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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

DAVID BERNHARDT, Secretary of the Interior; JOSEPH R. BALASH, Assistant Secretary for Land and Minerals Management, United States Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

STATE OF WYOMING, WESTERN ENERGY ALLIANCE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AMERICAN PETROLEUM INSTITUTE,

Intervenor-Defendants.

Case No. 4:18-cv-05712-YGR
Related: Case No. 4:18-cv-05984-YGR

WESTERN ENERGY ALLIANCE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND AMERICAN PETROLEUM INSTITUTE'S JOINT REMEDY BRIEF

Previous Hearing Date: March 4, 2020
Previous Hearing Time: 2:00 p.m.

Courtroom: 2, 4th Floor
Judge: Hon. Yvonne Gonzales-Rogers

/ / /

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I. INTRODUCTION

During oral argument on March 4, 2020, the Court ordered the parties to submit briefs on the appropriate remedy should the Court decide to invalidate the Revision Rule, 83 Fed. Reg. 49,184 (Sep. 28, 2018). Consistent with the Court's direction, Intervenor-Defendants Western Energy Alliance, Independent Petroleum Association of America and American Petroleum Institute hereby submit the following Joint Remedy Brief.

Contrary to statements made by Plaintiffs during the March 4, 2020 hearing, immediate vacatur of the Revision Rule is neither the presumptive nor the appropriate remedy. This Court may and should craft a remedy to avoid the disruptive consequences that would result from immediately and retroactively imposing the requirements of the 2016 Rule on operators. Specifically, if the Court vacates the Revision Rule, we request that the Court stay the vacatur's effect for one year and apply it only prospectively. It is not possible for either BLM or the regulated community to immediately bring themselves into compliance with the 2016 Rule prospectively, much less change past behavior conducted in compliance with the BLM regulations in place at the time. It is impossible to flip the "on" switch of such a sweeping regulation and expect immediate or even near-term compliance. A one-year, prospective delay in the effect of vacatur is consistent with BLM's determination in promulgating the 2016 Rule that one year was needed for the regulated community to fully comply with the 2016 Rule. This approach is particularly reasonable because operators could not reasonably have been expected to expend the time and financial resources necessary to prepare for compliance with the 2016 Rule that BLM twice suspended and replaced. Delayed vacatur that acts only prospectively would also ensure that operators are not retroactively penalized for noncompliance with a regulation that was not in effect.

A delay in the effective date of vacatur *from this Court* is necessary to avoid regulatory chaos and significant harms to operators. The disruptive effect of an immediate vacatur should not be punted for another court to deal with. Although there is pending litigation over the 2016 Rule in the United States District Court for the District of Wyoming, resolution of those challenges is likely at least several months away. This Court's delay in the effective date of vacatur of the

Revision Rule is the only way to ensure harm is avoided while giving the parties and the Wyoming court sufficient time to resolve the pending challenge to the 2016 Rule. Moreover, because the 2016 Rule was never fully effective, retroactive imposition of the 2016 Rule's requirements on operators would unfairly expose operators to BLM and Office of Natural Resources Revenue regulatory enforcement for past actions that operators cannot change.[1] Conversely, and also because the 2016 Rule was never fully effective and cannot be immediately implemented, a stayed vacatur would not prejudice the Plaintiffs.

II. COMPLETE AND IMMEDIATE VACATUR IS NEITHER THE ONLY REMEDY NOR THE APPROPRIATE REMEDY

Complete and immediate vacatur is not the only remedy to address a flawed rule, and it is not appropriate here. The Ninth Circuit has recognized that "[a]lthough the district court has power to do so, it is not required to set aside every unlawful agency action." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *accord Sierra Forest Legacy v. Sherman*, 951 F.Supp.2d 1100, 1105 (E.D. Cal. 2013) (citing *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 1995) (" It is well established in [the Ninth Circuit] that a Court is not mechanically obligated to vacate an agency decision that it finds invalid"). Rather, "[t]he court's decision to grant or deny injunctive or declaratory relief under the [Administrative Procedure Act] is controlled by principles of equity." *Nat'l Wildlife Fed'n*, 45 F.3d at 1343. Courts may fashion an appropriate remedy tailored to address a specific wrong. *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994).[2]

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[1] *See State of Wyoming et al. v. U.S. Dept. of the Interior et al.*, No. 2:16-CV-0285-SWS, Order Staying Implementation of Rule Provisions and Staying Action Pending Finalization of Revision Rule (D. Wyo. April 4, 2018), at n.9 ("No reasonable person would rush to comply with a rule that was delayed, suspended, and is soon to be revised, particularly when such compliance requires the expenditure of significant resources.")

[2] In the rulemaking context following judicial review under the Administrative Procedure Act, courts often remand to the agency without vacatur to remedy deficiencies. *See, e.g., Cal. Communities Against Toxins*, 688 F.3d at 994; *Western Oil & Gas Ass'n. v. U.S. EPA*, 633 F.2d 803, 813 (9th Cir.1980); *Idaho Farm Bureau Fed'n. v. Babbitt*, 58 F.3d 1392, 1406 (9th Cir.1995). This type of remedy is also available here for the reasons outlined by the Federal Defendants in Docket No. 162.

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When considering whether to vacate agency action, the Ninth Circuit considers "the disruptive consequences of an interim change that may itself be changed" as well as the severity of the agency's errors. *Cal. Communities Against Toxins v. U.S. Envtl. Protec. Agency*, 688 F.3d 989, 992 (9th Cir. 2012) (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C.Cir.1993) (internal quotation marks omitted)). In this case, immediate vacatur of the Revision Rule will have disruptive consequences that justify both staying vacatur and providing that it apply only prospectively.

III. THE COURT SHOULD STAY ANY VACATUR BY ONE YEAR

Courts regularly stay vacatur orders to allow for necessary interim action and to avoid the disruptive consequences of immediate vacatur. *See, e.g., Nat'l Educ. Ass'n v. DeVos*, 379 F.Supp.3d 1001, 1032 (N.D. Cal. 2019) (ordering a 30-day stay of vacatur order to minimize risk of confusion or disruption); *Anacostia Riverkeeper, Inc. v. Jackson*, 713 F.Supp.2d 50, 52-55 (D. D.C. 2010) (staying vacatur of various total maximum daily loads improperly promulgated by EPA under the Clean Water Act for one to seven years because the "disruptive effects of vacatur will be mitigated, if not eliminated, by staying vacatur."); *AARP v. U.S. Equal Employment Opportunity Comm'n*, 292 F.Supp.3d 238, 245 (D.C. Cir. 2017) (granting a one-year stay of the effective date of vacatur of two EEOC regulations to allow the EEOC to come up with interim or new permanent rules by the time the vacatur takes place); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 554 (D.C. Cir. 1983) (ordering a stay of vacatur of interim standard to allow EPA the opportunity to promulgate an emergency interim rule). This Court should stay any vacatur of the Revision Rule for one year, which is consistent with the timing of the 2016 Rule. Otherwise, immediate vacatur of the Revision Rule would have severe disruptive consequences for operators and BLM.

BLM specifically crafted the 2016 Rule to allow operators one year to comply with the most burdensome provisions of the Rule (known as the "phase-in" provisions). Such provisions include sections 3179.7(b) and 3179.8 (gas capture targets); sections 3179.201 and 202 (equipment replacement); section 3179.203 (control of storage tanks); and section 3179.301 (leak detection and repair requirements "LDAR"). *See* 81 Fed. Reg. 83,008, 83,082, 83,086–87 (Nov.

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18, 2016). Not only did BLM phase in the first gas capture target (85 percent) by one year, it then periodically ramped the targets downward over the first nine years of the 2016 Rule to 98 percent by January 1, 2026. *See id.* at 83,0832 (43 C.F.R. § 3179.7(b)(1)–(4)). BLM reasoned that, by phasing in the gas capture targets, the 2016 Rule would "allow sufficient time and flexibility to enable industry to better align oil development with gas infrastructure over time." *Id.* at 83,050. Similarly, BLM provided a one-year phase-in period for the other provisions to allow operators to obtain and install equipment.[3] *See, e.g.*, *id.* at 83,058.

Compliance with each of these obligations requires significant planning and lead time. For example, it can take months for larger operators to perform initial LDAR inspections, and significant time is required to order and install equipment required to comply with the storage tank, pneumatic controller, and pneumatic pump requirements. *See* Sgamma Decl., No. 2:16-cv-00285-SWS ¶ 11 (D. Wyo. Feb. 28, 2018). Many operators will need to assemble LDAR crews and hire third-party contractors, travel to and inspect sites, and design and engineer new recordkeeping and reporting systems. *Id.* Further, operators may now face additional delays because of the large number of other operators suddenly needing to order and install equipment and find personnel to perform inspections and other labor required for compliance. Some operators believed that as long as three years was necessary to obtain necessary equipment and hire and train inspectors. *See* 81 Fed. Reg. at 83,033.

And, operators are not the only entities that require more time to comply with the 2016 Rule. As communicated at the hearing, BLM also is not prepared to immediately implement the 2016 Rule. As of March 2018, multiple BLM field offices were unable to provide operators with guidance regarding various compliance obligations associated with the 2016 Rule. *See* Sgamma Decl., Case No. 2:16-cv-00285 ¶ 13 (D. Wyo. March 23, 2018). Operators had sought guidance on compliance questions including, but not limited to: how to address flaring of off-specification gas under 43 C.F.R. part 3179; how to determine gas capture percentage under section 3179.7; and

[3] Notably, in 2016, some industry commenters maintained that one year was insufficient to comply with the phased-in provisions of the 2016 Rule. *See* 81 Fed. Reg. at 83,050, 83,058.

how to define certain terms to allow for compliance with LDAR requirements under sections 3179.301 through 3179.305. *Id.* In some instances, BLM field offices were not able to advise operators on BLM's expectations for compliance, instead referencing that the 2016 Rule was under reconsideration and requesting that operators comply with current, and outdated processes. *Id.* In other circumstances, BLM field offices provided conflicting or confusing information, or refused or have been unable to answer questions. *Id.* BLM field offices also indicated that there has been no staff training on rule implementation or formal written directives or other guidance from BLM headquarters. *Id.* Because the 2016 Rule has been stayed or superseded since April 2018, BLM has not resolved, let alone made progress toward resolving, any of these implementation issues.

In addition, a one-year stay of vacatur is necessary given the significant compliance costs operators will incur. *See Cal. Communities Against Toxics*, 688 F.3d at 993 (finding vacatur inappropriate because it would delay the construction of a much needed power plant and stopping construction would be economically disastrous). Although BLM has acknowledged its 2016 cost estimates were inaccurate and too low, it still estimated that the 2016 Rule would cost up to $279 million per year to implement. *See* BLM, Waste Prevention Regulatory Impact Analysis, at 129 (Nov. 10, 2016). As the Agency noted in the Revision Rule, for marginal wells, this cost represents up to 1,037% of the value of expected production from the most marginal gas well and 236% of the total value of production from the most marginal oil well. 83 Fed. Reg. at 49,187. A one-year stay would allow operators to budget for these substantial costs. Should the Court fail to appropriately tailor the remedy, given the substantial compliance costs there also is a significant risk that marginal wells well be prematurely abandoned and the very waste problem both rules seek to avoid will be exacerbated.

Finally, to the extent Plaintiffs maintain that a stay is not warranted because industry or BLM should have been prepared to comply with the 2016 Rule, this rationale is wrong. Both industry and BLM appropriately relied on and implemented the Revision Rule while it was in effect. *See League of Wilderness Defenders-Blue Mtn. Biodiversity Project v. Bosworth et al.*, 383 F.Supp.2d 1285, 1303-4 (D. Or. 2005) (holding that when reviewing a challenged agency action

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under the Administrative Procedure Act, the court uses the regulations in effect at the time of the challenged decision rather than prior-enacted regulations); *Bark v. U.S. Forest Service*, No. CV 04-356-MO, 2007 WL 756746 at *5 (D. Or. March 3, 2007) (finding that under Ninth Circuit case law "the applicable … regulations are those in effect at the time the decision challenged in the lawsuit was prepared). Moreover, when BLM issued the Revision Rule, the Rule was entitled to a presumption of validity. *See Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir.2009) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir.2000)) (noting that courts should be "highly deferential [to the agency] and presume the agency action to be valid").

The fact that neither industry nor BLM can immediately implement the 2016 Rule warrants a one-year stay of any vacatur. These are the very types of "disruptive consequences" courts have sought to avoid. Accordingly, this Court should stay any vacatur by one year, consistent with the 2016 Rule.

IV. ANY VACATUR SHOULD BE PROSPECTIVE

If the Court decides to vacate the Revision Rule, any vacatur should be not only stayed, but also prospective. The U.S. Court of Appeals for the District of Columbia has recognized that vacatur of a rule, and retroactive reinstatement of a prior rule, can create impermissible retroactive liability. *Allied Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 153 (D.C. Cir. 1993) ("If indeed the remand leads to replacement of the per-licensee allocation, and licensees enjoy only refunds for the difference between liability under the old rule and liability under the new [rather than total refunds], it might be argued that such a result allows the new rule to have 'retroactive effect', in violation of *Georgetown University Hospital*."). The Supreme Court has stated that "[r]etroactivity is not favored in the law" and therefore held that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (citations omitted). Furthermore, courts often order prospective vacatur precisely to avoid the disruptive and unfair consequences that, as in this case, would accompany immediate vacatur. *See, e.g., Ctr. for Env'l Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954 (N.D. Cal. June

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20, 2016) (finding that prospective vacatur of agency guidance is warranted, in part, to mitigate the disruptive consequences of vacatur).

For example, if the Court were to vacate the Revision Rule entirely and immediately reinstate the 2016 Rule, operators would be required to review all flaring that they classified as unavoidably lost, and therefore not royalty-bearing, since December 2018 to determine whether or not the 2016 Rule also treats this flaring as unavoidably lost. If flaring previously reported as unavoidably lost under the Revision Rule will become royalty-bearing under the 2016 Rule, operators must revise the royalty report that is filed for every affected month on every effective lease. *See* Letter from Office of Natural Resources Revenue to Reporters (Apr. 9, 2018).[4] And, operators will be required to pay not only the additional royalty but also interest on the previously unavoidably lost gas. 30 U.S.C. § 1721(a). Moreover, even if the U.S. District Court for the District of Wyoming ultimately were to invalidate the 2016 Rule, operators would be able to recoup their royalties, but would not be able to recover overpayment interest. *See* Fixing America's Surface Transportation ("FAST") Act, Pub. L. No. 114-94, 129 Stat. 1312, Sec. 32301 (Dec. 4, 2015) (rescinding 30 U.S.C. § 1721(h) which formerly entitled operators of federal leases to interest on royalty overpayments). Operators also could potentially be subject to the retroactive imposition of regulatory violations for not complying with the 2016 Rule (e.g., not having the proper equipment installed), despite that, at the time, the 2016 Rule was suspended, and operators were not required to comply with the retroactively-applied regulatory requirements.

Where operators would be required to review and possibly correct prior reports and payments, courts have found that the "disruptive consequences" of vacatur warrants relief that is only prospective. For example, when invalidating a rule affecting Coast Guard shipping rates, the U.S. District Court for the District of Columbia found that the disruptive consequences of undoing administrative payments favored leaving a rule in place pending remand:

> In this case, vacatur would mean that the rates previously declared for the 2016 shipping season would be set aside and the 2015 rates, which were lower than those in 2016, would be deemed operative for the entirety of that shipping season. Shipping companies and pilotage associations would, after vacatur, find that every

[4] Available at https://www.onrr.gov/about/PDFDocs/Dear-Reporter-Letter_OGOR_4.9.2018.pdf.

> payment that was made in the 2016 season was erroneous. Moreover, it would appear that the Coast Guard would be unable to reinstate the 2016 rates through a properly justified new rule due to the presumption against retroactive rulemaking. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208–09, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) (quotation omitted). … **While there seems to be some dispute over whether and to what extent the pilotage associations might be required to issue refunds under those circumstances, to the extent that they would be required to do so, the disruptive consequences are clear.**

Am. Great Lakes Ports Ass'n v. Zukunft, 301 F. Supp.3d 99, 104 (D. D.C. 2018) (emphasis added). Similarly disruptive consequences have caused that court to vacate rules prospectively. *See Long-Distance Telephone Service Fed. Excise Tax Refund Litigation*, 853 F.Supp.2d 138, 144 (D. D.C. 2012) (finding retroactive vacatur was not warranted because it would call into question tax refunds that had already been processed).

For every provision of the Revision Rule, operators must compare it with the 2016 Rule to determine compliance, which includes royalty consequences. Even worse, operators will be powerless to change past behavior and could fall victim to retroactive penalties despite compliance with applicable regulations in effect at the time. The Court can avoid this regulatory chaos and disruptive consequence by applying any vacatur of the Revision Rule prospectively only.

V. CONCLUSION

For the foregoing reasons, we respectfully request that if the Court invalidates the Revision Rule, it stay vacatur for one year and apply vacatur only prospectively.

DATED: March 11, 2020

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 10960 Wilshire Boulevard, 18th Floor, Los Angeles, CA 90024-3804.

On March 11, 2020, I served the following document(s) described as **WESTERN ENERGY ALLIANCE, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND AMERICAN PETROLEUM INSTITUTE'S JOINT REMEDY BRIEF** on the interested parties in this action as follows:

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 11, 2020, at Los Angeles, California.

/s/ Christina Samayoa
Christina Samayoa