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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. DAVID BERNHARDT, *et al.*, Defendants.	No. 4:18-cv-05712-YGR (Consolidated With Case No. 4:18-cv-05984-YGR) **DEFENDANTS' MEMORANDUM OF LAW ON REMEDY**

Defendants submit the following brief on remedy as ordered by the Court at the March 4, 2020 hearing on the parties' cross motions for summary judgment.

In their complaints and briefing, Plaintiffs request vacatur of the entire Revision Rule should they prevail in this suit. But vacatur of the Revision Rule is neither equitable nor practicable, and is not required by law. The Court has discretion to consider the equities, including the fact that immediate reinstatement of the 2016 Rule not only is impossible given the time and effort required for operators to come into compliance with the Rule but also improbable given that intervenors in this suit are poised to bring an immediate challenge to the 2016 Rule in the Wyoming district court. Nor is such a sweeping remedy necessary. Plaintiffs' challenge is limited to certain provisions of the Revision Rule. By its own terms, the Rule is severable, rendering Plaintiffs' proposed remedy indiscriminately broad. AR 8.

To avoid the significant uncertainty and disruption that would follow from vacatur of the Revision Rule, this Court should remand to the agency without vacatur to allow the Bureau of Land Management ("BLM") to correct any errors. If the Court is inclined to vacate the Revision Rule, it should allow one year for both operators and the agency to come into compliance with the 2016 Rule, and it should limit the scope of the vacatur to the specific provisions of the Revision Rule challenged by Plaintiffs and held deficient by the Court.

This court "has discretion to shape an equitable remedy" for violations of the Administrative Procedure Act ("APA"). *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) ("[G]uided by authorities that recognize that a reviewing court has discretion to shape an equitable remedy, we leave the challenged designations in effect." (citations omitted)). To this end, "[a] flawed rule need not be vacated." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). The Ninth Circuit has consistently explained that "when equity demands, the regulation can be left in place while the agency follows the necessary procedures" to correct its action. *Idaho Farm Bureau*, 58 F.3d at 1405 (citations omitted); *see Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (finding that a court may remand without vacatur and permit the agency action to remain in force until the agency can consider or replace the action); *Pit River Tribe v.*

U.S. Forest Serv., 615 F.3d 1069, 1080–81 (9th Cir. 2010) ("Our courts have long held that relief for a NEPA violation is subject to equity principles."). To determine if a remedy as sweeping as vacatur is appropriate, courts consider (1) the seriousness of the agency's errors and (2) "the disruptive consequences" arising from vacatur. *Cal. Cmtys.*, 688 F.3d at 992.

In applying the first factor, the court does not look only at procedural error, but also "the extent of doubt whether the agency chose correctly." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). This inquiry "counsels remand without vacatur" where "an agency may be able readily to cure a defect in its explanation of a decision." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (quoted with approval in *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010)). The Court need not vacate where "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 151. In *Pollinator Stewardship Council v. EPA*, the Ninth Circuit posed the question as "whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." 806 F.3d 520, 532 (9th Cir. 2015).

Here, depending on the error found by this Court, BLM should be able to correct the error on remand by "offer[ing] better reasoning" or additional procedures. *Id.* By way of example, if the Court were to find that BLM's National Environmental Policy Act ("NEPA") analysis were deficient, BLM can correct that error on remand through additional environmental analysis. *See, e.g., Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1034 (E.D. Cal. 2013) (remanding to agency to address NEPA error without vacatur). Similarly, if the court were to find that the agency denied the public an opportunity to comment on any aspect of the rulemaking, the agency can provide for additional public comment on remand without the need to vacate the Rule. The Ninth Circuit took this same approach in *Idaho Farm Bureau*, in which the agency had failed to disclose a report that "was central to the Secretary's decision." 58 F.3d at 1403. The Court held that opportunity for public comment on that report was "particularly

crucial," and that the agency was required to disclose the report and then reconsider its decision. *Id.* at 1403-04. But the Court held that "equitable concerns weigh toward leaving the [decision] in place while [the agency] remedies its procedural error." *Id.* at 1406; *see also Cal. Cmtys.*, 688 F.3d at 992 (describing this as a "significant" error that did not require vacatur). Likewise, in *California Communities*, the agency conceded that there were "flaws in the reasoning" supporting its rule. 688 F.3d at 993. Yet the Ninth Circuit in *California Communities* declined to vacate that rule, holding that the **"delay and trouble vacatur would cause are severe."** *Id.* at 993 (emphasis added). The same is true here.

The second relevant factor under *California Communities* is "the disruptive consequences" of vacatur. *See id.* at 992 (quoting *Allied-Signal*, 988 F.2d at 150-51). Here, vacatur would be extremely disruptive because it would require immediate compliance with a new regulatory regime that has never been fully in effect. The 2016 Rule had a one-year implementation period because BLM recognized it was infeasible for operators to immediately acquire and install equipment, hire additional employees, adopt new procedures, and take other actions necessary to implement the provisions of the rule. AR 1, 925, 934, 949, 953. But because the 2016 Rule was postponed and suspended by the agency and then stayed by the Wyoming district court, operators never had the year to come into compliance. Then, almost 18 months ago, the agency significantly revised the rule, rescinding the provisions subject to phase-in periods. Operators are therefore not able to comply with the 2016 Rule in the near term. *See Wyoming v. U.S. Dep't of the Interior*, 366 F. Supp. 3d 1284, 1291-92 & n.9 (D. Wyo. 2018) (holding "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," and noting that operators would be "irreparably harmed by full and immediate implementation of the 2016 Waste Prevention Rule, magnified by temporary implementation of significant provisions meant to be phased-in over time"), *vacated as moot by* 768 F. App'x 790 (10th Cir. 2019). Nor is BLM in a position to administer the 2016 Rule immediately, as it would need to conduct training for BLM personnel, educate the regulated community, and develop any necessary guidance. *See* AR 662 (noting that "implementation

activities" would include "internal training, operator outreach/education, developing clarifying guidance, etc.").

Vacatur would also result in disrupting effects from an "interim change that may itself be changed." *Cal. Cmtys.*, 688 F.3d at 992 (citation omitted). The Wyoming district court in the challenge to the 2016 Rule has signaled its willingness to entertain an immediate challenge to the 2016 Rule if it were reinstated. Order Granting Motions to Stay Proceedings, *Wyoming v. Dep't of the Interior*, No. 16-cv-285 (D. Wyo. Aug. 23, 2019), ECF No. 261. Any potential injunction of the 2016 Rule would revive NTL-4A, which no party disputes offers less environmental protections than the 2016 Rule and the Revision Rule. These unintended consequences of vacatur make plain that Plaintiffs' proposed indiscriminate approach would leave every party worse off, including Plaintiffs. A remand to the agency without vacatur, or a deferred vacatur that provides a one-year phase-in period for the 2016 Rule, could help alleviate some of the most disruptive consequences of immediate implementation of the 2016 Rule.

If the Court is inclined to vacate the Revision Rule, it should exercise its equitable discretion and limit the scope of the vacatur to the specific provisions of the rule challenged by Plaintiffs and affected by its holdings. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (encouraging court to consider "less drastic remedy" such as "partial" vacatur). The Revision Rule is severable on its face and many of its provisions "do not inextricably depend on each other." AR 8. For example, if Plaintiffs were to succeed on their claim that BLM improperly delegated its authority to the states, that would justify vacatur only of 43 C.F.R. § 3179.201(a). Plaintiffs have not challenged the remainder of § 3179.201, and the rest of that provision can stand on its own, as a national standard for oil-well gas flaring. Likewise, Plaintiffs have not challenged the measurement and reporting requirements of § 3179.301 or the tribal deference provisions in § 3179.401. Plaintiffs have also not challenged BLM's reason for rescinding the waste minimization plans required by former § 3162.3-1(j)—that the requirement was duplicative of similar requirements already in place in most states. AR 9. And Plaintiffs have not challenged BLM's reasons for revising Sections 3179.101-104, which are all technical and unrelated to the cost of those requirements. AR 16-19.

Additionally, in many cases, BLM provided multiple reasons for rescinding or revising a particular provision and Plaintiffs have not questioned all of those reasons. For example, BLM rescinded the gas capture requirements in former § 3179.7, not only because of the costs that those requirements imposed, but also because of "practical problems" it had identified. AR 10. Among other things, the agency explained that the requirements "would have allowed unnecessary flaring in some cases while prohibiting necessary flaring in others," and provided specific examples of those situations. AR 10. Plaintiffs, however, challenged only one of BLM's reasons for its rescission of this provision and, therefore, Plaintiffs' argument does not overcome all of BLM's rationale. For this reason, Plaintiffs' argument does not and should not justify vacatur of the provision and restoration of a prior regulatory provision that BLM found to be practically and technically lacking.

CONCLUSION

Because vacatur of the Revision Rule would be an indiscriminate and unnecessarily broad remedy that would likely lead to outcomes benefitting no party, this Court should instead remand to the agency should it find any violation of law. If the Court is inclined to vacate the Revision Rule, it should defer vacatur by one year to allow time for both operators and the agency to come into compliance with the 2016 Rule, and it should limit the scope of the vacatur to the specific provisions of the Revision Rule challenged by Plaintiffs and held deficient by the Court.

Respectfully submitted this 11th day of March, 2020.

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