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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12
13 **STATE OF CALIFORNIA**, et al.,
14 Plaintiffs,
15 v.
16 **DAVID BERNHARDT**, et al.,
17 Defendants.
18

19 **SIERRA CLUB**, et al.,
20 Plaintiffs,
21 v.
22 **DAVID BERNHARDT**, et al.,
23 Defendants.
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Case No. 4:18-cv-05712-YGR
(Consolidated with No. 4:18-cv-05984-YGR)

**STATE PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM IN SUPPORT**

Date: January 14, 2020
Time: 10:00 a.m.
Courtroom: 1, 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
Notice of Motion and Motion for Summary Judgment.....	1
Memorandum of Points and Authorities	1
Statutory Background.....	3
I. Federal Land Management Statutes and BLM’s Duty to Prevent Waste.	3
II. The Administrative Procedure Act.....	4
Factual and Procedural Background	5
I. Waste of Federally-Managed Oil and Gas Resources.....	5
II. BLM’s Development of the Waste Prevention Rule.....	6
III. Attempts to Invalidate, Postpone, and Suspend the Rule.	8
IV. The Rescission.	10
Standard of Review	12
Argument	15
I. BLM Violated the APA by Failing to Provide a Reasoned Explanation for the Rescission.....	15
A. BLM’s Assertion That the Waste Prevention Rule Exceeds its Statutory Authority to Regulate Waste is Arbitrary and Capricious (Issues A-1 and A-4).	15
B. BLM’s Reliance on Executive Order 13783 is Unfounded (Issue B- 1).	20
C. BLM’s Regulatory Impact Analysis for the Rescission is Arbitrary and Capricious (Issues C and B-2).	23
1. BLM’s use of a “domestic” social cost of methane metric arbitrarily ignores substantial climate impacts and is contrary to the best available science (Issue C-1).	24
2. BLM failed to quantify or otherwise consider other substantial benefits of the Waste Prevention Rule (Issue C- 2).	28
3. BLM’s new analysis of impacts to marginal wells is arbitrary and capricious (Issue B-2).	29
4. BLM failed to provide a reasoned explanation for its change to the administrative burdens of implementing the Waste Prevention Rule (Issue C-3).	29
D. There is No Basis in the Record to Support BLM’s Claim that the Waste Prevention Rule is Duplicative of Federal and State Regulations (Issue A-4).	30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

(continued)

	Page
II. BLM’s New Definition of “Waste of Oil or Gas” is Contrary to Law and Arbitrary and Capricious (Issue A-2).....	33
III. BLM Failed to Take a “Hard Look” at the Environmental Impacts of the Rescission as Required by NEPA (Issue D).	36
Conclusion	36

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Air Alliance Houston v. E.P.A.
906 F.3d 1049 (D.C. Cir. 2018)13

Air North America v. Dep’t of Transp.
937 F.2d 1427 (9th Cir. 1991).....14

Am. Hosp. Ass’n v. Bowen
834 F.2d 1037 (D.C. Cir. 1987)4

Am. Med. Ass’n v. Reno
57 F.3d 1129 (D.C. Cir. 1995)17

Amerijet Int’l, Inc. v. Pistole
753 F.3d 1342 (D.C. Cir. 2014)20

Brewster v. Lanyon Zinc. Co
140 F. 801 (8th Cir. 1905).....16

California Pub. Utilities Comm’n v. Fed. Energy Regulatory Comm’n
879 F.3d 966 (9th Cir. 2018).....14, 18

California v. Azar
911 F.3d 558 (9th Cir. 2018).....5

Celotex Corp. v. Catrett
477 U.S. 317 (1986).....12

Center for Biological Diversity v. Bureau of Land Mgmt.
422 F. Supp. 2d 1115 (N.D. Cal. 2006)30

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.
467 U.S. 837 (1984).....14, 18

Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.
710 F.3d 946 (9th Cir. 2013).....34

Clean Air Council v. Pruitt
862 F.3d 183 (D.C. Cir. 2017)31

Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n
673 F.2d 525 (D.C. Cir. 1982)4, 17

Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n
673 F.2d 425 (D.C. Cir. 1982)5

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<i>Dep't of Treasury-I.R.S. v. Federal Labor Relations Authority</i> 521 F.3d 1148 (9th Cir. 2008).....	14, 35
<i>Encino Motorcars, LLC v. Navarro</i> 136 S. Ct. 2117 (2016).....	13, 33
<i>F.C.C. v. Fox Television Stations, Inc.</i> 556 U.S. 502 (2009).....	13, 14, 28, 30
<i>Home Box Office v. F.C.C.</i> 567 F.2d 9 (D.C. Cir. 1977).....	17
<i>In re Aiken County</i> 725 F.3d 255 (D.C. Cir. 2013).....	22
<i>King v. Burwell</i> 135 S. Ct. 2480 (2015).....	34
<i>Ladd Petroleum Corp.</i> 107 IBLA 5 (1989).....	16
<i>Marathon Oil Company v. Andrus</i> 452 F. Supp. 548 (D. Wyo. 1978).....	16
<i>McMaster v. United States</i> 731 F.3d 881 (9th Cir. 2013).....	14
<i>Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.</i> 463 U.S. 29 (1983).....	13, 14, 27
<i>Nat. Res. Def. Council v. U.S. E.P.A.</i> 279 F.3d 1180 (9th Cir. 2002).....	17
<i>Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.</i> 545 U.S. 967 (2005).....	13, 19, 23
<i>Occidental Eng'g Co. v. I.N.S.</i> 753 F.2d 766 (9th Cir. 1985).....	12, 13
<i>Organized Village of Kake v. U.S. Dep't of Agric.</i> 795 F.3d 956 (9th Cir. 2015).....	13
<i>Prometheus Radio Project v. F.C.C.</i> 652 F.3d 431 (3d Cir. 2011).....	17

TABLE OF AUTHORITIES

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Rife Oil Properties, Inc.
131 IBLA 357 (1994).....16

Safe Air for Everyone v. U.S. E.P.A.
488 F.3d 1088 (9th Cir. 2007).....4

State of California v. Bureau of Land Mgmt.
286 F. Supp. 3d 1054 (N.D. Cal. 2018) *passim*

State of California v. U.S. Bureau of Land Mgmt.
277 F. Supp. 3d 1106 (N.D. Cal. 2017)1, 9, 22, 28

State of California v. U.S. Dep’t of the Interior
--- F. Supp. 3d ---, 2019 WL 2223804 (N.D. Cal. Mar. 29, 2019) *passim*

Stewardship Council v. EPA
806 F.3d 520 (9th Cir. 2015).....36

U.S. v. Mead
533 U.S. 218 (2001).....14, 18

W. Radio Servs. Co. v. Qwest Corp.
678 F.3d 970 (9th Cir. 2012).....14

Walters v. Metro. Educ. Enters.
519 U.S. 202 (1997).....34

Wyoming v. U.S. Dep’t of Interior
--- Fed. Appx. ---, 2019 WL 1531498 (10th Cir. 2019).....10

Wyoming v. U.S. Dep’t of the Interior
2017 WL 161428 (D. Wyo. Jan. 16, 2017).....8, 15, 20

Zero Zone, Inc. v. U.S. Dep’t of Energy
832 F.3d 654 (7th Cir. 2016).....25

STATUTES

5 U.S.C. § 5514

5 U.S.C. § 5534

5 U.S.C. § 7059

TABLE OF AUTHORITIES
(continued)

		<u>Page</u>
1		
2		
3	5 U.S.C. § 706(2)	13, 36
4	5 U.S.C. § 801.....	8
5	25 U.S.C. §§ 396a–396g	3
6	25 U.S.C. §§ 2101–08.....	3
7	30 U.S.C. § 181	3
8	30 U.S.C. § 187	3, 15, 16, 33
9	30 U.S.C. § 191(a)	5
10	30 U.S.C. § 225	3, 15, 16, 33
11	30 U.S.C. § 1701.....	3, 4
12	30 U.S.C. § 1756.....	3, 15, 34
13	43 U.S.C. § 1701.....	3, 4
14	43 U.S.C. § 1732.....	4
15	42 U.S.C. § 7401	30
16	44 U.S.C. § 3503	18
17		
18		
19	FEDERAL REGULATIONS	
20	43 C.F.R. § 3160.0-5.....	35
21	43 C.F.R. § 3179.3	33
22	43 C.F.R. § 3179.4	16
23		
24	FEDERAL REGISTER NOTICES	
25	44 Fed. Reg. 76,600	16
26	47 Fed. Reg. 47,758	35
27	58 Fed. Reg. 51,735	18, 24, 25, 28
28		

TABLE OF AUTHORITIES

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

81 Fed. Reg. 6,6166

81 Fed. Reg. 6,61830

81 Fed. Reg. 6,63530

81 Fed. Reg. 35,82430, 31

81 Fed. Reg. 35,82530

81 Fed. Reg. 35,83130

81 Fed. Reg. 83,0086, 8

81 Fed. Reg. 83,0095, 6, 19, 28

81 Fed. Reg. 83,009-106, 18

81 Fed. Reg. 83,0105, 6, 22

81 Fed. Reg. 83,010–137

81 Fed. Reg. 83,0117, 19, 21

81 Fed. Reg. 83,011–137

81 Fed. Reg. 83,01221

81 Fed. Reg. 83,0137, 20, 30, 31

81 Fed. Reg. 83,013-147

81 Fed. Reg. 83,0145, 6, 7, 22, 25

81 Fed. Reg. 83,01515, 18, 19, 28

81 Fed. Reg. 83,01731

81 Fed. Reg. 83,018-1930

81 Fed. Reg. 83,01931, 32

81 Fed. Reg. 83,0216

81 Fed. Reg. 83,022-236

81 Fed. Reg. 83,02731

TABLE OF AUTHORITIES
(continued)

		<u>Page</u>
1		
2		
3	81 Fed. Reg. 83,028	21
4	81 Fed. Reg. 83,038	18
5	81 Fed. Reg. 83,038-39	34
6	81 Fed. Reg. 83,055	31
7	81 Fed. Reg. 83,058-59	31
8	81 Fed. Reg. 83,061	31
9	81 Fed. Reg. 83,067-68	31
10	81 Fed. Reg. 83,082	16
11	82 Fed. Reg. 16,093	8, 21
12	82 Fed. Reg. 16,096	22, 25, 27
13	82 Fed. Reg. 25,730	31
14	82 Fed. Reg. 27,430	9, 29
15	82 Fed. Reg. 27,641	31
16	82 Fed. Reg. 46,458	9
17	82 Fed. Reg. 58,050	9, 10, 13, 27
18	83 Fed. Reg. 7,924	10, 11, 16, 32
19	83 Fed. Reg. 49,184	<i>passim</i>
20	83 Fed. Reg. 49,184-85	5
21	83 Fed. Reg. 49,185	15, 19, 20
22	83 Fed. Reg. 49,185-86	11
23	83 Fed. Reg. 49,186	15, 19
24	83 Fed. Reg. 49,186-87	25
25	83 Fed. Reg. 49,186-88	23
26	83 Fed. Reg. 49,188	29, 30, 32
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

83 Fed. Reg. 49,189	19
83 Fed. Reg. 49,190	19, 25
83 Fed. Reg. 49,191	30, 33
83 Fed. Reg. 49,194-95	34
83 Fed. Reg. 49,195	33, 35
83 Fed. Reg. 49,197	11, 19, 33
83 Fed. Reg. 49,202	32
83 Fed. Reg. 49,203	32
83 Fed. Reg. 49,204-05	23
83 Fed. Reg. 49,205	21
83 Fed. Reg. 49,206	21
83 Fed. Reg. 49,207	21
83 Fed. Reg. 49,211	21
83 Fed. Reg. 49,212	16
83 Fed. Reg. 52,056	31
COURT RULES	
Fed. R. Civ. P. 56(a).....	1, 12
N.D. Cal. Local Rule 7.....	1
OTHER AUTHORITIES	
163 Cong. Rec. H949 (Feb. 3, 2017)	8
163 Cong. Rec. S2851 (May 10, 2017).....	8

1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
2 **TO ALL PARTIES AND COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that, on January 14, 2020, at 10:00 a.m., or as soon thereafter as
4 it may be heard, Plaintiffs State of California, by and through Xavier Becerra, Attorney General,
5 and the California Air Resources Board, and State of New Mexico, by and through Hector
6 Balderas, Attorney General (collectively, “State Plaintiffs”), by and through the undersigned
7 counsel, will, and hereby do, move for summary judgment pursuant to Rule 56 of the Federal
8 Rules of Civil Procedure and Civil Local Rule 7. This motion will be made before the Honorable
9 Yvonne Gonzalez Rogers, United States District Judge, Oakland Courthouse, 1301 Clay Street,
10 Oakland, CA 94612.

11 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs hereby move for
12 summary judgment on the ground that there is no genuine dispute as to any material fact and the
13 movant is entitled to judgment as a matter of law. In support of this motion, Plaintiffs submit the
14 accompanying Memorandum of Points and Authorities and a Proposed Order.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 In this action, State Plaintiffs challenge the latest decision by the U.S. Bureau of Land
17 Management, *et al.* (“BLM” or “Defendants”) to repeal the key requirements of the 2016 Waste
18 Prevention, Production Subject to Royalties, and Resource Conservation Rule (the “Waste
19 Prevention Rule” or “Rule”). Developed over the course of several years, the Waste Prevention
20 Rule was a commonsense measure to reduce the enormous waste of natural gas from oil and gas
21 operations on federal and tribal lands. At the time that it was promulgated, BLM estimated that
22 the Rule would allow for an additional 41 billion cubic feet of natural gas production per year,
23 increasing royalty payments to the federal government, tribes, and states, while reducing harmful
24 emissions of methane and hazardous air pollutants.

25 However, soon after the change in Presidential administration in January 2017, BLM
26 initiated a series of illegal attempts to prevent implementation of the Rule. First, the agency
27 purported to postpone certain compliance dates of the Rule even though it had already gone into
28 effect—an illegal action that was vacated by this District Court. *State of California v. U.S.*

1 *Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (“*California I*”). Then, BLM
2 finalized a rule to suspend certain requirements of the Rule pending its reconsideration. In
3 deciding a motion for preliminary injunction, this District Court found the agency’s action
4 unlawful, holding that BLM had failed to provide any reasoned basis for its action or adequate
5 notice and comment as required by the Administrative Procedure Act (“APA”). *State of*
6 *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018) (“*California II*”).

7 BLM’s latest attempt to repeal the key requirements of the Waste Prevention Rule fares no
8 better. 83 Fed. Reg. 49,184 (Sept. 28, 2018) (the “Rescission”) (AR 1).¹ Contrary to the
9 requirements of the APA, BLM failed to offer a reasoned explanation for repealing the key
10 provisions of a Rule that, just two years prior, it determined was necessary to fulfill its statutory
11 mandates to prevent waste, ensure that wasted gas is subject to royalties, and safeguard the public
12 welfare. Instead, the justifications that BLM does provide for the Rescission lack merit and are
13 contrary to BLM’s governing statutes and the evidence in the record, providing several
14 independent bases for this Court to find the Rescission to be arbitrary and capricious. First,
15 BLM’s assertion that the Rule exceeds its statutory authority to regulate “waste” is unsupported
16 by legal authority and is contrary to BLM’s own statements when promulgating both the
17 Rescission and the Rule itself. Second, BLM’s claim that the Rule would “unnecessarily
18 encumber energy production, constrain economic growth, and prevent job creation” is directly
19 contradicted by its own findings. Third, BLM’s analysis purporting to show that the costs of the
20 Rule now exceed its benefits—a wholesale reversal from its own conclusions in 2016—relies on
21 arbitrary, outcome-driven, and unsupported cost figures. Fourth, BLM has failed to explain why
22 other federal and state requirements, which were in existence at the time the Rule was
23 promulgated, now warrant the Rescission. Furthermore, BLM’s new definition of “waste of oil or
24 gas” is contrary to the language of the Mineral Leasing Act and the agency’s longstanding
25 definition and interpretation of this term, and lacks any reasoned basis. Finally, BLM’s
26 perfunctory conclusion that the Rescission would result in no significant environmental impacts
27 violates the requirements of the National Environmental Policy Act (“NEPA”).

28 ¹ The administrative record in this matter is cited as “AR [page number], excluding leading zeros.

1 public lands” under the principles of “multiple use and sustained yield.” *Id.* § 1732. Among
2 other requirements, FLPMA mandates that BLM manage public lands “in a manner that will
3 protect the quality of ... ecological, environmental, [and] air and atmospheric ... values,” *id.* §
4 1701(a)(8), and provides that BLM “shall, by regulation or otherwise, take any action necessary
5 to prevent unnecessary or undue degradation of the lands.” *Id.* § 1732(b).

6 **II. THE ADMINISTRATIVE PROCEDURE ACT.**

7 The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, governs the procedural
8 requirements for agency decision-making, including the rulemaking process. Prior to
9 formulating, amending, or repealing a rule, agencies must engage in a notice-and-comment
10 process. 5 U.S.C. §§ 551(5), 553. Notice must include “the legal authority under which the rule
11 is proposed,” and “either the terms or substance of the proposed rule or a description of the
12 subjects and issues involved.” *Id.* § 553(b). The public may then submit comments which the
13 agency must consider before promulgating a final rule. *Id.* § 553(c). Specifically, “the agency
14 shall give interested persons an opportunity to participate in the rule making through submission
15 of written data, views, or arguments with or without opportunity for oral presentation.” *Id.* To
16 satisfy the requirements of Section 553, notice of a proposed rule must “provide an accurate
17 picture of the reasoning that has led the agency to the proposed rule,” so as to allow an
18 “opportunity for interested parties to participate in a meaningful way in the discussion and final
19 formulation of rules.” *Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d
20 525, 528-30 (D.C. Cir. 1982); *Safe Air for Everyone v. U.S. E.P.A.*, 488 F.3d 1088, 1098 (9th Cir.
21 2007) (finding that the APA requires that interested parties have a “meaningful opportunity to
22 comment on proposed regulations”).

23 The above notice and comment requirements likewise apply when an agency seeks to
24 amend or repeal a rule that has previously been promulgated. *See Am. Hosp. Ass’n v. Bowen*, 834
25 F.2d 1037, 1044 (D.C. Cir. 1987) (“Section 553 of the Administrative Procedure Act requires
26 agencies to afford notice of a proposed rulemaking and an opportunity for public comment prior
27 to a rule’s promulgation, amendment, modification, or repeal.”). “The value of notice and
28 comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it

1 accomplished through its rulemaking without giving all parties an opportunity to comment on the
2 wisdom of repeal.” *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673
3 F.2d 425, 446 (D.C. Cir. 1982). If an agency fails to comply with these procedures, a court
4 “must” set aside the rule. *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

5 **FACTUAL AND PROCEDURAL BACKGROUND²**

6 **I. WASTE OF FEDERALLY-MANAGED OIL AND GAS RESOURCES.**

7 BLM, a component of the U.S. Department of the Interior (“DOI”), oversees more than 245
8 million acres of land and 700 million subsurface acres of federal mineral estate, on which reside
9 nearly 100,000 producing onshore oil and gas wells. 83 Fed. Reg. at 49,184 (AR 1). In fiscal
10 year 2017, federal onshore production lands accounted for approximately 9 percent of domestic
11 natural gas production, 5 percent of U.S. oil production, and generated \$1.9 billion in royalties,
12 which were shared with tribes and states. 83 Fed. Reg. at 49,184-85 (AR 1-2); *see* 30 U.S.C. §
13 191(a). Oil and gas production in the United States has increased dramatically over the past
14 decade due to technological developments such as hydraulic fracturing and directional drilling.
15 81 Fed. Reg. at 83,009 (AR 910). However, the American public has not fully benefitted from
16 this increase in domestic energy production because it “has been accompanied by significant and
17 growing quantities of wasted natural gas.” *Id.* at 83,014 (AR 915). For example, between 2009
18 and 2015, nearly 100,000 oil and gas wells on federal land released approximately 462 billion
19 cubic feet (“Bcf”) of natural gas through venting and flaring, enough gas to serve about 6.2
20 million households for a year. *Id.* at 83,009 (AR 910). In 2014 alone, operators vented about 30
21 Bcf and flared at least 81 Bcf of natural gas, approximately 4.1 percent of the total production
22 from BLM-administered leases or enough natural gas to supply 1.5 million households for a year.
23 *Id.* at 83,010 (AR 911).

24 When oil and gas operators waste natural gas through venting, flaring, and leaks, this not
25 only squanders a valuable public resource that could be used to supply our nation’s power grid
26 and generate royalties, but it also harms air quality. For example, venting, flaring, and leaks of

27 _____
28 ² Additional background is provided in the Joint Statement Regarding Procedural History, ECF
No. 98.

1 natural gas can release volatile organic compounds (“VOCs”), including benzene and other
2 hazardous air pollutants, as well as nitrogen oxides and particulate matter, which can cause and
3 worsen respiratory and heart problems. *Id.* at 83,014 (AR 915). In addition, the primary
4 constituent of natural gas—methane—is an especially potent greenhouse gas, which contributes
5 to climate change at a rate much higher than carbon dioxide. *Id.* at 83,009 (AR 910).

6 **II. BLM’S DEVELOPMENT OF THE WASTE PREVENTION RULE.**

7 Prior to 2016, BLM’s regulatory scheme governing the minimization of resource waste had
8 not been updated in over three decades. *Id.* at 83,008 (AR 909). Several oversight reviews,
9 including those by the Government Accountability Office (“GAO”) and the Department of the
10 Interior’s Office of the Inspector General, specifically called on BLM to update its “insufficient
11 and outdated” regulations regarding waste and royalties. *Id.* at 83,009-10 (AR 910-11). The
12 GAO specifically noted in 2010 that “around 40 percent of natural gas estimated to be vented and
13 flared on onshore Federal leases could be economically captured with currently available control
14 technologies.” *Id.* at 83,010 (AR 911). The reviews recommended that BLM require operators to
15 augment their waste prevention efforts and clarify policies regarding royalty-free, on-site use of
16 oil and gas. *Id.*

17 In 2014, BLM responded to these reports by initiating the development of a rule to update
18 its existing regulations on these issues. *Id.* After soliciting and reviewing input from
19 stakeholders and the public, BLM released its proposal in February 2016. 81 Fed. Reg. 6,616
20 (Feb. 8, 2016) (“Proposed Rule”) (AR 992). BLM received approximately 330,000 public
21 comments, including approximately 1,000 unique comments, on the Proposed Rule. 81 Fed. Reg.
22 at 83,021 (AR 922). The agency also hosted stakeholder meetings and met with regulators from
23 states with significant federal oil and gas production. *Id.*

24 BLM issued the final Waste Prevention Rule in November 2016. *Id.* at 83,008 (AR 909).
25 In the final Rule, BLM refined many of the provisions of the Proposed Rule based on public
26 comments to ensure both that compliance was feasible for operators and that the Rule achieved its
27 waste prevention objectives. *Id.* at 83,022-23 (AR 923-24). The Rule was designed to attain
28 considerable reductions in waste from flaring, venting, and equipment leaks, saving and putting to

1 use up to 41 billion cubic feet of gas per year. *Id.* at 83,014 (AR 915). In addition, the Rule
2 would annually avoid an estimated 175,000-180,000 tons of methane emissions, cut emissions of
3 volatile organic compounds by 250,000–267,000 tons, reduce toxic air pollutants by 1,860–2,030
4 tons, and generate up to \$14 million in additional royalties. *Id.*

5 The Rule addressed each major source of natural gas waste from oil and gas production—
6 venting, flaring, and equipment leaks—through different requirements. *Id.* at 83,010–13 (AR
7 911-14). In particular, the Rule prohibited venting except under specified conditions, and
8 required updates to existing equipment. *Id.* at 83,011–13 (AR 912-14). The Rule’s flaring
9 regulations reduced waste by requiring gas capture percentages that increased over time,
10 providing exemptions that scaled down over time, and requiring operators to submit waste
11 minimization plans. *Id.* at 83,011 (AR 912). Leak detection provisions required semi-annual
12 inspections for well sites and quarterly inspections for compressor stations. *Id.*

13 BLM determined that the Rule’s benefits outweighed its costs “by a significant margin.”
14 *Id.* at 83,014 (AR 915). Using a peer-reviewed model known as the “social cost of methane,”
15 which was developed by a federal agency working group for use in agency rulemakings, BLM
16 measured the benefits of the Rule by considering “the cost savings that the industry would receive
17 from the recovery and sale of natural gas and the environmental benefits of reducing the amount
18 of methane (a potent [greenhouse gas]) and other air pollutants released into the atmosphere.” *Id.*
19 BLM estimated that the Rule would result in monetized benefits of \$209–\$403 million annually,
20 including the monetized benefits of reducing methane emissions by roughly 35 percent, and
21 would improve air quality and overall quality of life for residents living near oil and gas wells.
22 *Id.* The Rule’s costs, on the other hand, would be minimal—between \$114 and \$275 million per
23 year industry-wide—which even for small operators would reduce profit margin by an average of
24 just 0.15 percentage points. *Id.* at 83,013-14 (AR 914-15). BLM acknowledged that these cost
25 estimates could be overstated because they did not take into account operators that were already
26 in compliance with the requirements of the Rule. *Id.* at 83,013 (AR 914).

III. ATTEMPTS TO INVALIDATE, POSTPONE, AND SUSPEND THE RULE.

Soon after the Rule was finalized, two industry groups and the States of Wyoming and Montana (later joined by North Dakota and Texas) (collectively, “Petitioners”) challenged the Rule in federal district court in Wyoming, on the alleged basis that BLM did not have statutory authority to regulate air pollution and that the Rule was arbitrary and capricious. *Western Energy Alliance v. Jewell*, No. 2:16-cv-00280-SWS (D. Wyo. petition filed Nov. 16, 2016); *State of Wyoming v. U.S. Dep’t of the Interior*, No. 2:16-cv-00285-SWS (D. Wyo. petition filed Nov. 18, 2016). State Plaintiffs, along with several environmental organizations, intervened on the side of BLM in defense of the Rule. On January 16, 2017, the Wyoming district court denied the Petitioners’ motions for a preliminary injunction, finding that the Petitioners had failed to establish a likelihood of success on the merits or irreparable harm. *Wyoming v. U.S. Dep’t of the Interior*, 2017 WL 161428 (D. Wyo. Jan. 16, 2017). The Waste Prevention Rule went into effect on January 17, 2017. 81 Fed. Reg. at 83,008 (AR 909).

On March 28, 2017, President Donald Trump issued Executive Order 13783, entitled “Promoting Energy Independence and Economic Growth.” 82 Fed. Reg. 16,093 (Mar. 31, 2017) (AR 1871). Section 7 of that Executive Order, entitled “Review of Regulations Related to United States Oil and Gas Development,” specifically called on the Secretary of the Interior to review and “as soon as practicable, suspend, revise, or rescind” the Waste Prevention Rule. *Id.* at 16,096 (AR 1874). The next day, then-Secretary of the Interior Ryan Zinke issued Secretarial Order 3349, which provided that within 21 days, BLM would review the Rule and issue an internal report as to “whether the rule is fully consistent with the policy set forth in Section 1 of the March 28, 2017 E.O.” AR 1863-1867.

Concurrently, various states and industry groups lobbied members of Congress to repeal the Waste Prevention Rule using the Congressional Review Act, 5 U.S.C. § 801 *et seq.* On February 3, 2017, the House passed Joint Resolution 36 to disapprove of the Waste Prevention Rule. 163 Cong. Rec. H949, H951 (Feb. 3, 2017). However, on May 10, 2017, a similar resolution failed in the Senate, leaving the Rule in effect. 163 Cong. Rec. S2851, S2853 (May 10, 2017).

1 On June 15, 2017, BLM published a notice in the Federal Register purporting to postpone
2 certain compliance dates of the Rule subject to APA Section 705, 5 U.S.C. § 705. 82 Fed. Reg.
3 27,430 (“Postponement Notice”). State Plaintiffs challenged this unlawful action on July 5, 2017
4 in this District Court. On October 4, 2017, the Court ruled that Section 705 did not apply to an
5 already-effective rule, and that BLM had failed to comply with the APA’s notice and comment
6 procedures. *California I*, 277 F. Supp. 3d at 1121. The Court also found that BLM’s failure to
7 consider foregone benefits rendered their action arbitrary and capricious in violation of the APA.
8 *Id.* at 1123. Thus, the Court vacated the Postponement Notice, and the Rule went back into
9 effect. *Id.* at 1127.

10 On October 5, 2017, BLM published a notice in the Federal Register proposing to delay and
11 suspend certain requirements of the Rule that were already in effect, or set to take effect in
12 January 2018, until January 17, 2019. 82 Fed. Reg. 46,458 (Oct. 5, 2017) (“Proposed
13 Suspension”) (AR 685). The requirements BLM targeted for suspension include those covered
14 by its prior Postponement Notice, as well as already-effective rules governing waste minimization
15 plans, well drilling, well completion and related operations, and downhole well maintenance and
16 liquids unloading. The public was permitted 30 days to submit comments. *Id.* State Plaintiffs
17 commented in opposition to the Proposed Suspension.

18 On December 8, 2017, BLM issued a final rule suspending key requirements of the Waste
19 Prevention Rule. 82 Fed. Reg. 58,050 (Dec. 8, 2017) (“Suspension”) (AR 661). To justify the
20 Suspension, BLM stated it had “concerns regarding the statutory authority, cost, complexity,
21 feasibility, and other implications” of the Rule, and therefore sought to suspend “requirements
22 that may be rescinded or significantly revised in the near future.” *Id.* State Plaintiffs challenged
23 the Suspension in this District Court. On a motion for preliminary injunction, the Court ruled in
24 favor of State Plaintiffs once again, finding that BLM had failed to provide a reasoned analysis
25 for the Suspension or factual support for the concerns which allegedly justified this action.
26 *California II*, 286 F. Supp. 3d at 1068. The Court also found that Suspension was likely to result
27 in “concrete harms that BLM’s own data suggests are significant and imminent,” such as
28

1 significant emissions of methane, VOCs, and other hazardous pollutants. *Id.* at 1073-75.

2 Consequently, the Court enjoined the Suspension. *Id.* at 1076.

3 After the failure of BLM's first two attempts to undo the Waste Prevention Rule, opponents
4 of the Rule returned to the Wyoming district court to seek to revive their dormant challenge. On
5 April 4, 2018, following briefing on Petitioners' renewed motions for preliminary relief, the
6 Wyoming district court issued an Order staying implementation of the Waste Prevention Rule's
7 provisions with January 2018 compliance deadlines. *Wyoming v. U.S. Dep't of the Interior*, Case
8 No. 2:16-cv-00285-SWS, ECF No. 215 ("Stay Order") (AR 23323-23333). On April 5 and 6,
9 2018, the Conservation and Tribal Citizen Group Plaintiffs and State Plaintiffs, respectively,
10 appealed the Stay Order to the Tenth Circuit Court of Appeals, challenging the district court's
11 failure to apply the four preliminary injunction factors prior to issuing a stay. On April 9, 2019,
12 the Tenth Circuit issued an Order and Judgment dismissing the appeals as moot and vacating the
13 Wyoming district court's Stay Order. *Wyoming v. U.S. Dep't of Interior*, --- Fed. Appx. ---, 2019
14 WL 1531498 (10th Cir. 2019).

15 **IV. THE RESCISSION.**

16 On February 22, 2018, BLM published a proposed "Rescission or Revision of Certain
17 Requirements" of the Waste Prevention Rule, 83 Fed. Reg. 7,924 ("Proposed Rescission") (AR
18 415), in which the agency proposed to repeal the majority of the Rule's provisions. *Id.* at 7,928
19 (AR 419). BLM offered three primary justifications for the Proposed Rescission: (1) the agency
20 had reconsidered the balance of the Rule's burdens and benefits, (2) the Rule overlapped with
21 other federal and state requirements, and (3) the Rule would have an undue impact on marginal or
22 low-producing wells. *Id.* at 7,924 (AR 415). The agency also requested comment on "whether
23 the 2016 Rule is consistent with [BLM's] statutory authority," without elaborating on whether
24 BLM had changed its longstanding position that the Rule was within its broad authority to
25 regulate waste or providing a basis for its request. *Id.* at 7,927 (AR 418); *see, e.g.*, AR 21397
26 (BLM arguing that "[b]ecause the Rule is aimed at waste prevention, it falls squarely within
27 BLM's authority under the Mineral Leasing Act"). State Plaintiffs submitted comments on the
28 Proposed Rescission on April 23, 2018, urging BLM to preserve the Waste Prevention Rule's

1 important requirements to prevent waste, protect public resources, boost royalty receipts for
2 American taxpayers, and ensure the safe and responsible development of oil and gas resources.
3 AR 84743-84760, 104442-104461.

4 On September 28, 2018, BLM issued a final rule entitled “Waste Prevention, Production
5 Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain
6 Requirements.” 83 Fed. Reg. 49,184 (Sept. 28, 2018) (AR 1). The Rescission eliminated key
7 provisions of the Waste Prevention Rule, including: (1) waste minimization plans, (2) gas-capture
8 percentages, (3) well drilling requirements, (4) well completion and related operations
9 requirements, (5) pneumatic controller requirements, (6) pneumatic diaphragm pump
10 requirements, (7) storage vessel requirements, and (8) leak detection and repair requirements. *Id.*
11 at 49,190 (AR 7). The Rescission also modified requirements related to gas capture, downhole
12 well maintenance and liquids unloading, and measuring and reporting volumes of flared and
13 vented gas—effectively reverting to regulatory requirements that preceded the Rule. *Id.* As
14 BLM admits, the final rule “will remove almost all of the requirements in the 2016 rule that
15 [BLM] previously estimated would pose a compliance burden to operators and generate benefits
16 of gas savings or reductions in methane emissions.” *Id.* at 49,204 (AR 21).

17 BLM’s justifications for the Rescission included those offered for the Proposed Rescission:
18 that the Waste Prevention Rule “added regulatory burdens that unnecessarily encumber energy
19 production, constrain economic growth, and prevent job creation”; that the Rule would have
20 “imposed compliance costs well in excess of the value of the resource (natural gas) that would
21 have been conserved,” especially with regard to marginal wells; and that the Rule overlapped
22 with EPA and state requirements for oil and gas operations. *Id.* at 49,184 (AR 1). In addition,
23 BLM argued for the first time that the Rule “exceeded the BLM’s statutory authority to regulate
24 the prevention of ‘waste,’” and it adopted a new regulatory definition of “waste of oil or gas” so
25 that it would only apply “where compliance costs are not greater than the monetary value of the
26 resources they are expected to conserve.” *Id.* at 49,185-86, 49,197 (AR 2-3, 14).

27 On September 28, 2018, BLM also released a “Regulatory Impact Analysis for the Final
28 Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule”

1 (“Regulatory Impact Analysis” or “RIA”). AR 32. While the Regulatory Impact Analysis
2 “draws heavily upon the analysis conducted in the RIA for the 2016 rule,” it reaches the opposite
3 conclusion in finding that the costs of the Rule’s requirements outweigh its benefits for three
4 primary reasons. RIA at 2-3 (AR 36-37). First, BLM relied upon a new “interim domestic social
5 cost of methane” metric that excludes the “global” costs resulting from increased methane
6 emissions. RIA at 2, 40-44 (AR 36, 74-78). BLM also found that the administrative burdens of
7 the Rule were twice as high as those calculated in 2016, and added a new discussion regarding the
8 impacts of the Rule on marginal wells. RIA at 39-40 (AR 73-74).

9 BLM also issued a 26-page Final Environmental Assessment (“EA”), and a Finding of No
10 Significant Impact, concluding that the Rescission would have no significant impacts on the
11 environment. AR 297-323, 332-339. While BLM admits that the Rescission would result in
12 increased VOC emissions (80,000 tons per year) and hazardous air pollutants (1,860 tons per
13 year) and that “minority and low-income populations living near oil and gas operations would
14 have benefitted from the reductions in emissions” under the Rule, it provides no consideration of
15 this issue other than to state that “[t]hese air pollutants affect the health and welfare of humans, as
16 well as the health of plant and wildlife species.” EA at 19 (AR 316). Although BLM’s estimates
17 of increased methane emissions are similar to what it calculated in 2016 (175,000 tons per year),
18 the agency concludes that “the actual effects of such emissions on global climate change cannot
19 be reliably assessed and thus are sufficiently uncertain as to be not reasonably foreseeable.” EA
20 at 18 (AR 315). Furthermore, BLM provides virtually no analysis of impacts from increased
21 noise and light pollution. EA at 20 (AR 317).

22 STANDARD OF REVIEW

23 Summary judgment should be granted when the record shows that “there is no genuine
24 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
25 Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding whether to grant
26 summary judgment in an APA challenge, the district court “is not required to resolve any facts in
27 a review of an administrative proceeding.” *Occidental Eng’g Co. v. I.N.S.*, 753 F.2d 766, 769
28

1 (9th Cir. 1985). Rather, the district court “is to determine whether or not as a matter of law the
2 evidence in the administrative record permitted the agency to make the decision it did.” *Id.*

3 Under the APA, a “reviewing court shall ... hold unlawful and set aside” agency action
4 found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
5 law,” “in excess of statutory jurisdiction, authority or limitations,” or “without observance of
6 procedure required by law.” 5 U.S.C. § 706(2)(A), (C), (D). An agency action is arbitrary and
7 capricious under the APA where the agency (i) has relied on factors which Congress has not
8 intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii)
9 offered an explanation for its decision that runs counter to the evidence before the agency; or (iv)
10 is so implausible that it could not be ascribed to a difference of view or the product of agency
11 expertise. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463
12 U.S. 29, 43 (1983) (“*State Farm*”).

13 An “agency changing its course by rescinding a rule is obligated to supply a reasoned
14 analysis for the change.” *State Farm*, 463 U.S. at 42; *Encino Motorcars, LLC v. Navarro*, 136 S.
15 Ct. 2117, 2125 (2016) (“Agencies are free to change their existing policies as long as they
16 provide a reasoned explanation for the change.”); see *Organized Village of Kake v. U.S. Dep’t of*
17 *Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (finding that “even when reversing a policy after an
18 election, an agency may not simply discard prior factual findings without a reasoned
19 explanation”). Moreover, an agency must “provide a more detailed justification than what would
20 suffice for a new policy created on a blank slate” when “its new policy rests upon factual findings
21 that contradict those which underlay its prior policy.” *F.C.C. v. Fox Television Stations, Inc.*, 556
22 U.S. 502, 515 (2009) (“*Fox*”). Any “unexplained inconsistency” between a rule and its repeal is
23 “a reason for holding an interpretation to be an arbitrary and capricious change.” *Nat’l Cable &*
24 *Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); see *Organized Village of*
25 *Kake*, 795 F.3d at 966-67 (holding that an agency’s contrary conclusions “[o]n precisely the same
26 record” were arbitrary and capricious). Each of these failures provide a separate basis for finding
27 a rule to be arbitrary and capricious. See, e.g., *California II*, 286 F. Supp. 3d at 1065-73 (finding
28 several independent bases for determining that Suspension was arbitrary and capricious); *Air*

1 *Alliance Houston v. E.P.A.*, 906 F.3d 1049, 1066 (D.C. Cir. 2018) (“EPA’s explanations for its
2 changed position on the appropriate effective and compliance dates are inadequate under *Fox* and
3 *State Farm*, and therefore arbitrary and capricious, for several reasons”).

4 When an agency’s decision turns upon the construction of a statute, the court must consider
5 whether the agency correctly interpreted and applied the relevant legal standards. “If the intent of
6 Congress is clear, that is the end of the matter; for the court, as well as the agency, must give
7 effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Res.*
8 *Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“*Chevron*”). An agency does not have authority
9 to adopt a regulation that is “manifestly contrary to the statute.” *Id.* at 844. Only if “the statute is
10 silent or ambiguous” must the court “decide how much weight to accord an agency’s
11 interpretation.” *McMaster v. United States*, 731 F.3d 881, 889 (9th Cir. 2013) (internal
12 quotations and citation omitted). As the Supreme Court has also stated, “[t]he fair measure of
13 deference to an agency administering its own statute has been understood to vary with
14 circumstances, and courts have looked to the degree of the agency’s care, its consistency,
15 formality, and relative expertness, and to the persuasiveness of the agency’s position.” *U.S. v.*
16 *Mead*, 533 U.S. 218, 228 (2001) (citations omitted); *see California Pub. Utilities Comm’n v. Fed.*
17 *Energy Regulatory Comm’n*, 879 F.3d 966, 975 (9th Cir. 2018) (finding that “an agency’s
18 interpretation is not owed deference if ‘there is reason to suspect that the interpretation does not
19 reflect the agency’s fair and considered judgment on the matter in question.’”) (quoting *W. Radio*
20 *Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 985 (9th Cir. 2012)). Furthermore, an agency’s
21 interpretation of a statute that it does not administer is not entitled to deference, and the Court
22 may conduct its review *de novo*. *See Dep’t of Treasury-I.R.S. v. Federal Labor Relations*
23 *Authority*, 521 F.3d 1148, 1152 (9th Cir. 2008); *Air North America v. Dep’t of Transp.*, 937 F.2d
24 1427, 1436 (9th Cir. 1991).³

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28 ³ Given Defendants’ representation to the Court “that they do not intend to challenge Plaintiffs’
standing,” ECF No. 96, State Plaintiffs do not address standing in this motion.

ARGUMENT

I. BLM VIOLATED THE APA BY FAILING TO PROVIDE A REASONED EXPLANATION FOR THE RESCISSION.

A. BLM’s Assertion That the Waste Prevention Rule Exceeds its Statutory Authority to Regulate Waste is Arbitrary and Capricious (Issues A-1 and A-4).⁴

The first rationale provided for the Rescission is BLM’s “belie[f] that many of the provisions of the 2016 rule exceeded the BLM’s statutory authority to regulate for the prevention of ‘waste’ under the Mineral Leasing Act.” 83 Fed. Reg. at 49,185 (AR 2). In particular, BLM claims that “[t]he 2016 rule was based on the premise that essentially any losses of gas at the production site could be regulated as ‘waste,’ without regard to the economics of conserving that lost gas,” and it cites a few cases that allegedly support this position. *Id.* at 49,186 (AR 3).⁵ However, this rationale is arbitrary and capricious for numerous, independent reasons.

First, as BLM stated in 2016, “[t]he purpose of [the Waste Prevention Rule] is to reduce waste of natural gas owned by the American public and tribes, which occurs during the oil and gas production process.” 81 Fed. Reg. at 83,015 (AR 916). The Rule is well within BLM’s authority to prescribe “rules ... for the prevention of undue waste” and to require lessees to use “all reasonable precautions to prevent waste of oil or gas.” 30 U.S.C. §§ 187, 225; *see also* 30 U.S.C. § 1756. As the Wyoming district court stated in finding that Petitioners’ had failed to demonstrate a likelihood of success on the merits of their claim that the Rule was an illegal air quality regulation, “[t]he terms of the MLA and FOGRMA make clear that Congress intended the Secretary, through the BLM, to exercise its rulemaking authority to prevent the waste of federal and Indian mineral resources and to ensure the proper payment of royalties to federal, state, and tribal governments.” *Wyoming v. U.S. Dep’t of the Interior*, 2017 WL 161428 at *6.

⁴ Pursuant to the direction of the Court (ECF No. 95), State Plaintiffs hereby provide issue numbers for each argument that correspond to the numbers provided by the Conservation and Tribal Citizen Group Plaintiffs in their Motion for Summary Judgment.

⁵ BLM’s new definition of “waste of oil or gas,” which follows from this rationale and improperly includes an economic limitation on the concept of waste, is addressed in Part II below.

1 None of the legal authorities cited address BLM’s mandates under the MLA to regulate
2 waste. *See* 30 U.S.C. §§ 187, 225. For example, the decision in *Brewster v. Lanyon Zinc. Co.*,
3 140 F. 801 (8th Cir. 1905), which predates the Mineral Leasing Act, involved a contract dispute
4 between a drilling company and private land owner where the court found a breach of the
5 covenant to exercise “reasonable diligence” when the company failed to proceed with the
6 contemplated operations. Moreover, the decision in *Marathon Oil Company v. Andrus*, 452 F.
7 Supp. 548 (D. Wyo. 1978), as well as the Interior Board of Land Appeals opinions in *Rife Oil*
8 *Properties, Inc.*, 131 IBLA 357 (1994) and *Ladd Petroleum Corp.*, 107 IBLA 5 (1989), discuss
9 the issue of when gas is “avoidably lost” and thus subject to federal royalties – a related but
10 distinct issue from BLM’s authority to require lessees to take “all reasonable precautions” to
11 prevent “waste.” Even the Rescission maintains a separate definition of “avoidably lost,” which
12 includes “[g]as that is vented or flared without the authorization or approval of the BLM,” and
13 “[p]roduced oil or gas that is lost” due to “[t]he failure of the operator to take all reasonable
14 measures to prevent or control the loss” or “to comply fully with the applicable lease terms and
15 regulations.” 43 C.F.R. § 3179.4; 83 Fed. Reg. at 49,212 (AR 29); *see also* Public Comments and
16 Responses on the Waste Prevention - Revise or Rescind Rule (“Response to Comments”) at 48-
17 49, 124, 125, 127 (AR 189-90, 265, 266, 268) (disagreeing with commenters that definitions of
18 “avoidably lost” and “waste of oil or gas” should be combined). Given that oil or gas is deemed
19 “avoidably lost” when a lessee fails to comply with a BLM regulation, these cases say nothing
20 about BLM’s ability to enact regulations for the prevention of waste (as the agency did in 2016);
21 nor do they provide support for the Rescission.⁶

22 Second, these legal authorities were not even mentioned, let alone discussed, in the
23 Proposed Rescission. This failure deprived State Plaintiffs of a meaningful opportunity to
24 comment on this central justification for the Rescission. It is not enough that an agency merely
25 identify some of the problems it believes may justify a repeal; rather, “[n]otice of a proposed rule

26 _____
27 ⁶ Indeed, since at least the adoption of NTL-4A in 1979, the term “avoidably lost” has included
28 the loss of oil and gas resulting from an operator’s failure to comply with “lease terms and
regulations” enacted by BLM. *See* 44 Fed. Reg. 76,600 (Dec. 27, 1979); *see also* 81 Fed. Reg. at
83,082 (AR 983); 83 Fed. Reg. at 49,212 (AR 29).

1 must include sufficient detail on its content and basis in law and evidence to allow for meaningful
2 and informed comment[.]” *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995)
3 (citation omitted); *Home Box Office v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977) (“[T]he notice
4 required by the APA ... must disclose in detail the thinking that has animated the form of a
5 proposed rule and the data upon which that rule is based”). Without such information, the public
6 cannot not meaningfully participate in the rule making process. *See Connecticut Light & Power*
7 *Co.*, 673 F.2d at 530 (“If the notice of proposed rule-making fails to provide an accurate picture
8 of the reasoning that has led the agency to the proposed rule, interested parties will not be able to
9 comment meaningfully upon the agency’s proposals.”); *accord Prometheus Radio Project v.*
10 *F.C.C.*, 652 F.3d 431, 452 (3d Cir. 2011) (notice of proposed rulemaking lacked sufficient detail
11 to permit “discussion of the actual issues involved”). BLM’s inclusion of this brand new
12 rationale in the Rescission failed to comply with the APA’s notice and comment requirement.
13 *Nat. Res. Def. Council v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002) (“A decision made
14 without adequate notice and comment is arbitrary or an abuse of discretion.”); *State of California*
15 *v. U.S. Dep’t of the Interior*, --- F. Supp. 3d ---, 2019 WL 2223804, *14-15 (N.D. Cal. Mar. 29,
16 2019) (finding that DOI violated the APA by “failing to provide the requisite information to
17 adequately apprise the public regarding the reasons” for repealing a duly promulgated regulation).

18 In fact, as the record further demonstrates, BLM staff did not agree that they lacked the
19 statutory authority to issue the Waste Prevention Rule. Rather, this rationale was pushed by the
20 White House’s Office of Information and Regulatory Affairs (“OIRA”), which reviews all
21 Executive Branch regulations, as well as Department of the Interior political appointees. During
22 the drafting of the proposed rule, BLM had rejected the inclusion of language regarding its
23 statutory authority when pushed by OIRA. AR 172946 (“OIRA recommended that the BLM
24 explicitly state that it lacked the authority to issue the 2016 final rule. BLM disagrees but
25 provided alternate preamble language as compromise.”); AR 173733 (“The second issue is in
26 relation to whether and how we speak to our authority surrounding the rule itself. Seems
27 DOI/DOJ are on one side and OMB/OIRA are on another.”). Moreover, as late as August 2,
28 2018, the draft version of the final rule did not contain this rationale, but was added following a

1 meeting with then-Deputy Secretary of the Interior David Bernhardt, Assistant Secretary of Land
2 and Minerals Management Joe Balash, and then-Principal Deputy Assistant Secretary of Land
3 and Minerals Management Katharine MacGregor, among others. *Cf.* AR 159791-92 (August 6,
4 2018 version of draft final rule with addition of statutory authority argument) *with* AR 159895-96
5 (August 2, 2018 version of draft final rule with no statutory authority argument).⁷

6 To the extent that this rationale was made at the direction the White House, it does not
7 deserve the deference that might be afforded to it under *Chevron*. *See Chevron*, 467 U.S. at 844
8 (finding that such deference due only to the agency “entrusted to administer” the relevant statute).
9 The limited statutory mandate of OIRA, which was created by the Paperwork Reduction Act of
10 1980, 44 U.S.C. § 3503, does not involve administration of the Mineral Leasing Act. Moreover,
11 BLM’s abruptly chosen rationale, made in response to pressure from OIRA and political
12 appointees rather than through careful deliberation and application of its expertise, also warrants
13 reducing the level of deference afforded to this interpretation. *See Mead*, 533 U.S. at 228;
14 *California Pub. Utilities Comm’n*, 879 F.3d at 975.

15 Third, BLM’s current position represents an unexplained inconsistency with the 2016 Rule,
16 where the agency explicitly considered and rejected this statutory authority argument when it was
17 raised by industry commenters. As BLM stated at that time, “there is no statutory or
18 jurisprudential basis for the commenters’ position that the BLM must conduct an inquiry into a
19 lessee’s economic circumstances before determining a loss of oil or gas to be “avoidable.” 81
20 Fed. Reg. at 83,038 (AR 939). Rather, BLM found that the Waste Prevention Rule “is a
21 necessary step in fulfilling its statutory mandate to minimize waste of the public’s and tribes’
22 natural gas resources,” as waste under its prior regulations was “unacceptably high.” *Id.* at
23 83,009-10, 83,015 (AR 910-911, 916). Moreover, BLM did not previously take the position that
24 “any” losses of gas could be regulated as waste or ignore “the economics of conserving that lost
25 gas.” To the contrary, BLM determined that the Waste Prevention Rule represented “economical,

26 ⁷ Executive Order 12866, which governs the federal agency rulemaking process, provides that an
27 agency “shall ... [i]dentify for the public those changes in the regulatory action that were made at
28 the suggestion or recommendation of OIRA.” Executive Order 12866, Section 6(a)(3)(E)(iii), 58
Fed. Reg. 51,735 (Sept. 30, 1993). BLM has not explicitly identified any changes in the
Rescission that were suggested or recommended by OIRA.

1 cost-effective, and reasonable measures that operators can take to minimize gas waste.” *Id.* at
2 83,009 (AR 910); *see id.* at 83,015 (AR 916) (“Today’s rule updates the existing provisions to
3 direct operators to take reasonable and common-sense measures to prohibit routine venting,
4 minimize the quantities of natural gas routinely flared, reduce natural gas losses through leaks,
5 and deploy up-to-date technology to reduce routine losses from production equipment.”). The
6 Rule also contained several exemptions for situations where regulatory requirements would
7 “cause the operator to cease production and abandon significant recoverable oil reserves under the
8 lease.” *See* 81 Fed. Reg. at 83,011 (AR 912) (capture targets); 83,012 (AR 913) (pneumatic
9 controllers and pumps; storage vessels); 83,028 (AR 929) (leak detection and repair). In sum,
10 BLM’s current position represents an “unexplained inconsistency” with the 2016 rulemaking that
11 renders the Rescission arbitrary and capricious. *See Brand X Internet Servs.*, 545 U.S. at 981.

12 Fourth, the Rescission itself is internally inconsistent regarding whether the Rule “exceeded
13 the BLM’s statutory authority to regulate for the prevention of ‘waste.’” *See* 83 Fed. Reg. at
14 49,185 (AR 2). For example, BLM states later in the preamble that “even if the 2016 rule did *not*
15 exceed the BLM’s statutory authority, it is nonetheless within the BLM’s authority to revise its
16 ‘waste prevention’ regulations in a manner that balances compliance costs against the value of the
17 resources to be conserved.” *Id.* at 49,189 (AR 6) (emphasis added). BLM also claims that it
18 “received a number of comments addressing its statutory authority and obligations,” but “did not
19 make any changes to the rule based on these comments.” *Id.* However, as discussed above,
20 nowhere in the Proposed Rule did BLM actually take the position that the Waste Prevention Rule
21 exceeded its statutory authority under the MLA to regulate waste. And BLM later characterizes
22 its position not as a statutory issue, but as a “policy determination.” *Id.* at 49,190, 49,197 (AR 7,
23 14). These shifting explanations for BLM’s primary rationale further render the Rescission
24 arbitrary and capricious.

25 Finally, there is no merit to BLM’s statement that its “experience in the litigation of the
26 2016 rule reinforces the BLM’s conclusion that the 2016 rule exceeded its statutory authority.”
27 *Id.* at 49,186 (AR 3). The Wyoming district court addressed an argument made by Petitioners
28 that the Waste Prevention Rule was actually an illegal attempt by BLM to regulate air pollution

1 under the Clean Air Act, which BLM contested. *Wyoming v. U.S. Dep't of the Interior*, 2017 WL
2 161428, at *3-9. Ultimately, the Wyoming district court found that Petitioners did not
3 demonstrate a likelihood of success on this argument. *Id.* at *9. The statutory authority rationale
4 now relied upon by BLM was not addressed by the Wyoming district court. Thus, the litigation
5 over the 2016 Rule provides no support for BLM's rationale in the Rescission.

6 In sum, the Rescission is arbitrary and capricious because it relies on an unsupportable
7 claim by BLM that the Waste Prevention Rule exceeded its statutory authority to regulate waste.

8 **B. BLM's Reliance on Executive Order 13783 is Unfounded (Issue B-1).**

9 BLM next asserts that the Waste Prevention Rule "would have added regulatory burdens
10 that unnecessarily encumber energy production, constrain economic growth, and prevent job
11 creation," contrary to the policies set forth in Section 1 of Executive Order 13783. 83 Fed. Reg.
12 at 49,184, 49,185 (AR 1, 2); RIA at 6-7 (AR 40-41) ("Need for Policy Action"). However, these
13 conclusory statements not only lack support, but they are directly contradicted by the record of
14 both the 2016 Rule and the 2018 Rescission. Additionally, BLM's reliance on Executive Order
15 13783 contravenes both the terms of the order itself and the statutory responsibilities the agency
16 acknowledges. In short, BLM's reliance on Executive Order 13783 falls well short of supplying
17 the required "reasoned explanation" for the Rescission. *See Amerijet Int'l, Inc. v. Pistole*, 753
18 F.3d 1342, 1350 (D.C. Cir. 2014) (conclusory agency statements deemed insufficient); *State of*
19 *California v. U.S. Dep't of the Interior*, --- F. Supp. 3d ---, 2019 WL 2223804 at *11-12 (DOI
20 failed to provide "reasoned explanation" for its reliance on Executive Order 13783 to justify rule
21 repeal).

22 To begin, BLM's rationale is contradicted not only by its 2016 findings in promulgating the
23 Waste Prevention Rule, but also by the record for the Rescission. BLM's regulatory impact
24 analysis for the Waste Prevention Rule ("2016 RIA") found that implementation costs for
25 "individual operators would be small, even for businesses with less than 500 employees." *See* 81
26 Fed. Reg. at 83,013 (AR 914). Specifically, BLM estimated that average costs for a
27 "representative small operator" would "result in an average reduction in profit margin of 0.15
28 percentage points." *Id.* at 83,013-14 (AR 914-15). As a result, BLM found that the Rule would

1 “not have a significant economic impact on a substantial number of small entities,” and “would
2 not alter the investment or employment decisions of firms or significantly adversely impact
3 employment.” *Id.* at 83,070 (AR 971). BLM also concluded that the Rule would increase natural
4 gas production by 9–41 Bcf per year, but would not “significantly impact the supply, distribution,
5 or use of energy.” *Id.* at 83,014, 83,077 (AR 915, 978). Moreover, as discussed above, the Rule
6 contained exemptions for situations where certain requirements would “cause the operator to
7 cease production and abandon significant recoverable oil reserves under the lease.” *See* 81 Fed.
8 Reg. at 83,011, 83,012, 83,028 (AR 912, 913, 929).

9 BLM’s findings for the Rescission do not differ in any material way. For example, BLM
10 finds that for even the smallest operators, the rule will increase annual profit margins by just
11 “0.19 percentage points,” 83 Fed. Reg. at 49,206 (AR 23), and “will not have a ‘significant
12 economic impact on a substantial number of small entities.’” *Id.* at 49,207 (AR 24). BLM states
13 that it does “not believe that the cost savings in themselves will be substantial enough to
14 substantially alter the investment or employment decisions of firms.” *Id.* at 49,206 (AR 23); RIA
15 at 65, 83 (AR 99, 117) (“the reduction in compliance costs represents such a small fraction of
16 company net incomes that we believe that the rule is unlikely to impact the investment decisions
17 of firms”); *see also* AR 159746, 179988, 179835 (“BLM does not expect the Waste Prevention
18 Rule to alter the investment or employment decisions of firms or significantly adversely impact
19 employment”). And BLM admits that it does “not expect that the final rule will significantly
20 impact the price, supply, or distribution of energy.” 83 Fed. Reg. at 49,205, 49,211 (AR 22, 28);
21 RIA at 57 (AR 91). To the contrary, BLM finds that the Rescission will actually *reduce* natural
22 gas production by 299 billion cubic feet, and royalty payments by \$79.1 million. 83 Fed. Reg. at
23 49,205 (AR 22); RIA at 3, 57, 60, 63 (AR 37, 91, 94, 97).

24 Separately, BLM’s cursory discussion failed to consider important provisions of the
25 Executive Order that are relevant to the Rescission. For instance, given the increased pollution
26 that BLM admits will result from the Rescission, the agency failed to address the Order’s
27 direction that “all agencies should take appropriate actions to promote clean air and clean water
28 for the American people.” *See* 82 Fed. Reg. at 16,093 (AR 1871). Nor does BLM acknowledge

1 that the bases it offered in 2016 for the Rule—national security, domestic energy development
2 and economic growth—are substantially consistent with Section 1 of E.O. 13783. The Executive
3 Order begins by stating that “[i]t is in the national interest to promote clean and safe development
4 of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that
5 unnecessarily encumber energy production, constrain economic growth, and prevent job creation.
6 Moreover, the prudent development of these natural resources is essential to ensuring the Nation's
7 geopolitical security.” *Id.* And, in explaining its justification for the Rule in 2016, BLM stated
8 that:

9 [N]atural gas is a limited and valuable public resource, which is critical to U.S.
10 energy security and national security. Natural gas also provides significant economic
11 benefits as an energy source for electricity generation and industrial and residential
12 use, and as a feedstock for manufacturing.... Venting, flaring, and leaks of natural gas
13 from production on BLM-administered sites waste this limited natural resource and
14 deprive the American public and tribes of the security and economic benefits that this
15 resource, which belongs to the public and tribes, would otherwise provide.

16 81 Fed. Reg. at 83,014 (AR 915). BLM fails to offer any reasoned explanation for reversing
17 itself.

18 Further, as Executive Order 13783 recognizes, a President’s Order cannot “impair or
19 otherwise affect” the statutory mandates imposed upon BLM by Congress. 82 Fed. Reg. at
20 16,096 (AR 1874); *see In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013) (“[T]he President
21 and federal agencies may not ignore statutory mandates or prohibitions merely because of a
22 policy disagreement with Congress.”). In finalizing the Waste Prevention Rule, BLM
23 acknowledged specifically that the “rule [was] a necessary step in fulfilling its statutory *mandate*
24 to minimize waste of the public’s and tribes’ natural gas resources.” 81 Fed. Reg. at 83,010 (AR
25 911) (emphasis added). Moreover, BLM emphasized that the agency “must carry out its
26 responsibility, delegated by Congress, to ensure the public’s resources are not wasted and are
27 developed in a manner that provides for long term productivity and sustainability.” *Id.* In light of
28 Congress’s direction, Executive Order 13783 cannot provide the reasoned explanation required of
BLM to rescind the Waste Prevention Rule.

This district court has twice rejected BLM’s failure to explain its contradictory findings to
first postpone, and then suspend, the requirements of the Rule. *See California I*, 277 F. Supp. 3d

1 at 1123 (“New presidential administrations are entitled to change policy positions, but to meet the
2 requirements of the APA they must give reasoned explanations for those changes and address
3 [the] prior factual findings underpinning a prior regulatory regime.”) (internal quotations and
4 citation omitted); *California II*, 286 F. Supp. 3d at 1067 (finding that BLM failed to provide an
5 adequate explanation because it failed to “point to any fact that justifies its assertion that the
6 Waste Prevention Rule encumbers energy production. Its concern remains unfounded.”). BLM’s
7 latest attempt to undo the requirements of the Waste Prevention Rule without a reasoned
8 explanation, and despite its own findings to the contrary, is similarly arbitrary and capricious.
9 *See Brand X Internet Servs.*, 545 U.S. at 981; *State of California v. U.S. Dep’t of the Interior*, ---
10 F. Supp. 3d ---, 2019 WL 2223804 at *12 (DOI’s statements regarding burden on energy
11 development “directly contradict its previous findings in its promulgation of” the rule it seeks to
12 repeal, in violation of the APA).

13 **C. BLM’s Regulatory Impact Analysis for the Rescission is Arbitrary and**
14 **Capricious (Issues C and B-2).**

15 BLM also claims that the 2016 Rule’s “compliance costs for industry and implementation
16 costs for the BLM exceed the rule’s benefits.” 83 Fed. Reg. at 49,186-88, 49,204-05 (AR 3-5,
17 21-22). BLM’s wholesale reversal from the conclusions of its 2016 RIA relies on an arbitrary,
18 outcome-driven manipulation of the numbers that fails to offer a reasoned explanation for the
19 inconsistencies with its prior analysis. BLM ignores several benefits of the Rule entirely,
20 including the reduction in hazardous air emissions, and undermines the other key benefits, such as
21 the reduction in methane emissions, by substituting spurious “interim” findings for peer-reviewed
22 science. On the cost side, BLM declares, without any factual support, that the administrative
23 burdens of the Rule are twice as high as those calculated in 2016. And BLM sandbags the public
24 with a new analysis of the alleged impacts of the Rule on marginal wells, which appeared for the
25 first time in the final RIA. Any one of the above flaws is enough to render BLM’s reliance on
26 this rationale a violation of the APA.
27
28

1 **1. BLM’s Use of a “Domestic” Social Cost of Methane Metric**
2 **Arbitrarily Ignores Substantial Climate Impacts and is Contrary to**
3 **the Best Available Science (Issue C-1).**

4 In 2016, to estimate the benefits of reducing methane emissions, BLM drew upon the
5 conclusions of an Interagency Working Group (“IWG”) founded under the Administration of
6 George W. Bush.⁸ AR 104455-104456. The IWG was specifically organized to develop a single,
7 harmonized value for greenhouse gas emissions for federal agencies to use in their regulatory
8 impact analyses for rulemaking under Executive Order 12866. AR 21377, 104456. The IWG’s
9 approach, known as the “social cost of greenhouse gases,” estimates the present value of the
10 damages caused from each additional ton of greenhouse gas emitted at a point in time, or
11 conversely, the present value of the benefits from reducing a ton of greenhouse gas emissions.
12 AR 21376. As the IWG stated in 2015, these damages must be considered globally “because
13 emissions of most greenhouse gases contribute to damages around the world and the world’s
14 economies are now highly interconnected.” AR 22069. This approach was developed over
15 several years through robust scientific and peer-reviewed analyses and public processes, and
16 represents the best available science on this issue. AR 21377, 104456.

17 In addition to being scientifically sound, IWG’s approach is consistent with longstanding
18 guidance regarding the valuing of effects of a rule generally. OMB Circular A-4 recognizes that a
19 regulation may “have effects beyond the borders of the United States,” and states that an agency’s
20 economic analysis should encompass “all the important benefits and costs likely to result from the
21 rule,” including “any important ancillary benefits.” AR 7598, 7609. OMB Circular A-4 instructs
22 agencies to monetize costs and benefits wherever possible. AR 7610. Moreover, OMB Circular
23 A-4 states that “where you choose to evaluate a regulation that is likely to have effects beyond the
24 borders of the United States, these effects should be reported separately.” AR 7598. Likewise,
25 Executive Order 12866 directs agencies to assess “*all* costs and benefits” of regulatory actions.
26 E.O. 12866, Section 1(a), 58 Fed. Reg. 51,735 (Oct. 4, 1993) (emphasis added); *id.* at Section

27 ⁸ The IWG was comprised of members from the Council of Economic Advisors, Council on
28 Environmental Quality, Department of Agriculture, Department of Commerce, Department of
 Energy, Department of the Interior, Department of Transportation, Department of Treasury,
 Environmental Protection Agency, National Economic Council, Office of Management and
 Budget, and the Office of Science and Technology Policy. AR 21377.

1 1(b)(6) (“Each agency shall assess both the costs and the benefits of the intended regulation”).
2 And, federal agencies have relied on the IWG’s valuation of the impacts of greenhouse gas
3 emissions in rulemakings since 2009, and courts have upheld this approach. *See Zero Zone, Inc.*
4 *v. U.S. Dep’t of Energy*, 832 F.3d 654, 678-79 (7th Cir. 2016) (finding that agency acted
5 reasonably in utilizing social cost methodology and considering global estimates).

6 In 2016, using the IWG methodology, BLM estimated that the benefits of methane
7 emission reductions from the Rule would be from \$2.55-\$3.84 billion over a ten-year period,
8 which far outweighed the estimate of costs. 81 Fed. Reg. at 83,014 (AR 925). In the Rescission,
9 BLM’s analysis cut that number by more than tenfold to \$66-\$259 million. RIA at 4 (AR 38).
10 BLM did so by relying on its own “interim”⁹ metric — which lacks any peer review — that
11 arbitrarily dismisses most of the costs associated with increased methane emissions. RIA at 94
12 (AR 128). The interim metric purports to estimate the “domestic” cost of methane. BLM claims
13 that it created this new “interim” approach because Executive Order 13783 disbanded the IWG
14 and rescinded its technical support documents. 83 Fed. Reg. at 49,186-87, 49,190 (AR 3-4, 7).

15 However, BLM fails to provide any reasoned explanation for its decision to ignore the best
16 available scientific and economic information in conducting its regulatory impacts analysis for
17 rulemaking. For example, Executive Order 13783 itself directed agencies to ensure that their
18 estimates of the social costs of greenhouse gases used in regulatory analyses are “based on the
19 best available science and economics.” 82 Fed. Reg. at 16,096 (AR 1874). OMB Circular A-4
20 provides that agencies should use “the best reasonably obtainable scientific, technical, and
21 economic information available. To achieve this, you should rely on peer-reviewed literature,
22 where available.” AR 7600. Executive Order 12866 provides that “[e]ach agency shall base its
23 decision on the best reasonably obtainable scientific, technical, economic, and other information.”
24 E.O. 12866, Section 1(b)(7), 58 Fed. Reg. at 51,735. While Executive Order 13783 disbanded the
25 IWG and withdrew its technical support documents, the President did not alter by fiat what

26 _____
27 ⁹ As BLM admits, this approach relies upon “interim values for use in regulatory analyses until an
28 improved estimate of the impacts of climate change to the U.S. can be developed.” RIA at 41
(AR 75). Yet BLM has failed to show that any such improved estimates are actually being
developed.

1 constitutes the best available science. Rather, recognition of the best available science is hard
2 won through exacting peer-review by experts in the relevant fields. The Executive Order in and
3 of itself has no impact on the consensus that IWG’s estimates constitute the best available science
4 in monetizing the impacts of greenhouse gas emissions. *See, e.g.*, AR 104456 (California Air
5 Resources Board commenting that “California continues to utilize the IWG-supported social cost
6 of [greenhouse gas] values in its policy and regulatory planning, as they continue to represent the
7 best available science.”); AR 83471 (Richard L. Revesz, *et al.*, “Best Cost Estimate of
8 Greenhouse Gases,” 357 *SCIENCE* 6352 (2017), stating that the “IWG’s estimates already are
9 the product of the most widely peer-reviewed models and best available data”).

10 By contrast, BLM’s “interim” measure lacks substantial analysis, much less peer review,
11 and relies on assumptions that are at odds with current scientific understanding. Among the
12 impacts on the United States left out of BLM’s “domestic” analysis are: impacts on 8 million U.S.
13 citizens living abroad, including thousands of U.S. military personnel; impacts on billions of
14 dollars of physical assets abroad owned by U.S. companies; spillover impacts on U.S. companies
15 from impacts on their trading partners and suppliers abroad; and impacts from changes in global
16 migration and geopolitical security. AR 6806-6807, 83422-83426, 83508-83515. BLM’s
17 approach—effectively treating the United States as an island completely cut-off from effects
18 outside its borders—has been soundly rejected by economists as improper and unsupported by
19 science. In 2015, the IWG concluded that “good methodologies for estimating domestic damages
20 do not currently exist.” AR 22074. In 2017, the National Academies of Science found that the
21 calculation of a domestic social cost of methane cannot be credibly done using current models, as
22 they ignore important spillover effects given the global nature of climate change. AR 22728.
23 And even the federal agency economists attempting to utilize a domestic-only measure have
24 acknowledged that “the development of a domestic [social cost of carbon (“SCC”)] is greatly
25 complicated by the relatively few region-or country-specific estimates of the SCC in the
26 literature.” AR 180230 (June 8, 2017 email exchange between EPA and BLM economists).

27 The obvious flaws in BLM’s approach are readily apparent in the RIA. For example, BLM
28 attempts to “approximate” the climate change impacts that occur within U.S. borders from one

1 model that generates only global estimates, claiming that such impacts are 10% of global values
2 based on a 2017 paper by William Nordhaus. AR 128 (citing Nordhaus (2017)). However, the
3 Nordhaus paper itself undermines this analysis, finding that such estimates vary based on the
4 model used, and concludes that “regional damage estimates are both incomplete and poorly
5 understood,” and “[a] key message here is that there is little agreement on the distribution of the
6 SCC by region.” AR 8949. Further, Dr. Robert S. Pindyck, whose work is also cited in the RIA
7 (*see* RIA at 99, 100 (AR 133, 134)), previously commented on BLM’s attempt to use this
8 approach for the Suspension, stating that “the domestic-only approach as implemented in the RIA
9 is wrong from an economic perspective. The most economically justifiable approach is, instead,
10 to use the full international value.” AR 83411.

11 BLM fails to provide any justification for its arbitrary “domestic-only” measure of
12 emissions impacts, nor could it. None of the orders governing regulatory impact analyses —
13 Executive Order 13783, OMB Circular A-4, or Executive Order 12866 — allow BLM to
14 completely ignore the global impacts of a rulemaking. To the contrary, Executive Order 13783
15 specifically identified the need for agencies to consider “domestic versus international impacts.”
16 82 Fed. Reg. at 16,096 (AR 1874); *see also* RIA at 53 (AR 87). Executive Order 13783 also
17 assumes that federal agencies will continue to “monetiz[e] the value of changes in greenhouse gas
18 emissions,” and instructs agencies to ensure that such estimates are “consistent with the guidance
19 contained in OMB Circular A-4.” 82 Fed. Reg. at 16,096 (AR 1874). Yet, instead of assessing
20 all costs and benefits of the Rescission or separately reporting effects that occur beyond the
21 borders of the United States, BLM has arbitrarily chosen not to report or consider global effects at
22 all, thereby grossly undervaluing the benefits of the Rule’s reductions in methane emissions. This
23 failure to “consider an important aspect of the problem” is arbitrary and capricious. *See State*
24 *Farm*, 463 U.S. at 43.

25 In sum, hiding under the language of Executive Order 13783, BLM has employed a new
26 “domestic” social cost of methane approach that is contrary to the best available science and fails
27 to consider an important aspect of the problem of increased methane emissions. BLM has failed
28 to provide a reasoned analysis for this change, let alone the “detailed justification” required for its

1 complete reversal in position. *See Fox*, 556 U.S. at 515. As such, BLM’s approach is arbitrary
2 and capricious and should be found unlawful.

3 **2. BLM Failed to Quantify or Otherwise Consider Other Substantial**
4 **Benefits of the Waste Prevention Rule (Issue C-2).**

5 The RIA also fails to quantify or provide any weight to other foregone benefits of repealing
6 the Waste Prevention Rule, such as the public health consequences of many additional tons of
7 VOC emissions and hazardous air pollutants, and visual and noise impacts on local communities
8 from flaring. *See* 81 Fed. Reg. at 83,009, 83,015 (AR 910, 916). For example, the Rescission
9 will increase VOC emissions by approximately 79,000-80,000 tons per year, or 798,000 tons over
10 the ten-year evaluation period in the RIA. RIA at 47 (AR 81). Yet BLM admits that it did not
11 attempt to “monetize the costs to public health and the environment of forgoing VOC or
12 hazardous air pollution emissions reductions,” despite the fact that such emissions “pose negative
13 impacts on climate, health, and human welfare.” RIA at 48 (AR 82). Additionally, the RIA fails
14 to even mention the visual and noise impacts that will result from the Rescission.

15 These deficiencies directly contradict the requirements for a regulatory impact analysis to
16 quantify or otherwise consider the non-monetary benefits that would be lost by repealing the
17 Waste Prevention Rule. As OMB Circular A-4 provides, “When there are important non-
18 monetary values at stake, you should also identify them in your analysis so policymakers can
19 compare them with the monetary benefits and costs. When your analysis is complete, you should
20 present a summary of the benefit and cost estimates for each alternative, including the qualitative
21 and non-monetized factors affected by the rule, so that readers can evaluate them.” AR 7586.
22 Similarly, as discussed above, Executive Order 12866 requires agencies to assess “*all* costs and
23 benefits” of regulatory actions. 58 Fed. Reg. at 51,735 (emphasis added).

24 As this district court previously concluded in overturning BLM’s illegal attempt to delay
25 the requirements of the Waste Prevention Rule, “[w]ithout considering both the costs and the
26 benefits of” a deregulatory action, an agency “fail[s] to take [an] ‘important aspect’ of the
27 problem into account.” *California I*, 277 F. Supp. 3d at 1122; *id.* at 1123 (“Defendants’ failure to
28 consider the benefits of compliance with the provisions that were postponed, as evidenced by the

1 face of the Postponement Notice, rendered their action arbitrary and capricious and in violation of
2 the APA.”). Consequently, the RIA for the Rescission, and thus the Rescission itself, is arbitrary
3 and capricious.

4 **3. BLM’s New Analysis of Impacts to Marginal Wells is Arbitrary and**
5 **Capricious (Issue B-2).**

6 State Plaintiffs hereby incorporate by reference Argument, Section II.B of the Conservation
7 and Tribal Citizen Group Plaintiffs’ Memorandum in Support of Motion for Summary Judgment.

8 **4. BLM Failed to Provide a Reasoned Explanation for its Change to the**
9 **Administrative Burdens of Implementing the Waste Prevention Rule**
10 **(Issue C-3).**

11 BLM’s claim that the costs of the Waste Prevention Rule now exceed its benefits is further
12 based on an unsupported recalculation that nearly doubles the “administrative burdens” for industry
13 and BLM to implement the Rule. 83 Fed. Reg. at 49,184, 49,188 (AR 1, 5); RIA at 39-40, 86-93
14 (AR 73-74, 120-127). In particular, the 2016 RIA calculated the burden to industry at \$5.5
15 million (based on an estimated 85,170 hours of administrative effort), and the burden to BLM at
16 \$1.3 million (based on 30,117 hours). 2016 RIA at 99, 102 (AR 1166, 1169). However, the 2018
17 RIA raises industry’s estimated administrative burden to \$10.7 million (and 164,000 hours), and
18 increased BLM’s burden to \$3.27 million (and 72,700 hours). RIA at 40 (AR 74). Yet BLM
19 provides no basis for this drastic increase other than to state that it consulted “with BLM State
20 and field offices to determine the level of expected response per provision.” RIA at 86 (AR 120).

21 However, the numbers provided by BLM in 2016 were also developed in consultation with
22 BLM staff. 2016 RIA at 96 n.81 (AR 1163) (“Estimates for the number of responses and burden
23 hours per response were provided by BLM program staff”). BLM has failed to identify or explain
24 any changed circumstances, technology, or economic conditions that would justify this dramatic
25 recalculation. For example, a large portion of this increase resulted by BLM’s tripling of the
26 number of hours that it would take industry to submit a waste minimization plan, from 8 to 24,
27 and increasing the number of responses by 50% from 2,000 to 3,000 — thereby increasing the
28 burden to industry from \$1.03 million to \$4.7 million. Cf. 2016 RIA at 96 (AR 1163) with RIA at
86 (AR 120). Given that operators never submitted any such plans, there is no basis in the record

1 for BLM's latest numbers, let alone the "more detailed justification" required by the U.S.
2 Supreme Court. *Fox*, 556 U.S. at 515; *see also Center for Biological Diversity v. Bureau of Land*
3 *Mgmt.*, 422 F. Supp. 2d 1115, 1149 (N.D. Cal. 2006) (finding it arbitrary and capricious for
4 agency's economic analysis "to rely on a critical assumption that lacks support in the record to
5 justify" decision).

6 **D. There is No Basis in the Record to Support BLM's Claim that the Waste**
7 **Prevention Rule is Duplicative of Federal and State Regulations (Issue A-**
8 **4).**

8 Finally, BLM posits that the Waste Prevention Rule is duplicative of other federal and state
9 requirements. 83 Fed. Reg. at 49,188, 49,191 (AR 5, 8). In particular, BLM claims that the Rule
10 "had many requirements that overlapped" with EPA's new source performance standards
11 ("NSPS") for new, reconstructed, and modified sources in the oil and natural gas sector issued
12 under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and that "some States with significant Federal
13 oil and gas production have similar regulations addressing the loss of gas from these sources." *Id.*
14 at 49,188 (AR 5).

15 However, BLM previously considered these same requirements when it promulgated the
16 Waste Prevention Rule, and it fails to provide any reasoned explanation for reaching an entirely
17 contrary conclusion regarding the need for Rule less than two years later. With regard to EPA's
18 regulations, BLM was well aware in 2016 that EPA was in the process of finalizing its NSPS and
19 "carefully coordinated" with that agency "to minimize compliance burdens for operators and to
20 avoid unnecessary duplication." 81 Fed. Reg. at 6,618, 6,635 (AR 994, 1011); 81 Fed. Reg. at
21 83,013, 83,018-19 (AR 914, 919-920).¹⁰ As BLM acknowledges, the EPA standards only apply
22 to new wells, not existing sources, and thus exclude the vast majority of U.S. oil and gas
23 operations. RIA at 26-27 (AR 60-61). Unlike EPA's requirements, which impose numeric
24 percentage-reduction requirements on emissions of greenhouse gases and VOCs from specified

25 _____
26 ¹⁰ Similarly, EPA stated in its own rulemaking that it "worked closely with [BLM] during
27 development of this rulemaking in order to avoid conflicts in requirements between the NSPS and
28 BLM's proposed rulemaking." 81 Fed. Reg. 35,824, 35,825 (June 3, 2016) (AR 2838); *see id.* at
35,831 (AR 2844) ("While we intend for our rule to complement the BLM's action, it is
important to recognize that the EPA and the BLM are each operating under different statutory
authorities and mandates in developing and implementing their respective rules.").

1 equipment and processes within the oil and natural gas source category, 81 Fed. Reg. at 35,824
2 (AR 2837), the Waste Prevention Rule sets no emissions standards for particular pollutants and
3 contains no air quality monitoring requirements. Moreover, BLM already addressed the potential
4 for overlapping regulations in 2016 by (1) allowing compliance with EPA's requirements for new
5 or modified sources to satisfy the requirements of the Waste Prevention Rule when both EPA
6 regulations and the Rule apply; and (2) exempting from the Rule equipment covered by existing
7 EPA regulations. 81 Fed. Reg. at 83,013, 83,027, 83,055, 83,058-59, 83,061 (AR 914, 928, 956,
8 959-960, 962). Furthermore, just like the Waste Prevention Rule, EPA has already attempted to
9 illegally delay its NSPS and is now reconsidering the standards. *See* 82 Fed. Reg. 25,730 (June 5,
10 2017) (Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified
11 Sources; Grant of Reconsideration and Partial Stay) (AR 2961); 82 Fed. Reg. 27,641 (June 16,
12 2017) (Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified
13 Sources: Three Month Stay of Certain Requirements) (AR 2956); *Clean Air Council v. Pruitt*,
14 862 F.3d 183 (D.C. Cir. 2017) (finding that EPA's stay was arbitrary and capricious and in
15 violation of the Clean Air Act and vacating stay). Subsequently, EPA proposed to weaken the
16 NSPS's requirements. 83 Fed. Reg. 52,056 (Oct. 15, 2018) (Oil and Natural Gas Sector:
17 Emission Standards for New, Reconstructed, and Modified Sources Reconsideration). BLM's
18 reliance on a rule that is itself being rolled back is suspect, even if it could show any duplication.

19 With regard to state regulations, BLM already considered such requirements in 2016 and
20 concluded that they were not as comprehensive or effective as the Waste Prevention Rule. *See* 81
21 Fed. Reg. at 83,019 (AR 920). Specifically, as BLM found:

22 Of the States with extensive oil and gas operations on BLM-administered leases, only
23 one has comprehensive requirements to reduce flaring, and only one has
24 comprehensive statewide requirements to control losses from venting and leaks.
25 Furthermore, State regulations do not apply to BLM-administered leases on Indian
26 lands, and States do not have a statutory mandate or trust responsibility to reduce the
27 waste of Federal and Indian oil and gas... . There is therefore a need for uniform,
28 modern waste reduction standards for oil and gas operations on public and Indian
lands across the country.

Id. The Waste Prevention Rule also allowed a state to request a variance if its regulations are at
least as effective as the Rule in reducing waste. 81 Fed. Reg. at 83,013, 83,017, 83,067-68 (AR

1 914, 918, 968-969). In the Rescission, BLM continues to admit that regulations “vary from State
2 to State” and some are “not as stringent” as the 2016 Rule. 83 Fed. Reg. at 49,202 (AR 19); *id.* at
3 49,203 (AR 20) (“BLM does not argue that each State’s existing flaring regulations will
4 necessarily reduce flaring rates in that State”).

5 In fact, BLM can only identify one State – California – that issued new regulations
6 regarding waste since promulgation of the 2016 rule. *Id.* at 49,188 (AR 5). However, even
7 California’s updated requirements on this issue do not obviate the need for the Waste Prevention
8 Rule. As the California Air Resources Board stated in its comments on the Proposed Rescission,
9 “several aspects of the Waste Prevention Rule provide greater and/or earlier benefits to California
10 than the State’s Oil and Gas Regulation alone, including requirements on liquids unloading,
11 mandatory planning for gas capture, and inclusion of flared gas in royalty rates (which creates
12 important financial incentives to reduce waste).” AR 104447. Moreover, federal regulation can
13 increase implementation and enforcement of state and tribal regulations and is necessary to fill
14 any gaps in these regulatory schemes. *Id.*

15 Regardless of EPA or state regulation, BLM has its own statutory mandates and public trust
16 responsibilities to limit resource waste on federal and tribal lands. *See* 81 Fed. Reg. at 83,019
17 (AR 920) (“State regulations do not apply to BLM-administered leases on Indian lands, and
18 States do not have a statutory mandate or trust responsibility to reduce the waste of Federal and
19 Indian oil and gas”). As BLM explained in 2016, the Waste Prevention Rule “helps to meet the
20 Secretary’s statutory trust responsibilities with respect to the development of Indian oil and gas
21 interests,” in part because “this rule will help ensure that the extraction of natural gas from Indian
22 lands results in the payment of royalties to Indian mineral owners, rather than the waste of
23 owners’ mineral resources.” *Id.* at 83,020-21 (AR 921-922). The Rule also meets these
24 responsibilities because “tribal members and individual Indian mineral owners who live near
25 Indian oil and gas development will realize environmental benefits as a result of this rule's
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1 reductions in flaring and air pollution from Indian oil and gas development.” *Id.* at 83,021 (AR
2 922).¹¹

3 In short, there is no basis for BLM’s claim that EPA or state regulations, which are far from
4 universal or consistent, somehow obviate the need for the Waste Prevention Rule. To the extent
5 that such regulations are duplicative (*i.e.*, that compliance with the Rule is already required by
6 other authorities), this would only further undermine BLM’s rationale that the Rule is unduly
7 costly or burdensome to industry. BLM has failed to provide any reasoned explanation for its
8 complete reversal in policy, and this unexplained inconsistency in rationale warrants reversal
9 under the APA. *See Navarro*, 136 S. Ct. at 2126 (holding that an agency’s change in practice
10 without explaining a prior inconsistent finding is arbitrary and capricious); *State of California v.*
11 *U.S. Dep’t of the Interior*, --- F. Supp. 3d ---, 2019 WL 2223804, *10 (finding that DOI’s rule
12 repeal was arbitrary and capricious where it failed to “explain the inconsistencies between its
13 prior findings in enacting the” rule and its decision to repeal the rule).

14 **II. BLM’S NEW DEFINITION OF “WASTE OF OIL OR GAS” IS CONTRARY TO LAW AND** 15 **ARBITRARY AND CAPRICIOUS (Issue A-2).**

16 Along with its arbitrary rationale that the Waste Prevention Rule exceeds BLM’s statutory
17 authority, BLM added a new definition of “waste of oil or gas” that, for the first time, includes an
18 economic limitation. 83 Fed. Reg. at 49,197 (AR 14). In particular, this new definition limits
19 “waste of oil or gas” to acts “where compliance costs are not greater than the monetary value of
20 the resources they are expected to conserve.” *Id.* at 49,197-98, 49,212 (AR 14-15, 29); *see* 43
21 C.F.R. § 3179.3. However, BLM’s new definition is contrary to law, arbitrary, and unworkable
22 for several reasons.

23 Under the Mineral Leasing Act, BLM must enforce leaseholders’ use of “all reasonable
24 precautions to prevent waste of oil or gas developed in the land,” 30 U.S.C. § 225, and require
25 leaseholders to comply with rules “for the prevention of undue waste,” 30 U.S.C. § 187.
26 Congress also reiterated its concern about waste in FOGRMA by providing that, “Any lessee is

27 ¹¹ To the extent that the agency is also relying on “voluntary” industry reductions to justify the
28 Rescission, BLM provides no evidence to support this position. *See* 83 Fed. Reg. at 49,191,
49,195 (AR 8, 12).

1 liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste
2 is due to negligence [or] the failure to comply with any rule or regulation, order or citation issued
3 under this chapter or any mineral leasing law.” 30 U.S.C. § 1756.

4 These statutory provisions include no specific economic limitations and make clear that
5 BLM must require leaseholders to prevent waste beyond what self-interest would impel. As
6 BLM stated in the 2016 rule, there is “no statutory or jurisprudential basis” requiring the agency
7 to “conduct an inquiry into a lessee’s economic circumstances before determining a loss of oil or
8 gas to be ‘avoidable’” or to regulate waste. 81 Fed. Reg. at 83,038-39 (AR 939-940). Since
9 economic self-interest should independently motivate leaseholders to avoid squandering natural
10 resources for which market value exceeds the costs of conservation, defining “waste” in this way
11 effectively nullifies these statutory provisions and is contrary to law. *See, e.g., King v. Burwell*,
12 135 S. Ct. 2480, 2498 (2015) (Scalia, J., dissenting) (“the rule against treating [a term] as a nullity
13 is as close to absolute as interpretive principles get”); *Walters v. Metro. Educ. Enters.*, 519 U.S.
14 202, 209 (1997) (holding that a statute “must be interpreted, if possible, to give each word some
15 operative effect”); *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 965 (9th
16 Cir. 2013) (“In interpreting statutes, we observe the cardinal principle of statutory construction
17 that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause,
18 sentence, or word shall be superfluous, void, or insignificant”) (internal quotations and citations
19 omitted).

20 The Rescission itself demonstrates how BLM’s new definition would nullify these statutory
21 mandates. For example, BLM has decided to eliminate the requirement that operators install low-
22 bleed pneumatic controllers,¹² despite the fact that the monetary value of the natural resources
23 conserved by this measure (\$20-26 million) is greater than the compliance costs (\$12-13 million).
24 83 Fed. Reg. at 49,194-95 (AR 11-12); RIA at 54 (AR 88). Yet because of this finding, BLM
25 reasons that it “expects many operators to adopt low-bleed pneumatic controllers even in the

26 ¹² As described by BLM, pneumatic controllers are “are automated instruments used for
27 maintaining a process condition, such as liquid level, pressure, pressure differential, and
28 temperature. Depending on the design, controllers are most often used in the oil and gas industry
to operate and control valves by use of readily available high-pressure natural gas.” RIA at 17
(AR 51).

1 absence of” a requirement to do so. 83 Fed. Reg. at 49,195 (AR 12). Such reasoning effectively
2 eliminates all regulation of waste: if compliance costs are greater than resource values, it is not
3 “waste” by definition; if resource values are greater than compliance costs, there no need to
4 regulate because industry will supposedly act voluntarily. BLM has failed to provide any
5 reasoned analysis to support this tortured position, nor could it.

6 As with its statutory authority rationale, this new definition was initially advocated not by
7 BLM, but by OIRA. *See* AR 164724 (“OMB/OIRA examiner pushed for its inclusion, but the
8 team is concerned that it would allow operators to broadly claim no losses are waste”); AR
9 172946 (“Economic Definition of Waste to Regulatory Text: OIRA provided subject language.
10 BLM accepted and added preamble discussion”); AR 173733 (“There are 3 primary issues that
11 have been brought up during the OMB/OIRA review... . The third issue is whether we need/want
12 an explicit definition of waste.”); AR 173828 (addition of definition to proposed rule).
13 Consequently, this Court should afford no deference to BLM’s explanation for this change. *Dep’t*
14 *of Treasury-I.R.S.*, 521 F.3d at 1152.

15 BLM’s new definition of “waste of oil or gas” is arbitrary and capricious for several other
16 reasons. First, BLM already defines this term *without* regard to economic considerations in its
17 operating regulations, as it has done since 1982. *See* 43 C.F.R. § 3160.0-5 (defining “waste of oil
18 or gas” as “any act or failure to act by the operator that is not sanctioned by the authorized officer
19 as necessary for proper development and production and which results in: (1) A reduction in the
20 quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper
21 operations; or (2) avoidable surface loss of oil or gas.”); 47 Fed. Reg. 47,758 (Oct. 27, 1982) (Oil
22 and Gas Operating Regulations; final rule). BLM has failed to explain the inconsistency that it
23 has created between these two regulations.

24 BLM further offers no reasoned basis regarding how to actually determine when
25 “compliance costs are not greater than the monetary value of the resources they are expected to
26 conserve,” which will likely result in arbitrary determinations. For example, compliance costs
27 will differ based on company size, which could result in a practice that constitutes “waste” for
28 one company and not another. Moreover, given the regular fluctuation in oil and gas prices, the

1 failure to install particular equipment could be considered “waste” one month but not the next.
2 And even if compliance costs can be readily assessed, it is entirely unclear what time horizon
3 should be used to assess the value of the resources conserved (e.g., 1 year? 5 years? 10 years?
4 The life of an oil and gas well?), which could significantly affect whether waste is occurring or
5 not. *See* Response to Comments at 51 (AR 192) (BLM admitting that “it would be absurd to
6 apply the definition without taking into account a time frame for recovering the operator’s
7 investment”).

8 For all of these reasons, the Court should find that BLM’s new definition of “waste of oil or
9 gas” is contrary to law and arbitrary and capricious.

10 **III. BLM FAILED TO TAKE A “HARD LOOK” AT THE ENVIRONMENTAL IMPACTS OF**
11 **THE RESCISSION AS REQUIRED BY NEPA (Issue D).**

12 State Plaintiffs hereby incorporate by reference Argument, Section IV of the Conservation
13 and Tribal Citizen Group Plaintiffs’ Memorandum in Support of Motion for Summary Judgment.

14 **CONCLUSION**

15 Declaratory relief and vacatur are the proper remedies “when a court concludes that an
16 agency’s conduct was illegal under the APA.” *State of California v. U.S. Dep’t of the Interior*, ---
17 F. Supp. 3d ---, 2019 WL 2223804 at *18 (citing *Stewardship Council v. EPA*, 806 F.3d 520, 532
18 (9th Cir. 2015)); *see* 5 U.S.C. § 706(2) (“reviewing court shall ... hold unlawful and set aside”
19 agency action that violates the APA). Given BLM’s numerous violations of the APA in
20 promulgating the Rescission, State Plaintiffs respectfully request that this Court grant their
21 motion for summary judgment, declare that the Rescission is unlawful, and vacate the Rescission.
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