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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and STATE OF MONTANA, *et al.*,	)	
	)	Civil No. 16-cv-285-SWS
Petitioners,	)	(Lead Case)
v.	)	**STATE OF WYOMING AND STATE OF MONTANA'S REPLY IN SUPPORT OF PETITION FOR REVIEW OF FINAL AGENCY ACTION**
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
Respondents,	)	
WESTERN ENERGY ALLIANCE, *et al.*	)	
Petitioners,	)	
v.	)	Civil No. 16-cv-280-SWS
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
Respondents.	)	

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INTRODUCTION

In their opening brief, the States of Wyoming and Montana (States) demonstrated that the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (2016 Rule), exceeded the Bureau of Land Management's statutory authority, unlawfully relied on ancillary benefits to justify its significant costs, and unlawfully conflicted with both the Clean Air Act and the Administrative Procedure Act. (Docket No. 141). Since then, this matter has taken a number of twists and turns, including most recently, the Bureau's confession of error and request for vacatur. (Docket No. 278). In addition to the errors set forth in their opening brief and the opening briefs of the other Petitioners, the States agree with the Bureau's confession of additional errors.

They also agree that in light of all these errors, the Court should vacate the 2016 Rule.[1] In fact, equity weighs strongly in favor of vacatur and preservation of the status quo that has persisted since 1979. The 2016 Rule has never been fully implemented, and doing so years after the original phase-in date would cause significant disruptive consequences. After four years of litigation in two different

[1] The States also agree with the Bureau that the severable provisions of the 2016 Rule set forth on page 25 of the Bureau's Supplemental Merits Response Brief (Docket No. 278) have not been challenged in this litigation and should not be enjoined or vacated. References to the 2016 Rule as a whole in this brief are made for convenience only and more specifically refer to 43 C.F.R. subpart 3179 in its entirety.

courts, over two different rules, it has become apparent that continuing under the regulatory regime that has worked for decades represents the only sensible course until the Bureau can promulgate a rule that can withstand judicial review no matter where it is challenged.

BACKGROUND

The Bureau has thoroughly recited the administrative and judicial proceedings that bring this case back before the Court, and the States incorporate the Bureau's statement of the relevant background facts.

DISCUSSION

I. The 2016 Rule is unlawful for the reasons confessed by the Bureau.

The Bureau admits that in issuing the 2016 Rule it failed to "(1) assess the impact of the 2016 Rule on marginal wells, (2) separately consider the domestic costs and benefits of the 2016 Rule, and (3) explain and identify support for the rule's capture requirements." (Docket No. 278 at 10-11). Additionally, the Bureau admits that it erred in its interpretation of the Mineral Leasing Act's waste provisions. (Docket No. 278 at 19). The States agree with the Bureau on all counts, and would offer three additional points for the Court's consideration of the errors confessed by the Bureau.

First, California, New Mexico, and the citizen groups (Intervenors) assert that the Court must decide the issues in this case on the 2016 Rule's rationale and

administrative record, not on impermissible post-hoc litigation positions. (Docket No. 279 at 2-6). The States agree that "[i]t is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, --- U.S. ---, 140 S. Ct. 1891, 1907 (2020) (internal quotation marks and citation omitted); (Docket No. 279 at 2). But, of course, that principle bars an agency from **defending** its actions on new grounds, it does not bar an agency from **confessing** that it erred in its prior actions. The Intervenors cite no authority suggesting that those two disparate actions are governed by the same rules and, consequently, the Court should give the Bureau's confession of error the "great weight" to which it is entitled. *Sibron v. New York*, 392 U.S. 40, 58 (1968).

Second, Intervenors contend that the Court must defer to the Bureau's original interpretation of its authority to regulate waste in the 2016 Rule under *Chevron* step-two. (Docket No. 279 at 8). Whether to afford *Chevron* deference to a prior agency interpretation when the agency confesses that it erred in that interpretation is not a common question, but the States have found one case that did directly address the issue.

In *Global Tel*Link v. FCC*, while litigation was pending, the Federal Communications Commission changed its view of its statutory authority, and counsel for the agency notified the Court that it would not oppose the petitioner's

challenges related to that authority. 866 F.3d 397, 406 (D.C. Cir. 2017). Admittedly in dicta, the D.C. Circuit concluded that in such circumstances "it would make no sense for this court to determine whether the disputed agency positions advanced in the [original] *Order* warrant *Chevron* deference when the agency has abandoned those positions." *Id.* at 408 (italics in original). In his concurring opinion, Judge Silberman noted that he "especially agree[d] that *Chevron* deference would be inappropriate in these unusual circumstances." *Id.* at 418. In his dissenting opinion, Judge Pillard disagreed:

> By suggesting that agencies can relinquish judicial deference through such limited and belated maneuvers as refusing to defend portions of their briefs during oral argument, the majority risks enabling agencies to end-run the principle that they must "use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."

Id. at 425.

Judge Pillard's comments miss the mark. The *Chevron* framework merely provides a standard governing judicial review of agency action, it does not empower or enable an agency to amend or repeal a rule unilaterally without adhering to the procedural requirements of the Administrative Procedure Act. In fact, "This argument ignores the distinction between judicial and agency action. … [A] court's decision to vacate an agency's action is not subject to the APA, and an agency's motion for vacatur is not a *fait accompli*." *Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241 n.6 (D. Colo. 2011).

Instead, the *Global Tel*Link* majority represents the better view. It makes little sense to defer to an agency that no longer seeks deference on an interpretation that is committed to agency discretion in the first instance under *Chevron* step-two. That view is consistent with the general principle that "Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980). That power is expansive and can be exercised at any time, even during litigation.

> Under *Chevron*, agencies are entitled to formulate policy and make rules "to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843, 104 S. Ct. 2778 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974)). Furthermore, an agency must be allowed to assess "the wisdom of its policy on a continuing basis." *Id.* at 864, 104 S. Ct. 2778. Under the *Chevron* regime, agency discretion to reconsider policies does not end once the agency action is appealed. *See Auer v. Robbins*, 519 U.S. 452, 462-63, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) (deferring to agency's interpretation of its own regulation advanced in litigation). [The court has] noted that "[a]ny assumption that Congress intended to freeze an administrative interpretation of a statute, which was unknown to Congress, would be entirely contrary to the concept of *Chevron*—which assumes and approves the ability of administrative agencies to change their interpretation." *Micron Tech., Inc.*, 243 F.3d at 1312.

SKF USA Inc. v. United States, 254 F.3d 1022, 1030 (Fed. Cir. 2001).

Accordingly, the Court need not and should not defer to the Bureau's interpretation of its authority to regulate waste under the Mineral Leasing Act set forth in the 2016 Rule under *Chevron* step-two. Instead, the Court should simply

resolve the issue "applying the usual rules of statutory construction." *Global Tel*Link*, 866 F.3d at 408. As set forth in the Petitioners' opening briefs and the Bureau's confession, application of those rules leads inescapably to the conclusion that the 2016 Rule exceeds the Bureau's authority.

Third, the Intervenors assert that the Bureau's rationales for confessing error in the 2016 Rule were rejected by the *California* court and, therefore, those rationales cannot form a valid basis for the Bureau's current decision to confess error in the 2016 Rule. (Docket No. 279 at 4 (citing *California v. Bernhardt*, 4:18-cv-05712-YGR, 2020 WL 4001480 (N.D. Cal. July 15, 2020)). But the *California* court specifically stated that it was not considering the merits of the 2016 Rule, and acknowledged that the 2016 Rule was not before it. *California*, 2020 WL 4001480, at *1 ("This suit only focuses on the adequacy of the Rescission, and not the 2016 Rule"); and *14 ("Nor is the Court tasked with determining whether the [2016 Rule] adequately addressed economic issues or resulted from an excess of jurisdiction. The appropriateness of that process [is] not being challenged here."). Accordingly, to the extent, the *California* court relied on the contents of the 2016 Rule in its consideration of the subsequent Rescission Rule, that court's statements are dicta. But more importantly, the *California* court did not consider or decide any of the specific issues in this case, including those raised by the Bureau in its confession of error.

For example, the Bureau now confesses that it erred in its interpretation of the waste prevention provisions of the Mineral Leasing Act because it did not take sufficient account of operator economics. (Docket No. 278 at 19-22). That is a very different concern than the one addressed by the *California* court when it found that an interpretation "limited to the *economics* of individual well-operators" conflicted with the Bureau's public welfare obligations. *California,* 2020 WL 4001480, at *12 (emphasis in original). In fact, the two concerns are nearly perfect opposites and a reasonable interpretation of the Bureau's obligation to consider both operator economics and the public welfare likely falls somewhere in the middle.

Similarly, with regard to marginal wells, the Bureau now confesses that it erred when it failed to adequately assess the impact of the 2016 Rule on marginal wells. (Docket No. 278 at 11). The *California* court did not decide this issue. Instead, that court concluded that the Bureau failed to provide the public adequate notice and an opportunity to comment on a new marginal well analysis underlying the Rescission Rule. 2020 WL 4001480 at *20-22. The *California* court did characterize the Bureau's analysis in the 2016 Rule as "rigorous," in comparison to the new analysis, which the court described as "cursory." *Id.* at *22. But that comparison, which the court admitted did not follow a "comprehensive review," was made to prove a point about the Rescission Rule and is not a substitute for careful judicial review of the analysis in the 2016 Rule. *Id.*

Finally, in this litigation the Bureau now confesses that it failed to separately consider the domestic costs and benefits of the 2016 Rule. (Docket No. 278 at 14). By contrast, the *California* court found that in the Rescission Rule the Bureau improperly relied on an interim domestic model to measure the social cost of methane and improperly failed to consider the global impacts of the Rescission Rule. 2020 WL 4001480 at *23-28. Notably, the *California* court did not find that the Bureau was precluded from considering the domestic costs and benefits of the 2016 Rule, just that there are not currently good methodologies "focusing solely on domestic effects." *Id.* at *27. Thus, the issues presented to the two courts are different. Although the California court's conclusion that the Bureau improperly excluded global impacts supports the Bureau's confession that it erred when it excluded domestic costs and benefits in the 2016 Rule. The agency simply cannot ignore important consequences of its actions whether those consequences are global or domestic.

Because the issues in the two cases are distinct, the *California* court's decision has no bearing on the issues pending before this Court, and nothing in that decision precludes this Court from concluding that the errors identified by the Bureau warrant vacatur of the 2016 Rule.

II. The 2016 Rule is also unlawful for the reasons set forth by the Petitioners.

The States and other Petitioners demonstrated the numerous deficiencies of the 2016 Rule in their opening briefs. Those deficiencies remain regardless of the Bureau's confession of error, and the Bureau has made no attempt to dispute the Petitioners' claims of error in its response. While little more needs to be said in support of the opening briefs, the States would offer two points in reply to the Intervenors' response briefs.

First, the Intervenors assert that this case is analogous to *Massachusetts v. EPA*, 549 U.S. 497, 531-32 (2007), where the Supreme Court concluded that the EPA was empowered to regulate carbon dioxide emissions from motor vehicles. (Docket Nos. 174 at 10-11 and 175 at 21-230). EPA had argued that to do so it would have to tighten mileage standards, a job specifically delegated to the Department of Transportation by Congress. 549 U.S. at 531-32. But the Court found, "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and avoid inconsistency." *Id.* at 532. Importantly, the Clean Air Act specifically gives the EPA authority to regulate "the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines[.]" 42 U.S.C. § 7521(a)(1). Thus, both agencies were specifically tasked by Congress to regulate motor vehicles, albeit to achieve different ends. Overlap could hardly be avoided in that case where the agencies were each given explicit authority

over the exact same vehicles. As set forth in the State's opening brief, there is no similar overlapping mandate here. (Docket No. 141 at 22-26). The Bureau and the EPA occupy separate fields and *Massachusetts* does not stand for the broad proposition that one agency can invade a field occupied by another.

Second, Intervenors assert that the Bureau was well within its authority to consider the ancillary benefits of the 2016 Rule. *See, e.g.*, (Docket No. 174 at 19-22 (citing Executive Order 12866[2] requiring agencies to assess "all costs and benefits" of regulatory actions and OMB Circular A-4[3] directing agencies to include "any important ancillary benefits" in their benefit-cost analyses); Docket No. 175 at 29-37 (citing *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 679 (7th Cir. 2016) (finding Department of Energy acted reasonably when it compared global benefits to national costs); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 625 (D.C. Cir. 2016) (holding EPA was free to consider potential co-benefits that might be achieved from enforcing the HCl MACT floor.)). But the Intervenors' argument and authorities fail to address the fundamental concern raised by the States and which remains unanswered by any court. Can the ancillary benefits of a rule provide the primary

[2] Executive Order 12866, 58 Fed. Reg. 51735 (September 30, 1993).

[3] OMB Circular A-4: https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf

justification for the rule, particularly where those ancillary benefits fall outside the scope of the agency's statutory authority?

The States continue to assert that the answer to that specific question, foreshadowed by the majority opinion in *Michigan v. EPA*, must be No. *Michigan*, 576 U.S. 743, 759-60 (2015). Otherwise, there is simply no limit on agency authority. As the States said in their opening brief, if the answer to this question is not No then "[a]ny colorable tie to an agency's authority would permit the agency to act on a problem Congress never asked the agency to solve and would allow agencies to impose unreasonable regulations on citizens and industries to achieve outcomes unrelated to the reason the regulation was purportedly adopted." (Docket No. 141 at 2). That outcome cannot be squared with the core principle of administrative law that "an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). It is one thing for ancillary benefits to be part of the calculus but quite another for them to be the fundamental driver of the calculus.

III. Vacatur is the appropriate remedy.

"Vacatur is an equitable remedy ... and the decision whether to grant vacatur is entrusted to the district court's discretion." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1139 (10th Cir. 2010). In exercising that equitable

discretion courts consider "'the seriousness of the deficiencies in the completed rulemaking and the doubts the deficiencies raise about whether the agency chose properly from the various alternatives open to it in light of statutory objectives,' weighed against any harm that might arise from vacating the existing rule, including the potential disruptive consequences of an interim change." *Ctr. For Native Ecosystems*, 795 F. Supp. 2d at 1242 (quoting *UMW v. Dole*, 870 F.2d 662, 673 (D.C. Cir.1993); and citing *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

Here there can be no dispute that the many deficiencies in the 2016 Rule are serious. The Bureau's confession of error in its interpretation of its statutory authority alone brings into question the very foundations of the 2016 Rule. The failure to take operator economics into consideration in spite of decades of past practice and statutory mandates that only require lessees to "use all **reasonable** precautions to prevent waste of oil or gas" and to "exercise **reasonable** diligence, skill and care in the operation" of leases is a serious and readily apparent failing of the 2016 Rule. 30 U.S.C. §§ 225 and 187 (emphasis added). It is inherently unreasonable, illogical, and contrary to the purposes of the Mineral Leasing Act to require a lessee to operate in a manner that is uneconomical.

Similarly, the Bureau's failure to adequately explain why it used a global emissions metric to quantify the benefits of a rule designed to curb domestic waste

under the Mineral Leasing Act is also a serious deficiency. (Docket No. 278 at 14-16). To be sure, the deficiency identified by the Bureau does not mirror the States' view that the Bureau's reliance on ancillary global climate change benefits cannot justify the significant direct costs of the rule. (Docket No. 141 at 26-30). But even the narrower admission that it failed to explain why the Bureau used this metric presents a serious deficiency in the rule. Conceivably, an adequate explanation might at least address directly the States' claim of error.

In turn, the harm that might arise from vacating the rule is merely prospective and speculative. The 2016 Rule has never been fully implemented and the Intervenors are no more harmed by vacatur than they have been under the status quo for the last forty years. Moreover, those harms are identical to the harms arising each time the Court previously granted a stay in this matter—loss of the alleged air quality benefits of the 2016 Rule. In granting those prior motions, however, the Court never concluded that these prospective, speculative harms justified denying the requested stays.

By contrast, the consequences of not vacating the rule are severe and patently inequitable to the Petitioners in this case. Implementing the 2016 Rule at this point would have significant disruptive consequences. Although the 2016 Rule became effective in 2017, it provided for compliance with key provisions by January 2018. These provisions include requirements for Leak Detection and Repair (LDAR),

storage tank controls, pneumatic controller replacement, and pneumatic pump control/replacement, among others. *See* 81 Fed. Reg. 83,008, 83085-87 (Nov. 18, 2016) (43 C.F.R. §§ 3179.301(f), 3179.203(c), 3179.201(d) and 3179.202(h)). This phase-in deadline allowed operators the time necessary to comply with the onerous requirements of the rule, but that deadline has long since passed. Were the Court to deny vacatur and leave the rule in place, many operators would be immediately out of compliance for the sole reason that they relied on the Bureau's subsequent decision to rescind the 2016 Rule. The consequences of the Bureau's failure to promulgate a rescission rule that could withstand judicial review should not fall on others.

Here, a careful balancing of the equities on all sides of the dispute leads to the conclusion that the Court should vacate the 2016 Rule. Vacating the 2016 Rule does the least amount of harm, while leaving it in place would cause a dramatic, immediate change in the status quo. Accordingly, equity requires the Court to vacate the 2016 Rule.

CONCLUSION

For the foregoing reasons, the States of Wyoming and Montana request that the Court enter an order vacating and setting aside the 2016 Rule as both contrary to law and arbitrary and capricious agency action.

DATED this 4th day of September 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of this Court's July 28, 2020 Order on Expedited Merits Briefing Schedule (Docket No. 276) because this brief contains 3,446 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type style requirements of D. Wyo. Local Civ. R. 10.1(a) and Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Word 2010 in 14 point font size and Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2020, the foregoing was filed electronically with the Court, using the CM/ECF system, which caused the foregoing to be served electronically upon counsel of record.

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