling. AR159757; *see also* AR96468.

9 These types of harms directly impact Citizen Group members living on the Fort Berthold and
10 Navajo Reservations. *See supra* p. 1 n.1 (all standing declarations are included in Ex. A); J. Bird
11 Bear Decl. ¶¶ 13–14, 16 (describing the impacts of flaring and the industrialization of the landscape
12 as a result of oil and gas drilling, including “the orange night sky,” the “bluish plume” over her rural
13 reservation, and “noises that sound like a major metropolitan airport is located ... just over the hill”);
14 T. Bird Bear Decl. ¶¶ 3, 20–24 (describing how she feels like “prisoner in [her] home because of the
15 chemicalized air outside [her] door”); L. DeVille Decl. ¶¶ 14, 16, 21 (describing the constant smell
16 of hydrocarbons and flares that “rumble[] the ground like a train passing by”); Pinto Decl. ¶¶ 11, 14;
17 Begaye Decl. ¶¶ 8, 13–15. Because these impacts disproportionately affect Native Americans living
18 in low-income communities, they raise environmental justice concerns. *See* AR161881–86
19 (concluding that tribal communities experience disproportionate health risks from oil and gas
20 emissions because they are more likely to live within 0.5 miles of an oil and gas well, and that
21 Native Americans living on tribal land in North Dakota, New Mexico, and Utah experience more
22 than double each state’s average poverty rates).

23 Yet the EA does not even *mention* the many tribal communities who are suffering the
24 impacts of BLM-approved oil and gas drilling, let alone examine the Rescission’s impacts to those
25 communities, as required by NEPA. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*,
26 255 F. Supp. 3d 101, 140 (D.D.C. 2017) (holding agency’s “bare-bones” environmental justice
27 analysis concluding that Tribe would not be disproportionately harmed violated NEPA’s hard look
28 requirement); *see also Sierra Club v. FERC*, 867 F.3d 1357, 1369 (D.C. Cir. 2017) (upholding EIS

1 that fully discussed disproportionate impacts on environmental-justice communities while
2 recognizing plaintiffs “[p]erhaps ... would have a stronger claim if the agency had refused entirely
3 to discuss the demographics of the populations that will feel the pipelines’ effects”).

4 Without any analysis, the EA concludes the Rescission “is not expected to have a significant
5 impact on minority and low-income populations living near oil and gas operations.” AR318. BLM
6 cannot conclude impacts are not significant absent a comprehensive analysis of the relevant impacts.
7 *Anderson v. Evans*, 371 F.3d 475, 492 (9th Cir. 2004) (holding where a “critical question” was never
8 analyzed the agency could not support its finding that the impacts were not significant). Indeed,
9 BLM’s complete disregard for the Rescission’s impacts to tribal communities falls well short of
10 Executive Order 12,898 and the Council on Environmental Quality’s (CEQ) guidance for
11 considering environmental justice under NEPA, which require every federal agency to “make
12 achieving environmental justice part of its mission by identifying and addressing, as appropriate,
13 disproportionately high and adverse human health or environmental effects of its programs, policies
14 and activities on minority populations and low-income populations,” including Native Americans.
15 59 Fed. Reg. 7,629 (Feb. 16, 1994); CEQ, *Environmental Justice, Guidance Under the National*
16 *Environmental Policy Act* 9 (1997), [https://www.doi.gov/sites/doi.gov/files/uploads/EJ-under-](https://www.doi.gov/sites/doi.gov/files/uploads/EJ-under-NEPA.pdf)
17 [NEPA.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/EJ-under-NEPA.pdf) (instructing agencies to examine the “interrelated cultural, social, occupational, historical,
18 or economic factors that may amplify the natural and physical environmental effects of the proposed
19 agency action.”).¹⁷

20 BLM attempts to excuse its failure to consider these impacts by claiming, without support,
21 that hazardous air pollution “would be geographically dispersed and would, for the most part, occur
22 in sparsely populated areas.” AR237. NEPA does not allow BLM to discount the localized impacts
23 to people for whom the public health impacts are of clear significance. *See Anderson*, 371 F.3d at
24

25 ¹⁷ Although Executive Order 12,898 does not create an independent right to judicial review, *see*
26 *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998), an agency’s
27 environmental justice analysis in a NEPA document is reviewable under the APA’s arbitrary and
28 capricious standard, *see Latin Ams. for Social & Econ. Dev. v. Fed. Highway Admin.*, 756 F.3d 447,
465 (6th Cir. 2014); *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006);
Comms. Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 689 (D.C. Cir. 2004).

1 490 (holding that even if the proposed action did not significantly impact the overall whale
2 population, the “local effects” to the summer population in the Washington area might be significant
3 and therefore warranted preparation of an EIS); *White Tanks Concerned Citizens, Inc. v. Strock*, 563
4 F.3d 1033, 1039–41 (9th Cir. 2009) (rejecting agency’s attempt to ignore water pollution impacts
5 merely because they only impacted a small area). BLM’s view that it can ignore rural tribal
6 communities that are suffering significant impacts is a violation of NEPA.

7 3. *BLM discounts and ignores important climate impacts (Issue D-1c).*

8 The Rescission causes an annual climate impact equivalent to putting nearly 3 million
9 passenger vehicles on the road. AR84146; *see also California*, 286 F. Supp. 3d at 1073. Yet the EA
10 fails to take a “hard look” at these impacts by attempting to minimize the Rescission’s significant
11 methane emissions by comparing them to total U.S. emissions, ignoring readily available science-
12 based metrics for assessing the actual effects of the Rescission’s emissions, and discounting
13 important domestic and global impacts.

14 The Rescission EA merely incorporates by reference climate-related information from the
15 Waste Prevention Rule, including observed and projected climate impacts in regions where federal
16 and Indian oil and gas leases are located, and quantifies the estimated foregone emissions reductions
17 caused by the Rescission: 175,000 to 180,000 tons of methane per year. AR307–08, 314. BLM then
18 dismisses the Rescission’s climate impacts by comparing these foregone emissions reductions to
19 total greenhouse gas emissions for the United States and concluding the Rescission’s estimated
20 foregone emissions reductions are less than 1% of total U.S. methane emissions. AR315.

21 BLM’s attempt to discount the Rescission’s incremental impact ignores that climate change
22 has cumulative impacts attributable to numerous emissions sources that may appear relatively
23 insignificant in isolation, but are collectively harmful. *See Stack & Vandenberg, The One Percent*
24 *Problem*, 111 Colum. L. Rev. 1385, 1393 (2011) (framing sources as less than 1% of global
25 emissions is dishonest and a prescription for climate disaster). NEPA requires BLM to acknowledge
26 this by considering the “incremental impact” of the Rescission’s emissions “when added to other
27 past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7; *see infra* p. 35. Indeed,
28 “the impact of greenhouse gas emission on climate change is precisely the kind of cumulative

1 impacts analysis that NEPA requires agencies to conduct.” *CBD v. NHTSA*, 538 F.3d at 1217.

2 Moreover, BLM must communicate the “*actual* environmental effects resulting from ... emissions”
3 of greenhouse gas emissions, not just quantify them. *Id.* at 1216. BLM has not done so.

4 BLM claims in the EA that “the actual effects of [the Rescission’s methane emissions] on
5 global climate change cannot be reliably assessed and thus are sufficiently uncertain as to be not
6 reasonably foreseeable.” AR319. This is not true. Scientifically robust methods exist to assess the
7 actual effects of greenhouse gas emissions, including the social cost of methane protocol and carbon
8 budgeting. *See CBD v. NHTSA*, 538 F.3d at 1200 (citing a range of values for carbon emissions
9 reductions, and noting that it “is certainly not zero”).

10 Indeed, BLM concedes as much by purporting to estimate the *domestic* social cost of
11 methane in its 2018 RIA, yet fails to use the social cost of methane in the EA to fulfill its duty to
12 take a hard look. Courts have held that agencies must use the social cost of carbon (the rigorous,
13 consensus-based, transparent protocol on which the social cost of methane is built) in their NEPA
14 analyses. *See, e.g., Mont. Env’tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074,
15 1094–95 (D. Mont. 2017); *High Country Conservation Advocates*, 52 F. Supp. 3d at 1192–93. It is
16 arbitrary for an agency to quantify an action’s benefits while ignoring its costs, where tools, such as
17 the social cost of carbon, exist to calculate those costs. *High Country Conservation Advocates*, 52 F.
18 Supp. 3d at 1192. Yet that is exactly what BLM did here. *See* AR301–02 (discussing the
19 Rescission’s reduction in compliance costs, but nowhere discussing the climate damages).

20 Even if BLM could rely on its “interim” estimate used in the 2018 RIA to somehow satisfy
21 its independent NEPA duty to take a hard look in the Rescission EA, this estimate ignores critical
22 domestic and global damages. *See supra* p. 22. Because BLM’s “interim” social cost of methane is
23 inconsistent with peer-reviewed science and expert recommendations, the EA violates NEPA’s
24 mandate to use “[a]ccurate scientific analysis,” 40 C.F.R. § 1500.1(b), and to ensure the “scientific
25 integrity” of NEPA documents, *id.* § 1502.24. *See Or. Nat. Desert Ass’n v. Jewell*, 840 F.3d 562,
26 570 (9th Cir. 2016). The omission of important domestic and global costs from the EA also violates
27 NEPA’s mandate to consider an action in its appropriate “context,” including “*society as a whole*
28 (*human, national*), the affected region, the affected interests, and *the locality*.” *Anderson*, 371 F.3d at

1 487 (citing 40 C.F.R § 1508.27) (some emphasis added); *see also* 42 U.S.C. § 4332(2)(F) (requiring
2 agencies to “recognize the worldwide and long-range character of environmental problems”). The
3 appropriate context for a nationwide rulemaking that contributes to a global problem is the “world as
4 a whole.” *See Mont. Env’tl. Info. Ctr.*, 274 F. Supp. 3d at 1101–02 (for greenhouse gases, agency may
5 not “limit its context analysis to the local and regional level”); *accord Barnes v. U.S. Dep’t of*
6 *Transp.*, 655 F.3d 1124, 1139–40 (9th Cir. 2011) (noting “the effect of greenhouse gases on climate
7 is a *global* problem” (emphasis in original)).

8 Another method BLM could use to address the magnitude and severity (i.e., significance) of
9 total greenhouse gas emissions is a “carbon budget.” The Citizen Groups recommend this approach
10 for BLM’s use in the EA, but BLM failed to respond. *See* AR84158–61, AR173–74 (BLM
11 disagreeing it must use the social cost of methane in its EA, but not mentioning carbon budgeting). A
12 carbon budget sets a cap on the remaining greenhouse gases that can be emitted while keeping global
13 average temperature rise below certain climate impact thresholds. *See* AR22660–66 (peer-reviewed
14 article discussing carbon budgeting). According to the most recent Intergovernmental Panel on
15 Climate Change report, approximately 1,000 gigatons of CO₂-equivalent (CO₂e) may be emitted
16 while keeping human-induced warming to less than 2°C. AR22096. BLM can disclose what portion
17 of the remaining budget the Rescission’s total, cumulative emissions will consume. Like the social
18 cost of methane protocol, a carbon budget “disclose[s] the actual environmental effects” of the
19 Rescission in a way that “brings those effects to bear on [the agency’s] decisions.” *Baltimore Gas &*
20 *Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 96 (1983).

21 While NEPA does not mandate any particular methodology, *see, e.g., WildEarth Guardians*
22 *v. Zinke*, 368 F. Supp. 3d 41, 79 (D.D.C. 2019), it does mandate that BLM use state of the art science
23 to make sound scientific decisions, *id.* at n.31; 40 C.F.R. §§ 1500.1(b), 1502.22(b), 1502.24.
24 Accordingly, BLM must analyze the actual effects of climate change using available tools with
25 scientific integrity—such as the peer-reviewed social cost of methane and carbon budgeting. Given
26 the availability of these tools, there is no merit to BLM’s claim that there are no methods to assess
27 the Rescission’s actual climate impacts.

1 **B. BLM violates NEPA by failing to consider the Rescission’s air and climate**
2 **impacts in combination with other federal actions (Issue D-2).**

3 BLM was well aware that at the same time it was working to rescind the Waste Prevention
4 Rule’s protections, the Administration also was systematically dismantling regulations aimed at oil
5 and gas emissions and ramping up federal fossil fuel development. BLM unlawfully failed to
6 consider the cumulative health and climate impacts of these actions.

7 To avoid the “tyranny of small decisions” agencies must consider the cumulative impacts of
8 their actions. *Kern*, 284 F.3d at 1076–78 (quoting CEQ, *Considering Cumulative Effects Under the*
9 *National Environmental Policy Act 1* (1997)); *Te-Moak Tribe of W. Shoshone v. U.S. Dep’t of the*
10 *Interior*, 608 F.3d 592, 602 (9th Cir. 2010) (“[NEPA] require[s] that an EA fully address cumulative
11 environmental effects.” (quotation omitted)). “‘Cumulative impact’ is the impact on the environment
12 which results from the incremental impact of the action when added to other past, present, and
13 reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person
14 undertakes such other actions. Cumulative impacts can result from individually minor but
15 collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

16 Although labeled a “cumulative impacts analysis,” the half page BLM devotes to analyzing
17 the Rescission’s cumulative impacts does nothing more than reference back to its scant discussion of
18 air quality and climate impacts. AR321. BLM fails to identify *any* other past, present, or reasonably
19 foreseeable future actions or analyze them in combination with the Rescission’s impacts. At a
20 minimum, BLM was required to consider the Rescission’s cumulative air quality and climate
21 impacts in combination with EPA’s proposal to weaken its own oil and gas regulations, and with
22 BLM’s fossil fuel program for federal and tribal minerals. *See Bosworth*, 510 F.3d at 1028
23 (recognizing the importance of a cumulative impacts analysis “in a situation ... where [the proposed
24 action] is nationwide in scope and has the potential to impact a large number of acres”).

25 At the same time that BLM was rescinding its Waste Prevention Rule, EPA was in the
26 process of weakening its own oil and gas air quality regulations—both actions that would result in
27 cumulatively greater air emissions from oil and gas drilling operations nationwide. *See* AR84164–
28 65. Before BLM finalized the Rescission, EPA proposed rescinding provisions in its regulation that

1 will lead to annual increases in emissions of 380,000 tons of methane, 100,000 tons of VOCs, and
2 3,800 tons of hazardous air pollutants. 83 Fed. Reg. 52,056, 52,059 (Oct. 15, 2018).¹⁸ Yet, BLM
3 ignored the combined impact of EPA’s proposal and the Rescission, in violation of NEPA. 43 C.F.R.
4 § 46.30 (Interior Department NEPA regulations defining “reasonably foreseeable future actions” to
5 include “federal ... activities not yet undertaken, but sufficiently likely to occur,” including
6 “activities for which there are existing ... proposals”); *see also N. Plains Res. Council*, 668 F.3d at
7 1079 (holding agency failed to consider reasonably foreseeable BLM proposals in its cumulative
8 impacts analysis). In fact, instead of acknowledging EPA’s proposal to weaken its regulations, BLM
9 expressly relies on EPA’s *existing* regulations in its cumulative impacts analysis to suggest the
10 Rescission’s impact would lessen over time. AR321. BLM cannot simply assume EPA regulations
11 will remain in place indefinitely despite contrary evidence.

12 BLM also ignored the tremendous cumulative climate impacts of its fossil fuel program for
13 federal and tribal lands in combination with the Rescission. *See* AR84149–50, 84153, 84163–64.
14 Between 2003 and 2014, approximately 25% of all U.S. and 3–4% of global fossil fuel greenhouse
15 gas emissions were attributable to federal coal, oil, and gas resources leased and developed by the
16 Interior Department. AR21185. Other studies indicate that in 2012 private extraction of federal fossil
17 fuels contributed approximately 1,344 million metric tons of CO₂e to the atmosphere. AR84160.
18 Because the Interior Department is responsible for federal fossil fuel production—which contributes
19 significantly to climate change—BLM must consider the Rescission in combination with those
20 impacts or, at a minimum, the federal and tribal oil and gas leasing program as a whole. *See*
21 *WildEarth Guardians*, 368 F. Supp. 3d at 75–77 (requiring cumulative climate assessment for lease
22 sale to include assessment of BLM’s oil and gas leasing program nationwide); *see also* AR416
23

24 ¹⁸ Although EPA’s proposal was not published in the Federal Register until October 15, 2018, EPA
25 provided it to the public on September 11, 2018, two weeks before BLM promulgated the
26 Rescission. *See* EPA, *Proposed Improvements 2016 New Source Performance Standards* (last
27 updated Dec. 19, 2018), [https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-
industry/proposed-improvements-2016-new-source](https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/proposed-improvements-2016-new-source). Furthermore, BLM could have coordinated with
28 EPA earlier in the process, as it did extensively in preparing the Waste Prevention Rule. *See, e.g.,*
VF117 (describing coordination with EPA); VF81–82 (proposed Waste Prevention Rule RIA
analyzing costs and benefits depending upon whether EPA finalized its regulations).

1 (noting that in Fiscal Year 2015, federal oil and gas wells produced 183.4 million barrels of oil, 2.2
2 trillion cubic feet of natural gas, and 3.3 billion gallons of natural gas liquids). As the *WildEarth*
3 *Guardians* court recognized, given the “cumulative nature of climate change, considering each
4 individual drilling project in a vacuum deprives the agency and the public of the context necessary to
5 evaluate oil and gas drilling on federal land before irretrievably committing to that drilling.” 368 F.
6 Supp. 3d. at 83; *CBD v. NHTSA*, 538 F.3d at 1217 (“The impact of greenhouse gas emissions on
7 climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to
8 conduct.”); *San Juan Citizens All. v. BLM*, 326 F. Supp. 3d. 1227, 1248 (D.N.M. 2018) (rejecting
9 “facile conclusion” that leasing decision’s climate impacts were “minor” and no cumulative impacts
10 analysis was required). Here too, considering the Rescission in a vacuum deprives the public of the
11 broader context: the significant climate impacts of BLM’s fossil fuel program.

12 BLM’s only response is the familiar refrain that it will analyze any cumulative impacts *later*.
13 AR337. But the Rescission has *nationwide* impacts—including cumulative impacts—that are not
14 appropriate for site-specific analysis. *Bosworth*, 510 F.3d at 1027–28 (noting the importance of a
15 cumulative analysis where the action is “nationwide in scope”). Indeed, the Ninth Circuit has held
16 that future impacts analysis at the project level “does not relieve [the agency] of its obligation to
17 ensure that the [project] as a whole has no cumulative impacts.” *Id.* at 1027; *see also supra* p. 29.

18 **C. BLM violates NEPA by failing to prepare an EIS despite the Rescission’s**
19 **significant impacts (Issue D-3).**

20 The foregoing discussion demonstrates that the Rescission will have significant
21 environmental and health impacts. BLM was therefore required to perform a much more detailed
22 analysis in an EIS, rather than an EA. This Court already concluded that a small subset (one year) of
23 these effects would irreparably harm public health. *California*, 286 F. Supp. 3d at 1075. BLM’s rush
24 to rescind regulatory protections is no excuse for failing to seriously consider the environmental and
25 health effects of doing so in accordance with NEPA. *See Bosworth*, 510 F.3d at 1026–30 (holding
26 impacts of relaxing nationally applicable environmental standards would be significant).

27 Agencies must prepare an EIS for any “major Federal action[] significantly affecting the
28 quality of the human environment.” 42 U.S.C. § 4332(2)(C). “Major federal actions” include “new

1 or revised agency rules [and] regulations.” 40 C.F.R. § 1508.18(a). To determine whether a proposal
2 has significant effects requiring an EIS, an agency may first prepare an EA. *Id.* §§ 1501.3,
3 1501.4(b)–(c). If the agency determines the proposal will not have significant effects, it must explain
4 its determination in a finding of no significant impact (FONSI). *Id.* §§ 1501.4(e), 1508.13. The
5 FONSI must supply a “convincing statement of reasons” demonstrating the proposed action does not
6 have a significant impact. *CBD v. NHTSA*, 538 F.3d at 1220, 1223 (quotation omitted).

7 The threshold to prepare an EIS is not high; agencies must prepare an EIS if there are
8 “substantial questions” about whether a project’s impacts are significant. *Anderson*, 371 F.3d at 488
9 (quotation omitted). In deciding whether a proposal’s impacts are significant, agencies must consider
10 a number of factors including: “[t]he degree to which the proposed action affects public health or
11 safety”; “[w]hether the action is related to other actions with individually insignificant but
12 cumulatively significant impacts”; “[t]he degree to which the effects on the ... environment are
13 likely to be highly controversial”; and “the degree to which the possible effects ... are highly
14 uncertain.” 40 C.F.R. § 1508.27(b). The presence of any “one of these factors may be sufficient to
15 require preparation of an EIS in appropriate circumstances.” *Ocean Advocates*, 402 F.3d at 865.
16 Here, *all* of these factors are present and raise far more than substantial questions about the
17 Rescission’s significant impacts.

18 First, the Rescission’s air and climate pollution poses significant risks to public health. *See*
19 *CBD v. NHTSA*, 538 F.3d at 1222 (recognizing global warming will have an impact on “public
20 health and safety”); *Ctr. for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140, 1158 (N.D. Cal.
21 2013) (recognizing that potential public health impacts from fracking satisfied public health
22 significance factor). Rescinding these nationwide protections will harm tribal communities and
23 others living in close proximity to wells and exacerbate ozone pollution in multiple areas already
24 exceeding public health standards, and the Rescission’s increased methane emissions will only add
25 to the public health threat. *See supra* pp. 28, 29–30. BLM’s FONSI claims these impacts are not
26 significant based on its unsupported, but repeated assertion that emissions will be “geographically
27 dispersed” and occur in “sparsely populated areas.” AR336. But this claim ignores that the
28 Rescission’s significant public health impacts are localized. *See supra* pp. 31–32.

1 Second, EPA’s own proposal to weaken its regulations and BLM’s overall federal and tribal
2 oil and gas program compound the significance of these public health and climate impacts. *See supra*
3 pp. 35–37; 40 C.F.R. § 1508.27(b)(7) (requiring consideration of “cumulatively significant
4 impacts”). BLM’s FONSI ignores these cumulative impacts, in violation of NEPA. AR337.

5 Third, at the very least, the debate over the extent of the Rescission’s climate impacts
6 warrants an EIS. As discussed previously, BLM’s reliance on an “interim” social cost of methane
7 arbitrarily ignored peer-reviewed science and the recent recommendations of experts in the field
8 showing impacts far greater than BLM’s discloses. *See supra* pp. 21–22. And BLM wrongly claims
9 that the Rescission’s “actual effects” are too uncertain to evaluate, when there are scientifically
10 supported tools for doing so. *See supra* p. 32–34. The Court should reject the Rescission on these
11 grounds. In any event, an EIS is required before BLM proceeds because BLM’s reliance on an
12 “interim” social cost of methane is “highly controversial” for the purposes of NEPA, and BLM itself
13 claims “uncertainty” in terms of climate impacts. 40 C.F.R. § 1508.27(b).

14 An action “is highly controversial when there is a substantial dispute about [its] size, nature,
15 or effect.” *Anderson*, 371 F.3d at 489 (citations and quotations omitted). Here, using the peer-
16 reviewed interagency estimate, BLM found the Waste Prevention Rule would have net climate
17 benefits of up to \$204 million per year, AR1073, while BLM’s new “interim” approach cuts the
18 Rule’s total benefits by up to 96%, AR84090. Numerous commenters, including expert economists,
19 critiqued BLM’s use of this “interim metric.” AR206; AR83414; AR83419–31; AR83471. BLM’s
20 assessment of the climate impacts is precisely the sort of controversial decision under NEPA that
21 compels an EIS. *See Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001)
22 (*NPCA v. Babbitt*) (holding there was a significant controversy where there was a high volume of
23 comments “cast[ing] substantial doubt on the adequacy of the [agency’s] methodology and data”);
24 *CBD v. NHTSA*, 538 F.3d at 1222 (recognizing volume of comments raising questions about the
25 stringency of the agency’s proposal satisfied the controversy factor).

26 Fourth, BLM attempts to avoid in depth climate analysis by claiming (wrongly) that the
27 impacts are too “uncertain” to be reasonably foreseeable. AR319. But NEPA mandates the opposite:
28 uncertainty about environmental impacts “argue[s] in favor of preparing an EIS, not against it.”

1 *NPCA v. Babbitt*, 241 F.3d at 731–35, 737 (citing 40 C.F.R. § 1508.27(b)); *Ocean Advocates*, 402
 2 F.3d at 870–71. The Rescission EA itself concludes that “there a number of significant uncertainties
 3 involved in estimating the climate impacts of methane emissions.” AR308. BLM identifies
 4 uncertainties pertaining to “aspects of the natural world” as well as “population and economic
 5 growth, [greenhouse gas] emissions, the translation of Earth system changes to economic damages,
 6 and the role of adaptation.” *Id.* Yet—ignoring its own statements—BLM’s FONSI asserts “there are
 7 no reasonably foreseeable environmental effects that are considered to be highly uncertain.” AR337.
 8 This arbitrary and unsupported conclusion violates NEPA.¹⁹

9 In its zeal to make sure that private companies do not have to spend money to protect public
 10 resources, BLM runs roughshod over statutory requirements, gives short shrift to the impacts on the
 11 very people Congress mandated the agency protect, and adopts an unlawful metric for accounting for
 12 the effects of climate change. To comply with NEPA, BLM must step back and take a hard look at
 13 the cumulative effects of rescinding nationwide protections through preparation of an EIS.

14 CONCLUSION

15 Because BLM promulgated the Rescission in violation of law, this Court should vacate the
 16 Rescission and reinstate the Waste Prevention Rule. Under the APA, this Court “shall set aside”
 17 regulations that violate the APA or NEPA. 5 U.S.C. § 706(2)(A); *Kake*, 795 F.3d at 970. “The effect
 18 of invalidating an agency rule is to reinstate the rule previously in force.” *Kake*, 795 F.3d at 970
 19 (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005)) (striking down rule exempting
 20 national forest from the roadless rule and reinstating the roadless rule); *Lockyer II*, 575 F.3d at 1020–
 21 21 (upholding remedy order setting aside roadless rule rescission and reinstating roadless rule).

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 25 _____
 26 ¹⁹ BLM’s only justification is that it analyzed the Waste Prevention Rule’s impacts in 2016, that EA
 27 was not challenged in court, and the Rescission EA “closely followed the 2016 EA.” AR336.
 28 However, the fact that the 2016 EA—which analyzed the impacts of *adding* significant public health
 and climate protections and relied on the longstanding social cost of methane—was not challenged
 does not bear on whether the environmental impacts of *rescinding* those protections using a new,
 “interim,” and unsupported social cost of methane is highly controversial. *Id.*

1 Respectfully submitted this 7th day of June, 2019,

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