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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

DAVID BERNHARDT, et al.,

Defendants.

SIERRA CLUB, et al.,

Plaintiffs,

v.

DAVID BERNHARDT, et al.,

Defendants.

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

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

PLAINTIFFS' JOINT SUPPLEMENTAL BRIEF ON REMEDY

Judge: Hon. Yvonne Gonzalez Rogers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

FEDERAL REGULATIONS

INTRODUCTION

BLM has spent years attempting to unlawfully delay, suspend, and rescind the Waste Prevention Rule. Its current effort—the Rescission—attempts to write the agency's obligation to prevent waste out of the Mineral Leasing Act ("MLA"), arbitrarily ignores significant harms to the public and relies on data not made available for public comment in violation of the Administrative Procedure Act ("APA"), and fails to take the required hard look at the significant public health and climate impacts under the National Environmental Policy Act ("NEPA"). BLM itself recognizes that the Rescission allows the loss of 299 billion cubic feet of publicly owned natural gas, reduces royalties to tribes and the public by $79.1 million, and increases air pollution and greenhouse gas emissions. AR 22, 91, 94, 97. Despite these serious and ongoing harms, BLM now urges this Court to keep the Rescission wholly (or partially) in effect even if this Court finds that it violated the law. This Court should decline the invitation, and apply the standard remedy of vacating the rule it is entirety if it finds the Rescission unlawful.

ARGUMENT

I. THE COURT SHOULD APPLY THE DEFAULT REMEDY OF VACATUR.

The default remedy for unlawful agency regulation under both the APA and NEPA is vacatur of the unlawful rule and reinstatement of the prior rule. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (*en banc*) ("Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid" and the "effect of invalidating an agency rule is to reinstate the rule previously in force") (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005)); *Se. Alaska Conserv. Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action"), *rev'd on other grounds*, *Coeur Alaska, Inc. v. Se. Alaska Conserv. Council*, 557 U.S. 261 (2009); *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1020 (9th Cir. 2009) (upholding vacatur and reinstatement of prior regulation based on NEPA violation); *Klamath–Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1241 (N.D. Cal. 2015) ("When a court finds an agency's decision unlawful under the [APA], vacatur is the standard remedy"); *Nat'l Min.*

Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated'") (citation omitted); *see also* ECF No. 141 at 54–55 (citing cases), ECF No. 140 at 38 (same). Consistent with BLM's repeated, unlawful attempts to delay the Waste Prevention Rule's critical protections for the last three years, BLM and Defendant-Intervenors (collectively, "Defendants") argue that the Court should depart from the default remedy and leave the Rescission in place. But they provide no good reason for the Court to allow the harm caused by the illegal Rescission—including increased waste, reduced royalties, and air and climate pollution—to continue.

Departing from the default remedy of vacatur risks giving agencies a "free pass ... to exceed their statutory authority and ignore their legal obligations under the APA, making a mockery of the statute." *California v. BLM*, 277 F. Supp. 3d 1106, 1126 (N.D. Cal. 2017) ("*California I*"). That is especially true here, where BLM has delayed implementation of critical protections through three successive unlawful actions. Accordingly, courts exercise their equitable discretion to depart from the default remedy only in "rare circumstances." *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010). None of these circumstances apply here.

When determining whether vacatur is appropriate, courts "consider whether vacating a faulty rule could result in possible environmental harm, and [courts] have chosen to leave a rule in place when vacating would risk such harm," defeating a statute's purpose. *Pollinator Stewardship Council v. Envtl. Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015); *see Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (declining to vacate because setting aside listing of snail species as endangered would risk potential extinction); *Cal. Cmtys. Against Toxics v. Envtl. Prot. Agency*, 688 F.3d 989, 994 (9th Cir. 2012) (remanding without vacatur because vacating could increase air pollution, undermining the Clean Air Act's goals); *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1022 (E.D. Cal. 2013) (declining to vacate because leaving existing framework "in place while the Agency corrects the deficiency in its NEPA analysis is environmentally preferable").

Here, remanding the Rescission without vacating it would undermine the goals of BLM's governing statutes by permitting *increased* waste of public resources, as well as allowing harmful pollution that should have been abated long ago. Conversely, vacating the Rescission would reinstate the Waste Prevention Rule, which has substantial *beneficial* consequences for the public, as this Court has repeatedly recognized. *California I*, 277 F. Supp. 3d at 1126; *see also California v. BLM*, 286 F. Supp. 3d 1054, 1076 (N.D. Cal. 2018) ("*California II*") ("harms [from the suspension of the Waste Prevention Rule] will have substantial detrimental effects on public health, and unlike economic loss, cannot be recovered"). Vacating the Rescission will reinstate urgently-needed protections that result in the capture of 299 billion cubic feet of otherwise-wasted natural gas, secure tens of millions in royalties to tribes and the public, and cut air pollution and greenhouse gas emissions. *See* AR 22, 81, 91, 94, 97.

Courts next "weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *Pollinator Stewardship Council*, 806 F.3d at 532 (internal quotations and citations omitted). Here, a remedy other than vacatur is inappropriate under both factors. First, the legal flaws in the Rescission are "serious." *See id.* (finding agency errors serious if "fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand"). Each of the issues raised by Plaintiffs—BLM's fundamentally flawed interpretation of "waste" under the MLA; BLM's arbitrary finding of economic burden and reliance on a flawed assessment of costs at marginal wells that was never made available to the public; BLM's placement of a "thumb on the scale" by over-counting industry cost-savings while undervaluing lost public benefits from the Rescission in its comparison of costs and benefits; and BLM's failure to fully consider impacts under NEPA—goes to the heart of BLM's justifications for its unlawful action. A finding for Plaintiffs on any of these issues would warrant vacatur. *See, e.g., California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1178–79 (N.D. Cal. 2019) ("*California III*") (finding "serious violations" of the APA warranting vacatur where agency "violated clearly established Supreme Court precedent requiring an agency to provide a reasoned explanation for disregarding and contradicting facts

and circumstances underlying the adoption of the rules that it now seeks to repeal" and "failed to comport with the APA's notice and comment requirement, thereby denying the public a meaningful opportunity to participate in the regulatory process"); *California I*, 277 F. Supp. 3d at 1125 (finding BLM's errors in "illegally invoking" Section 705 of the APA and "circumvent[ing] the APA's notice-and-comment requirements were serious"); *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1245 (finding agency's failure to conduct NEPA cumulative effects analysis—"an integral part of fulfilling NEPA's purposes"—warranted vacatur). BLM's errors here are serious and cannot be easily cured by "better reasoning" or "additional procedures." *See* Defendants' Memorandum of Law on Remedy, ECF No. 162 ("BLM Br.") at 3.[1]

Second, the potential impacts pointed to by Defendants are not the type of severe "disruptive consequences" that warrant remand without vacatur. In *California I*, this district court vacated BLM's initial unlawful stay of the Waste Prevention Rule, concluding that the "potential disruptive consequences" to industry from reinstating the Waste Prevention Rule were outweighed by the fact that "compliance [with the Waste Prevention Rule] will reduce the waste of public resources, curb the emission of harmful environmental pollutants, increase royalty payments, and, for many of the new requirements relating to reducing the waste of valuable resources, pay for itself over time." *California I*, 277 F. Supp. 3d at 1125–26.

While Defendants assert that vacatur of the Rescission would be "extremely disruptive," BLM Br. at 4, they provide no evidence documenting their alleged harms. Defendants have had ample time to understand and prepare to implement the Waste Prevention Rule. This is BLM's *third* unlawful attempt to delay or rescind the critical protections in the Waste Prevention Rule. Moreover, Defendants' assertions that the Waste Prevention Rule "has never been fully in effect" are incorrect. BLM Br. at 4; *see* Western Energy Alliance, Independent Petroleum Association of

[1] For example, BLM suggests that vacatur is not necessary if the Court finds a NEPA violation, because BLM can simply "correct that error on remand through additional environmental analysis." BLM Br. at 3. This "apparent perception that … conducting the requisite comprehensive review is a mere formality, causes some concern … ." *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010). Indeed, it defeats NEPA's fundamental purpose of requiring agencies to consider environmental and health impacts *before* taking action, with the goal of improving the ultimate decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

American, and American Petroleum Institute's Joint Remedy Brief, ECF No. 163 ("Industry Br.") at 4. The Waste Prevention Rule was fully in effect for much of 2017, *see* Joint Statement Regarding Procedural History, ECF No. 98 at 3–5, and operators should have been preparing during that time to fulfill requirements with January 2018 compliance dates. Furthermore, between February 2018 and April 2018, *all provisions* of the rule (including "phase-in" provisions cited by Industry-Intervenors, Industry Br. at 5–6) were fully operative following this district court's preliminary injunction of BLM's suspension of the Rule, and operators were required to comply. *California II*, 286 F. Supp. 3d at 1076; *see also* ECF No. 98 at 5–6.[2]

Furthermore, the unsubstantiated possibility that some operators may not be prepared to immediately comply with the Waste Prevention Rule now is not a reason to remand the Rescission without vacatur or to impose a lengthy stay of vacatur. *See California I*, 277 F. Supp. 3d at 1126 (vacatur "would merely put the regulated parties back in the position of working toward compliance. If some of the regulated entities of the oil and gas industry will not be able to [comply] … that is a problem to some extent of their own making and is not a sufficient reason for the Court to decline vacatur"); *California III*, 381 F. Supp. 3d at 1179 (vacatur not unduly disruptive because "any significant change in the rules … inevitably will result in a period of adjustment for interested parties").[3]

Industry-Intervenors' related claims that a stay of vacatur is needed to avoid "significant compliance costs," Industry Br. at 7, are unsupported by both the case law and the evidence in the record. This case is a far cry from *California Communities*, 688 F.3d at 993–94, which Industry-Intervenors cite for the proposition that compliance costs may necessitate a delay of vacatur. In that case, the court remanded a Clean Air Act rule regarding offset credits for a power plant to

[2] Industry-Intervenors cite to a two year-old declaration filed in the District of Wyoming by the head of one industry trade group for the proposition that industry is not prepared to comply. Industry Br. at 6. That declaration does not list any companies that were unable to comply with the Waste Prevention Rule. Moreover, the only evidence in the record before this Court shows that major operators were complying with the Waste Prevention Rule before BLM's unlawful attempts to suspend and rescind it, *see* AR 24151 (noting that XTO, the production subsidiary of ExxonMobil, was complying), and there is no evidence that operators and BLM could not move swiftly to implement the Rule.

[3] Plaintiffs do not disagree that vacatur of the Rescission may only be applied prospectively. *See* Industry Br. at 8-10.

EPA without vacatur, because immediate vacatur could have posed a threat to the power supply, spurring blackouts that would "necessitate the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent." *Id.* at 994. In contrast to those substantial threats to the environment and communities, the only harm Industry-Intervenors posit here is that operators may prematurely abandon an unspecified number of marginal wells due to compliance costs, citing BLM's comparison of total compliance costs to annual revenues at individual marginal wells. Industry Br. at 7. But, even if those harms standing alone could justify remand (they do not), as Plaintiffs explained in their briefs, that analysis is deeply flawed and misleading and fundamentally does not support claims of premature abandonment in light of exemptions in the Waste Prevention Rule for when compliance costs would cause a well to shut-in. *See, e.g.*, ECF No. 109 at 27–32, ECF No. 141 at 32–37. Industry-Intervenors' claim of substantial costs is further undercut by BLM's analysis finding that compliance costs represent just a small fraction of an operator's profits (0.19% of the average small company's profit margin). AR 23.

Finally, speculation about what may happen in litigation over the Waste Prevention Rule in the District of Wyoming is not a reason to "to allow a major … rule that the Court has determined was improperly repealed to nonetheless remain permanently repealed." *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 917 (N.D. Cal. 2006), *aff'd* 575 F.3d 999 (9th Cir. 2009). Indeed, this Court repeatedly has faced the prospect that its decision would affect pending litigation in the District of Wyoming, and has never let that influence its analysis of the appropriate remedy. *See California I*, 277 F. Supp. 3d at 1125; *California II*, 286 F. Supp. 3d at 1061–62.

Furthermore, it is disingenuous and speculative to suggest that vacatur of the Rescission is an "interim change" based on the possibility of continued litigation in the District of Wyoming, BLM Br. at 5, or that the Wyoming district court will be "force[d]" to address the Waste Prevention Rule through "the extraordinary remedy of an injunction." State of Wyoming's Brief Regarding Remedy, ECF No. 164 ("Wyoming Br.") at 3. Indeed, the only time the Wyoming district court considered the merits of the challenge to the Waste Prevention Rule, it found no

likelihood of success on the merits. *Wyoming v. U.S. Dep't of Interior*, 2017 U.S. Dist. LEXIS 5736, at *31, 33–34 (D. Wyo. Jan. 16, 2017).[4] Likewise, it is utterly speculative that a "potential injunction of the 2016 Rule would [fully] revive NTL-4A." BLM Br. at 5. At any rate, it is for the Wyoming district court to decide whether, should it find any provision of the Waste Prevention Rule unlawful, provisions of the Waste Prevention Rule or the NTL-4A should apply in the interim.

For all these reasons, the Court should not countenance the agency's request for a "free pass … to exceed their statutory authority and ignore their legal obligations," and should vacate the Rescission. *California I*, 277 F. Supp. 3d at 1126. However, as Defendants have represented and this Court recognized at the hearing on cross-motions for summary judgment, a decision to immediately vacate the Rescission would result in the revival of litigation challenging the Waste Prevention Rule in the Wyoming district court, *see* Wyoming Br. at 2, along with likely requests to that court for emergency relief. To forestall additional delay and expenditure of resources briefing such relief,[5] Plaintiffs believe that a decision by this Court to stay an order vacating the Rescission for a period of up to 90 days would help to facilitate a merits decision in the nearly fully-briefed challenges to the Waste Prevention Rule in the Wyoming litigation. *See* Wyoming Br. at 3 ("substantial progress has already [been] made on merits briefing" in the Wyoming litigation); Industry Br. at 3 (resolution of the Wyoming litigation may be done in "several months"). Plaintiffs believe that the Waste Prevention Rule was a lawful exercise of BLM's authority, are prepared to fully defend those standards before the Wyoming district court, and have a strong interest in that court expeditiously rendering a decision on the merits of the Rule.

[4] While the Wyoming district court later stayed portions of the Waste Prevention Rule, that decision was not based on the merits of the Waste Prevention Rule, but to allow BLM to time to finalize the Rescission so that the court could "meaningfully and finally engage in a merits analysis of the issues raised by the parties." *Wyoming v. U.S. Dep't of Interior*, 366 F. Supp. 3d 1284, 1292 (D. Wyo. 2018), *vacated as moot*, 768 F. App'x 790 (10th Cir. 2019). Should this Court find the Rescission unlawful, that rationale for a stay of the Waste Prevention Rule would no longer apply.

[5] Petitioners in the Wyoming litigation have previously filed three separate sets of preliminary injunction requests in that case, a pattern that has contributed to delay in resolving the merits of those challenges. *See* ECF No. 98 at 3, 5–6.

II. THE COURT SHOULD NOT SEVER ANY PORTION OF THE RESCISSION.

There is no merit to BLM's argument that the Court should limit the scope of vacatur to certain portions of the Rescission. BLM Br. at 5-6.[6] From the outset of this litigation, Plaintiffs have challenged each of BLM's primary justifications for the Rescission, and sought to have the rule vacated in its entirety. *See* ECF No. 29 at 3, 23 (State Plaintiffs requesting "order vacating Defendants' unlawful issuance of the [Rescission] so that the Waste Prevention Rule is automatically reinstated in its entirety"); ECF No. 1 in Case No. 18-cv-05984-YGR (Citizen and Tribal Group Plaintiffs requesting Court to "[v]acate the Rescission Rule and reinstate the Waste Prevention Rule in its entirety"). BLM provides no authority for the proposition that Plaintiffs must challenge every single statement in a rulemaking in order secure the default remedy of a vacatur. To the contrary, if the Court reaches the remedy issue, the relevant legal authority governing severability supports vacatur of the entire Rescission.

As discussed above, when a court finds an agency rulemaking to be unlawful under the APA, vacatur of the entire rule is the standard remedy. *See* 5 U.S.C. § 706(2)(A). Courts may set aside part of an agency action only if it is severable from the rest of the action. *See Arizona Pub. Serv. Co. v. Envtl. Prot. Agency*, 562 F.3d 1116, 1122 (10th Cir. 2009). "Whether the offending portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. Fed. Commc'ns Comm'n*, 236 F.3d 13, 22 (D.C. Cir. 2001) (citing *K-Mart Corp. v. Cartier, Inc.* 486 U.S. 281, 294 (1988)) (emphasis in original). When evaluating an

[6] BLM cites to *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) for the proposition that a court should consider the "less drastic remedy" of a "partial" vacatur. *See* BLM Br. at 5. However, the Supreme Court in *Monsanto* was contrasting vacatur with the "extraordinary" remedy of an injunction. *See Monsanto*, 561 U.S. at 165-66 ("If a less drastic remedy (such as partial or complete vacatur of [agency's] deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted."). Not only did the Supreme Court also characterize "complete vacatur" as a "less drastic remedy," *id.*, but this decision is inapposite given that Plaintiffs have not sought an injunction here. *See* ECF No. 29 at 23 (seeking declaratory judgment and vacatur); ECF No. 1 in Case No. 18-cv-05984-YGR at 49 (same). Because Plaintiffs have sought vacatur, not an injunction, the concerns raised by Defendant-Intervenor Wyoming regarding nationwide injunctions, Wyoming Br. at 2-4, are likewise misplaced. *See Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1186 (9th Cir. 2004) (setting aside an unlawful agency decision through vacatur "prohibits, as a practical matter, the enforcement of" that decision, but is not "the practical equivalent of 'enjoining'" the agency).

agency's intent, the court must be able to find "without any substantial doubt that the agency would have adopted the severed portion on its own." *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 708 (D.C. Cir. 2018) (quotations omitted). When that "doubt" is present, the court will not "attempt, even with the assistance of agency counsel, to fashion a valid regulation from the remnants of the old rule." *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 867 (D.C. Cir. 2006) (quotations omitted).

Here, BLM claims that the Rescission is severable on its face and that many of its provisions "do not inextricably depend on each other." BLM Br. at 5 (citing AR 8). However, the vague language regarding severability in the Rescission does not end the inquiry. As the U.S. Supreme Court has held, "a severability clause is an aid merely; not an inexorable command." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 n.49 (1997)). The Supreme Court has further cautioned that such a clause does not give a court license to "devise a judicial remedy that ... entail[s] quintessentially legislative work." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). "Such an approach would inflict enormous costs on both courts and litigants." *Whole Woman's Health*, 136 S. Ct. at 2319.

BLM was explicit in its rulemaking that the Rescission was promulgated based on a new interpretation of its statutory authority, its desire to reduce regulatory burdens, an updated cost-benefit analysis, and alleged duplication with EPA and state regulations (AR 1–5)—the very justifications Plaintiffs challenged in this case. The provisions now cited by BLM are explicitly based on these justifications and provide no support for its arguments regarding severability. *See* BLM Br. at 5-6. For example, BLM's new rules governing oil-well gas flaring in 43 C.F.R. § 3179.201 replaced the more stringent "capture percentage" requirements in the Waste Prevention Rule, and are explicitly justified by BLM's new analysis of state regulations (AR 19–20), and, by BLM's own admission, its new interpretation of its statutory authority. *See* ECF No. 123 at 24-25 (BLM stating that its "change in its position on the effectiveness of state regulations … is based on BLM's changed view of 'waste' in the" Rescission). Thus, BLM's assertion that a

finding that it improperly delegated its authority to states would justify vacatur of only 43 C.F.R. § 3179.201(a) does not withstand scrutiny. BLM Br. at 5. Section 3179.201(a) essentially provides that gas vented or flared in compliance with state regulations is royalty-free. Striking this provision would not cure the deficiencies in the remaining rule that result from BLM's unlawful definition of "waste," and related determination that every state adequately prevents waste. Similarly, BLM's claim that Plaintiffs did not challenge its justification for rescinding the waste minimization plan requirement is simply false—Plaintiffs addressed both the duplication and burden arguments in their briefs and during oral argument on cross-motions for summary judgment. *See, e.g.*, ECF 108 at 29-33; ECF No. 140 at 19, 26–28. So to for Rescission's changes to 43 C.F.R. §§ 3179.101–104. These provisions are inextricably bound up with what is considered avoidable or unavoidable loss, categorizations that go to the heart of what each rule considered "waste," a topic that was extensively litigated.

Moreover, even if some "technical" remnants of the Rescission are untethered to these justifications, *see* BLM Br. at 5, it makes no sense to sever such portions given the complete lack of evidence that BLM would have enacted such provisions alone. *See MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 23 (vacating entire rule where severing portions "would severely distort the [agency's] program and produce a rule strikingly different from any the [agency] has ever considered or promulgated"); *Telephone and Data Systems, Inc. v. Fed. Commc'ns Comm'n*, 19 F.3d 42, 50 (D.C. Cir. 1994) (finding vacatur of the whole agency order appropriate where "[t]he intertwined character of the order's component parts gives rise to a substantial doubt that a partial affirmance would comport with the [agency's] intent"). Vacatur of the entire Rescission is also "in keeping with the fundamental principle that agency policy is to be made, in the first instance, by the agency itself—not by courts, and not by agency counsel." *See Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989).

Finally, "[w]hen a rule is so saturated with error, as here, there is no point in trying to sever the problematic provisions. The whole rule must go." *See City and Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1024-25 (N.D. Cal. 2019), *appeal docketed*, No. 20-15398 (9th Cir.

Mar. 9, 2020). BLM's numerous and serious violations of law in promulgating the Rescission warrant vacatur of the entire rule. *See N. Carolina v. Envtl. Prot. Agency*, 531 F.3d 896, 929 (D.C. Cir. 2008) (finding that it must vacate agency rule where its "fundamental flaws" foreclose the agency "from promulgating the same standards on remand") (quoting *Nat. Res. Def. Council v. Envtl. Prot. Agency*, 489 F.3d 1250, 1261-61 (D.C. Cir. 2007)); *California III*, 381 F. Supp. 3d at 1178-79 (finding agency's failure to comply with Supreme Court precedent "requiring an agency to provide a reasoned explanation for disregarding and contradicting facts and circumstances underlying the adoption of the rules that it now seeks to repeal," and failure "to comport with the APA's notice and comment requirement," to be "serious" and vacating entire repeal rule).

CONCLUSION

Given BLM's numerous and serious violations of law in promulgating the Rescission, Plaintiffs respectfully request that this Court grant their motions for summary judgment, deny Defendants' cross-motions for summary judgment, declare that the Rescission is unlawful, and vacate the entire Rescission.

Dated: March 18, 2020

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