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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; EARTHWORKS; ENVIRONMENTAL DEFENSE FUND; NATURAL RESOURCES DEFENSE COUNCIL; THE WILDERNESS SOCIETY; NATIONAL WILDLIFE FEDERATION; CITIZENS FOR A HEALTHY COMMUNITY; DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT; ENVIRONMENTAL LAW AND POLICY CENTER; FORT BERTHOLD PROTECTORS OF WATER AND EARTH RIGHTS; MONTANA ENVIRONMENTAL INFORMATION CENTER; SAN JUAN CITIZENS ALLIANCE; WESTERN ORGANIZATION OF RESOURCE COUNCILS; WILDERNESS WORKSHOP; WILDEARTH GUARDIANS; and WYOMING OUTDOOR COUNCIL, Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; and UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	Case No. 3:17-cv-7187 Date: January 25, 2018 Time: 10:00 a.m. Courtroom: B, 15th Floor Judge: Hon. Maria-Elena James **CONSERVATION AND TRIBAL CITIZEN GROUPS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

This action challenges Secretary of the Interior Ryan Zinke's unlawful attempt, just weeks before compliance was due, to amend the Bureau of Land Management's ("BLM") Waste Prevention Rule to remove important protections for one year while he reexamines them. In attempting, through this hasty rulemaking, to substantively amend the regulations *before* considering his statutory mandates and authorities and *before* considering the record facts documenting the urgent need for these regulations, Secretary Zinke violates bedrock principles of administrative law.

While an agency may reconsider its policies and change them, it must first demonstrate that its new policy is (1) permissible under the statute and (2) based upon good reasons grounded in the factual record, and it must (3) keep an open mind and allow the public to meaningfully comment on the change. There are no shortcuts for temporary changes, and the Administrative Procedure Act ("APA") creates no distinction between changes that impose protections and those that would take them away.

Secretary Zinke has fulfilled none of these requirements. Rather, he premises his revision on the findings of a secret "initial review," and promises to "evaluat[e] these issues" *later*, "as part of [his] reexamination" when he will "more thoroughly explore" them through a notice and comment rulemaking. But this amend now explain later approach violates basic administrative law rules that require agencies to *first* examine their statutory authorities and the facts and engage the public in this effort, and *then* revise their regulations. Otherwise, if agencies can substantively amend their regulations merely by expressing concerns and a wish to reconsider them (and in the meantime avoid imposing costs on a preferred stakeholder at the expense of others), agencies will lurch from one policy to the next with far less examination than reasoned decisionmaking requires, undermining certainty for regulated entities and the public alike.

The consequences of Secretary Zinke's unlawful action are immediate and profound. His action—removing protections that would otherwise be achieved in just a few weeks—will enable tens of thousands of oil and gas wells on federal and tribal lands to continue wasting natural gas, allowing hundreds of thousands of tons of harmful air pollutants to be emitted and squandering

public and tribal resources. Plaintiffs request that this Court preliminarily enjoin this harmful action, and reinstate the January 17, 2018 deadline for complying with BLM's Waste Prevention Rule.

BACKGROUND

I. BLM Promulgates the Waste Prevention Rule.

The Mineral Leasing Act ("MLA") states that "[a]ll leases of lands containing oil or gas … shall be subject to the condition that the lessee will … use all reasonable precautions to prevent waste of oil or gas developed in the land." 30 U.S.C. § 225. In 2008, 2010, and 2016, the Government Accountability Office "raised concerns" about BLM's "insufficient and outdated" venting and flaring regulations, criticized BLM's failure to provide operators "clear guidance" about determining how much gas is wasted, and "recommended that the BLM update its regulations to require operators to augment their waste prevention efforts." 81 Fed. Reg. 83,008, 83,009–10, 83,017 (Nov. 18, 2016) (A3–4, 11).[1] The Interior Department did its own review and estimated that federal oil and gas lessees vented or flared more than 462 billion cubic feet of natural gas on public and tribal lands between 2009 and 2015—enough gas to serve over 6.2 million homes for a year. *Id.* at 83,015 (A9). BLM further concluded that much of this wasted gas could be captured or avoided using proven, low cost technologies. *Id*. at 83,009–13 (A3–7). BLM determined that new regulations were necessary because its existing regulations found in Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases ("NTL-4A"), 44 Fed. Reg. 76,600 (Dec. 27, 1979), which had not been updated in more than 35 years, did "not reflect modern technologies, practices, and understanding of the harms caused by venting, flaring, and leaks of gas," were not "particularly effective in minimizing waste of public minerals," and were "subject to inconsistent application." 81 Fed. Reg. at 83,015, 83,017, 83,038 (A9, 11, 32).

Consequently, in 2014, BLM commenced a rulemaking process. *Id.* at 83,010 (A4). After soliciting extensive stakeholder feedback from states, tribes, companies, trade organizations, non-governmental organizations, and citizens, and holding four public meetings and tribal outreach sessions, BLM issued a proposed rule in early 2016. *Id*. (A4); 81 Fed. Reg. 6616, 6617 (Feb. 8,

[1] "A" cites are to Plaintiffs' consecutively-paginated appendix, filed with this Memorandum. The appendix includes documents cited in this Memorandum, generally in the order they are cited.

2016) (A87). BLM then considered more than 330,000 public comments, and finalized the rule (the "Waste Prevention Rule") on November 18, 2016. 81 Fed. Reg. at 83,010 (A4). The Waste Prevention Rule requires operators to capture natural gas that would otherwise be wasted, upgrade certain equipment, and periodically inspect their facilities for leaking natural gas and repair such leaks. *Id*. at 83,010–13 (A4–7). Some of the Waste Prevention Rule's provisions required compliance on the Rule's effective date—January 17, 2017—while others, including the capture and leak detection and repair requirements, did not require compliance until January 17, 2018 in order to give operators time to come into compliance. *Id.* at 83,024, 83,033, 83,082 (A18, 27, 76).

BLM estimated that the Rule would reduce wasteful venting of natural gas by 35% and wasteful flaring by 49% and increase royalties by up to $14 million per year. *Id.* at 83,014 (A8). The Rule also would significantly benefit local communities, public health, and the environment by increasing royalty revenues, reducing the visual and noise impacts associated with flaring, protecting communities from smog and carcinogenic air toxic emissions, and reducing greenhouse gas pollution. *Id.* (A8).

II. Industry, Some States, and Secretary Zinke Unsuccessfully Attempt to Block the Waste Prevention Rule.

Shortly after BLM finalized the Waste Prevention Rule, industry groups and states requested that a court preliminarily enjoin the Rule, a request that BLM opposed and the district court denied. *Wyoming v. U.S. Dep't of the Interior*, Nos. 2:16-cv-280-SWS & 2:16-cv-285-SWS, 2017 WL 161428, at *1, *12 (D. Wyo. Jan. 16, 2017). Industry groups and the newly appointed Secretary Zinke then lobbied members of Congress to repeal the Rule using the Congressional Review Act, an effort that was blocked when a majority of Senators voted against the motion to proceed to debate on the resolution on May 10, 2017. 163 Cong. Rec. S2851, S2853 (May 10, 2017) (A90); A112–13.

In the meantime, President Trump issued Executive Order No. 13,783, directing the Secretary of the Interior to consider revising or rescinding the Waste Prevention Rule. Exec. Order No. 13,783 § 7(b)(iv), 82 Fed. Reg. 16,093, 16,096 (Mar. 28, 2017) (A176). The next day, Secretary Zinke issued Secretarial Order No. 3349 directing the BLM Director to review the Rule and report to the Assistant Secretary of Land and Minerals Management within 21 days on whether the Rule is

fully consistent with the policies set forth in Executive Order No. 13,783. Secretarial Order No. 3349 § 5(c)(ii) (Mar. 29, 2017) (A182). Although BLM's Acting Director has completed the 21-day report, that report has not been made public, and BLM has failed to release it in response to multiple requests under the Freedom of Information Act. A112.

In response to this initial internal review, Secretary Zinke made it clear that he would attempt to ensure that operators would *never* have to fully comply with the Waste Prevention Rule, announcing his "three-step plan to propose to revise or rescind the [Waste Prevention] Rule and prevent any harm from compliance with the Rule in the interim." A187. The first step was to suspend the bulk of the Waste Prevention Rule without *any* notice or public comment. *See* 82 Fed. Reg. 27,430 (June 15, 2017) (A194). This stay was short-lived, however. Upon challenges brought by Plaintiffs Sierra Club, et al. (collectively, the "Conservation and Tribal Citizen Groups") and the States of California and New Mexico, this Court declared that the Secretary's purported attempt to stay the Rule's compliance dates violated the APA, vacated the stay, and ordered BLM to reinstate the Rule in its entirety. *California v. BLM*, Nos. 17-cv-3804-EDL & 17-cv-3885-EDL, 2017 WL 4416409, at *14 (Oct. 4, 2017).

III. Secretary Zinke Amends the Waste Prevention Rule.

One day after this Court reinstated the Waste Prevention Rule, the Secretary took the second step in his three-step plan (the step challenged here) proposing a new rule to amend the Waste Prevention Rule and remove its protections for one year. 82 Fed. Reg. 46,458 (Oct. 5, 2017) (A197). In his haste to make this new rule effective before the January 17, 2018 compliance deadline, the Secretary allowed a scant 30 days for public comment on his proposal and did not grant requests to extend that deadline and hold hearings. 82 Fed. Reg. 58,050, 58,062 (Dec. 8, 2017) (A260); A215–37.

In line with the assurances he had given the Wyoming court in June, after issuing the proposal, but *before* he even received public comments, Secretary Zinke represented to that court that he *would* suspend the Rule. A241–42. As promised, on December 8, the Secretary published his

amendment to the Waste Prevention Rule ("Amendment"). 82 Fed. Reg. at 58,050 (A248).[2] The Amendment substantively revises requirements in the Waste Prevention Rule by lifting the obligation to comply with "all of the requirements" in the Waste Prevention Rule that would "generate benefits of gas savings or reductions in methane emissions"—in other words, that would reduce waste—for one year. *Id.* at 58,051 (A249). It does not put back into effect BLM's earlier regulation, NTL-4A. *Id.* at 58,063 (A261). The Secretary claims that he is "reviewing concerns" and "reconsidering" the requirements, and that he "does not believe that operators" should be required to comply with the Waste Prevention Rule "until the BLM has had an opportunity to review its requirements and, if appropriate, revise them through notice-and-comment rulemaking." *Id.* at 58,051–52, 58,055 (A248–49, 253).

In the Amendment, the Secretary does not explain how the revision is permissible under his statutory authorities, examine the facts upon which the Waste Prevention Rule was based, or explain his changed position. Indeed, he deemed public comments on the substantive merits of the Waste Prevention Rule "outside the scope" of this rulemaking. *See, e.g.*, *id.* at 58,059, 58,061 (A257, 259); A276, 280, 282–86, 291, 293, 312, 319, 332–34, 336. Instead, he claims that the Amendment does not "substantively change" the Waste Prevention Rule because it only lifts that Rule's obligations temporarily. 82 Fed. Reg. at 58,050 (A248). And he promises to "thoroughly explore" and "evaluat[e] these issues" when he revises or rescinds the Rule through a future "notice-and-comment rulemaking," the third step in his three-step plan. *Id.* at 58,050–51, 58,053 (A248–49, 51).

While claiming that the Amendment is not a substantive change, the Secretary acknowledges that the Amendment will result in additional waste of 9 billion cubic feet of natural gas over the next

[2] When commenters noted to the Secretary that a December 8 finalization would be too late to alleviate operator obligations prior to the January 17, 2018 compliance date because of the Congressional Review Act's requirement that major rules not go into effect until 60 days after publication, he simply revised his finding in the proposed rule that the Amendment is a "major rule" that "would have an annual effect on the economy of $100 million or more," 82 Fed. Reg. at 46,466 (A205), to a finding that the Amendment is *not* a "major rule" and "will not have an annual effect on the economy of $100 million or more," 82 Fed. Reg. at 58,064 (A262), without any explanation for the change. Based on this change, the Secretary gave the Amendment an effective date of January 8, 2018. *See id.* at 58,050 (A248).

year, *id.* at 58,057 (A255)—enough to heat approximately 130,000 homes for a year.[3] This waste will be accompanied by additional emissions of 175,000 tons of methane—a highly potent climate pollutant—and 250,000 tons of smog-forming volatile organic compounds ("VOCs") during the year the compliance obligations are removed. *Id.* at 58,056–57 (A254–55). Moreover, the Secretary acknowledges that the public, including federal, state, and tribal governments, will lose royalties of $2.6 million as a result of the Amendment. *Id.* at 58,057 (A255). At the same time, while asserting that the Waste Prevention Rule must be revised to avoid compliance burdens, he concedes "that technology is readily available that helps reduce the amount of natural gas lost during production operations or from fugitive leaks," A277, and that "the average reduction in compliance costs" from the Amendment will "be just a small fraction of a percent of the profit margin for small companies," A429, and "will not substantially alter the investment or employment decisions of firms," 82 Fed. Reg. at 58,057–58 (A255–56).

ARGUMENT

To obtain a preliminary injunction, plaintiffs must demonstrate: (1) a likelihood of success on the merits; (2) that they are likely to suffer irreparable harm in the absence of injunctive relief; (3) that the balance of equities favors an injunction; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). All four criteria are met here. An injunction is necessary prior to the January 17, 2018 compliance deadline to ensure that tens of thousands of wells on federal and tribal lands do not continue to irreversibly waste publicly-owned gas and emit harmful air pollution, irreparably harming Conservation and Tribal Citizen Groups' members (many of whom live near these wells) and others as a result of the illegal Amendment.

I. Plaintiffs Are Likely to Succeed on the Merits Because Secretary Zinke's Substantive Amendment of the Waste Prevention Rule Violates the APA.

While agencies are free to reconsider and revise their policies, *before* doing so they must demonstrate "that the new policy is permissible under the statute, [and] that there are good reasons

[3] Calculation based on average natural gas consumption per home, using Energy Information Administration data. *See* Energy Info. Admin., *Natural Gas* (last visited Dec. 17, 2017), https://www.eia.gov/naturalgas/data.php#consumption.

for it" justified by the administrative record. *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515–16 (2009); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41–42 (1983). This includes—as would be true for promulgation—squarely addressing the legal and record bases of the policy it proposes to revise and providing a "reasoned analysis" explaining why it is changing course. *State Farm*, 463 U.S. at 41–42; *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966–67 (9th Cir. 2015) (en banc). The public must also be given a meaningful opportunity to comment upon the substance of the proposed change and to persuade the agency to follow a different course. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011). By attempting to substantively revise the Waste Prevention Rule *before* the Secretary considers his statutory authority or reviews the record facts, and *before* providing an opportunity for meaningful comment, the Amendment fails all of these requirements. Because the Amendment is "arbitrary" and "capricious," and "without observance of procedure required by law," 5 U.S.C. § 706(2)(A), (D), Plaintiffs are likely to succeed on the merits.

A. The Amendment is a substantive change to BLM's regulations.

The Amendment directly amends BLM's Waste Prevention Rule. *See* 82 Fed. Reg. at 58,072–73 (A270–71) (amending Parts 3160 and 3179 of the Code of Federal Regulations). Through the Amendment, Secretary Zinke has removed compliance obligations for *all* of the provisions that "generate benefits of gas savings or reductions in methane emissions" for one year. *Id.* at 58,051 (A249). Removing these obligations will have "palpable effects upon regulated industry and the public," resulting in waste of 9 billion cubic feet of natural gas, increasing methane emissions by 175,000 tons and VOCs by 250,000 tons, and leading to the loss of $2.6 million in royalties, and is therefore a substantive revision. *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) (quotation omitted) (agreeing "that the December 5 order was a substantive rule since, by deferring the requirements that coal operators supply life-saving equipment to miners [for six months] it had palpable effects"); s*ee also Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) ("*Abraham*") ("[A]ltering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standards."); *Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816, 818 (D.C. Cir. 1983) (suspending rule's requirements has a

"substantive effect on the obligations of the owners of existing facilities and on the rights of the public"); *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 763 (3d Cir. 1982) ("*NRDC*") (postponement "certainly had palpable effects upon the regulated industry and the public in general, because, inter alia, the postponement of the amendments likewise postponed the obligation of the … industry to comply with [the] standards, and therefore had a substantial impact upon both the public and the regulated industry" (quotation omitted)).

The Secretary attempts to have it both ways by justifying the Amendment based on his legal authority to revise existing regulations, while at the same time claiming that he has not substantively revised the Waste Prevention Rule. In response to public comment asserting that BLM lacks "implicit or explicit legal authority" to suspend duly promulgated regulations, the Secretary responds that he has "ample legal authority to *modify* or otherwise *revise* the existing regulation in response to substantive concerns regarding cost and feasibility." 82 Fed. Reg. at 58,059 (A257) (emphasis added). At the same time, however, the Secretary asserts—without any support—that the Amendment "does not substantively change the 2016 final rule." *Id.* at 58,050 (A248). This is incorrect. Removing compliance obligations for all of the provisions that generate benefits of gas savings or reductions in methane emissions for one year is a substantive revision because it has "palpable effects" upon the regulated industry (relieving compliance obligations) and the public (reducing royalties and increasing the waste of publicly-owned natural gas and associated dangerous air pollution). *Donovan*, 653 F.2d at 580 n.28.[4]

[4] The Secretary's assertion that the Amendment is not a "substantive" change appears to be based on the fact that it is temporary. 82 Fed. Reg. at 58,050 (A248) (noting that the Amendment postpones implementation for one year). This assertion is inconsistent with *Donovan* and the other cases discussed above, which hold that even temporary changes that have palpable effects on industry and the public constitute substantive revisions. Indeed, a contrary ruling would allow agencies to enact significant policy changes without complying with APA requirements by simply taking a series of shorter-duration actions. Moreover, Secretary Zinke fundamentally mischaracterizes his action by labeling it "temporary." As he explained, the whole point of his three-step plan, including the Amendment, is to ensure that industry *never* has to comply with substantive provisions of the Waste Prevention Rule. *See supra* p. 4. The specific purpose of the Amendment is to remove these obligations until the Secretary has "sufficient time" to rescind or revise them. *E.g.*, 82 Fed. Reg. at 58,053 (A251). Accordingly, there is nothing temporary about the Secretary's plans to alleviate compliance with the Waste Prevention Rule.

The D.C. Circuit rejected a similar bid by the Reagan Administration to suspend compliance with a regulation while it further studied alleged concerns regarding whether the regulation might lead to "dissemination of potentially misleading … information" and in order "to minimize the imposition of unwarranted compliance costs" in the meantime. *Pub. Citizen v. Steed*, 733 F.2d 93, 100 (D.C. Cir. 1984) (quotation omitted). The court recognized that the regulation's suspension should be subject to the *State Farm* standard of review because (1) the suspension would remain in place until the agency completed a notice and comment rulemaking to revise the underlying regulation, and (2) the agency had adopted a "180 degree reversal" from its "former views as to the proper course," adopting instead the contrary position of the regulated industry. *Id.* at 98 (quotation omitted).

The same is true here. Secretary Zinke is removing the obligation to comply with BLM's Waste Prevention Rule until he completes a rulemaking to revise or rescind the Rule based on a 180-degree reversal of BLM's prior position. *See infra* pp. 11–14. As such, the Amendment is a substantive revision to the Waste Prevention Rule and is subject to the same APA requirements as BLM's initial decision to promulgate that Rule. *See Pub. Citizen,* 733 F.2d at 98; *State Farm*, 463 U.S. at 41 ("[T]he rescission or modification of an occupant protection standard is subject to the same test" as "the agency's action in promulgating such standards"). The Secretary has not come close to meeting those requirements here.

B. The Secretary has not demonstrated that the Amendment is permissible under his statutory authority.

Although BLM adopted the Waste Prevention Rule to fulfill its statutory duty to prevent waste under the MLA and its other governing statutes, Secretary Zinke entirely failed to analyze whether eliminating all of the Rule's significant provisions for a year is permissible under these same authorities. This failure renders his decision arbitrary and capricious. *See Fox Television*, 556 U.S. at 515 (agency must show that a "new policy is permissible under the statute"); *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 66 (D.C. Cir. 2017) (discussing *Fox Television*'s requirement that the new rule "meets the requirements of showing consistency with the statute").

In promulgating the Waste Prevention Rule, BLM concluded, based upon oversight reports documenting a pervasive problem of waste and an expansive record, that its prior waste prevention regulations were inadequate, and that new standards were necessary to ensure that lessees use "all reasonable precautions to prevent waste of oil or gas." 30 U.S.C. § 225; 81 Fed. Reg. at 83,009–10 (A3–4). Secretary Zinke now seeks to eliminate for a year all of the provisions of the Waste Prevention Rule that address this statutory directive, resulting in waste of 9 billion cubic feet of natural gas. 82 Fed. Reg. at 58,057 (A255). The Amendment does not even put back into effect the inadequate NTL-4A during this interim period. *See id.* at 58,063 (A261). Indeed, the Amendment leaves BLM with no national, uniform regulations to control waste of publicly and tribally owned gas, despite BLM's earlier finding that the volume of natural gas lost on public and tribal lands is "unacceptably high," and that such standards were necessary to curb this "significant and growing" problem. 81 Fed. Reg. at 83,014–15 (A8–9). Yet, in removing these waste prevention standards, the Secretary fails to even *mention* section 225 of the MLA and its directive to prevent waste, much less grapple with whether his substantive change to the Waste Prevention Rule is consistent with or permissible under that section. *See Fox Television*, 556 U.S. at 515–16; *Am. Petroleum Inst.*, 862 F.3d at 66.[5]

Nor has Secretary Zinke pointed to any other statutory authority that permits him to delay the requirements of the Waste Prevention Rule in order to reconsider them. Agencies are creatures of

[5] Although the Secretary fails to address BLM's statutory obligation under the MLA, he asserts that the Amendment "does not leave unregulated the venting and flaring of gas from Federal and Indian oil and gas leases" because "regulations from the BLM, the [Environmental Protection Agency ("EPA")], and the States will operate to address venting and flaring during the period of the suspension." 82 Fed. Reg. at 58,051–52 (A249–50). But this assurance is patently arbitrary and runs counter to the evidence before the Secretary. *State Farm*, 463 U.S. at 43. For example, the Secretary points to the provisions of the Waste Prevention Rule that he is not revising, but ignores the fact that these provisions (which largely govern when operators must pay royalties on lost gas) *do not* "generate benefits of gas savings or reductions in methane emissions"—in other words, do not prevent waste. 82 Fed. Reg. at 58,051 (A249). Likewise, Secretary Zinke does not even mention that the EPA regulations he cites have also been proposed to be delayed in significant part to allow EPA to reconsider them. *See* 82 Fed. Reg. 27,645 (June 16, 2017). Nor does he acknowledge, much less explain, his departure from BLM's prior finding that EPA and state regulations were inadequate to fulfill BLM's independent obligation to prevent waste. *See* 81 Fed. Reg. at 83,019 (A13); *Fox Television*, 556 U.S. at 537 (requiring agency to acknowledge and provide good reasons for changing course); *see also* A784–85, 789–800 (¶ 17 & Appx. 1) (describing how state and EPA standards do not deliver the same waste savings as the Waste Prevention Rule).

Congress and "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The Secretary points generally to a suite of statutes as allegedly providing authority to issue the Amendment. *See* 82 Fed. Reg. at 58,051 (A249) (citing the MLA, the Mineral Leasing Act for Acquired Lands of 1947, the Federal Oil and Gas Royalty Management Act of 1982, the Federal Land Policy and Management Act of 1976, the Indian Mineral Leasing Act of 1938, the Indian Mineral Development Act of 1982, and the Act of March 3, 1909); *see also id.* at 58,059 (A257) (similar). He then vaguely alleges that "[t]hese statutes authorize the Secretary of the Interior to promulgate such rules and regulations as may be necessary to carry out the statutes' various purposes." *Id*. at 58,051 (A249). But he does not point to any particular authority in any of these statutes, or the APA, to remove the obligations of a regulation in order to reconsider it. He does not even explain which of these statutes' "various purposes" the Amendment is intended to serve.

BLM also points to its "inherent authority" to reconsider the Waste Prevention Rule. A297. But while agencies may have authority to reconsider their regulations following the proper APA procedures and consistent with their statutory authorities, they have no "inherent power to" take the *separate* action of "suspend[ing] a duly promulgated regulation where no statute confer[s] such authority." *See Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Abraham*, 355 F.3d at 202). BLM's complete failure to demonstrate that the Amendment is permissible under its statutory authority renders its decision arbitrary.

C. The Secretary has not given good reasons for the Amendment grounded in the record.

The Secretary has also not given "good reasons" for substantively revising the Waste Prevention Rule. *See Fox Television*, 556 U.S. at 515–16. "For reasons to qualify as 'good' under *Fox*, they must be 'justified by the rulemaking record.'" *Am. Petroleum Inst.*, 862 F.3d at 66 (quoting *State Farm*, 463 U.S. at 42). Moreover, where an agency changes course it must "display awareness that it *is* changing position" and supply a "reasoned explanation … for disregarding facts and circumstances that underlay … the prior policy." *Fox Television*, 556 U.S. at 515–16; *see State Farm*, 463 U.S. at 42 (agency "is obligated to supply a reasoned analysis for the change"). As the

Ninth Circuit recognized in a directly analogous case, "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation." *Organized Vill. of Kake*, 795 F.3d at 968. But that is exactly what the Secretary has done here.

Secretary Zinke offers numerous alleged "concerns" that he plans to address through a *subsequent* rulemaking. *E.g.*, 82 Fed. Reg. at 58,051 (A249) ("The BLM is reexamining … reassessing … reconsidering."). But, even assuming these "concerns" are meritorious—which they are not—they all represent dramatic departures from BLM's positions when it adopted the Waste Prevention Rule, and they are not explained, analyzed, or "justified by the administrative record." *Am. Petroleum Inst.*, 862 F.3d at 66 (quoting *State Farm*, 463 U.S. at 42). Indeed, the Secretary refused to consider public comments related to these alleged concerns, deferring consideration to the subsequent rulemaking. *See, e.g.*, A276 (BLM claiming that comments that the Waste Prevention Rule is not burdensome to industry were "beyond the scope of this rulemaking," and stating that the agency "will assess the burden, economic impacts, and financial conditions of the industry as it develops an appropriate proposed revision of the [Waste Prevention Rule]"). Accordingly, these concerns cannot form the basis of BLM's decision to substantively revise the Waste Prevention Rule *in advance* of the subsequent rulemaking. And there is no reason why a *revision* is necessary to allow BLM time to consider whether to further revise or rescind the Waste Prevention Rule through a subsequent notice and comment rulemaking. *See* 82 Fed. Reg. at 58,050 (A248).

For example, the Secretary's primary rationale for suspending the Waste Prevention Rule's provisions—to "prevent operators from being *unnecessarily burdened* by regulatory requirements that are subject to change"—represents a 180-degree change in BLM's position that is neither acknowledged nor explained. *Id.* at 58,053 (A251) (emphasis added). After conducting an initial review in response to the President's directive—the results of which have never been released to the public—the Secretary concluded that "some provisions" of the Waste Prevention Rule "add considerable regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." *Id.* at 58,050 (A248). This unsupported conclusion is entirely contrary to BLM's earlier finding—based upon an extensive record and substantial public engagement—that the Waste Prevention Rule imposes "economical, cost-effective, and reasonable

measures … to minimize gas waste." 81 Fed. Reg. at 83,009 (A3). In fact, BLM modeled the Rule's provisions on measures that are already widely and successfully deployed in leading States and by leading companies. *See id.* at 83,012, 83,019, 83,023, 83,025 (A6, 13, 17, 19) (noting provisions modeled after existing regulations in North Dakota, Wyoming, and Colorado). BLM specifically analyzed the costs to small companies and determined that on average compliance costs would constitute approximately 0.15% of per company profits. *Id.* at 83,069 (A63). Based on this analysis, BLM concluded that the Rule was not expected to impact investment decisions or employment in the oil and gas industry.

The Secretary now offers no explanation, much less a "reasoned explanation," for disregarding his prior factual findings. *Organized Vill. of Kake*, 795 F.3d at 968. In fact, in the Amendment, the Secretary reaffirms the modest impact of the compliance costs: "BLM believes that the rule would not have a significant economic impact on a substantial number of small entities. … BLM estimates the average reduction in compliance costs to be just a small fraction of a percent of the profit margin for small companies." A429; *see also* 82 Fed. Reg. at 58,058 (A256) (conceding that the Amendment will only reduce compliance costs by $60,000 per entity "during the initial year when the requirements would be suspended or delayed," which represents only 0.17% of per-company profits). There is no rational connection between the Secretary's belief—before even conducting his review—that operators would be "unnecessarily burdened" by the Waste Prevention Rule and the facts in record, which suggest precisely the opposite.

The Secretary points to "newfound concern" that "despite the [Waste Prevention Rule's] assertions, many of the … rule's requirements would pose a particular compliance burden to operators of marginal or low-producing wells" and cause them to stop operating. *Id.* at 58,050 (A248). But, as with his other concerns, he does not provide any explanation or facts upon which this changed view is based. In fact, the Secretary deemed comments regarding the impact on marginal wells to be outside the scope of the rulemaking. A282. Nor is this a new concern: the Secretary is simply restating industry complaints. *See Pub. Citizen*, 733 F.2d at 98, 101. In the Waste Prevention Rule, however, BLM squarely addressed and rejected industry's comments about impacts to marginal wells, noting that the Rule includes numerous exemptions where provisions "would

impose such costs as to cause the operator to cease production." *See* A443; *see also* 81 Fed. Reg. at 83,029–30 (A23–24) (rejecting industry request to exempt marginal wells from leak detection requirements).

BLM's failure to explain its change in position is directly analogous to the situation presented in *Organized Village of Kake*, where the Forest Service attempted—following a Presidential election—to rescind in part the Clinton-era Roadless Rule without addressing its earlier factual findings. There, the rescission rule rested on the "express finding" that it would "pose[] only minor risks to roadless values," which was "a direct, and entirely unexplained contradiction of the Department's [earlier] finding" that the Roadless Rule was necessary to protect roadless values. 795 F.3d at 968 (quotation omitted). The *en banc* Ninth Circuit did not countenance this unexplained change, holding that an agency must provide a reasoned explanation for taking action inconsistent with its prior factual findings. *Id*. at 969.

The same is true here. The Secretary's new finding—that the Waste Prevention Rule imposes an unnecessary burden—is completely unsupported and unexplained. To the extent the Secretary argues that he has not yet made such a finding, and merely has "concerns" that the Waste Prevention Rule might impose unnecessary burdens, he has put the cart before the horse. *See* 82 Fed. Reg. at 58,051 (A249) (Secretary *intends* to reexamine costs, but has not yet done so).

The Secretary also relies heavily on his desire to alleviate industry from its compliance obligations and BLM from its enforcement obligations because he plans to reconsider the Rule and the requirements may be "transitory." *Id.* at 58,050–51 (A248–49). This is also not a "good reason." If the fact that an agency planned to reconsider a regulation were a sufficiently "good reason" to alleviate compliance with a duly promulgated regulation, it would create a significant loophole in the APA. Agencies could effectuate major changes in policy without explaining their reasoning or supporting their decision in the administrative record just by promising future reexaminations. This Court "cannot countenance such a result." *NRDC*, 683 F.2d at 768 ("To allow the APA procedures in connection with the further postponement to substitute for APA procedures in connection with an initial postponement would allow EPA to substitute post-promulgation … procedures for pre-promulgation [ones] at any time by taking an action without complying with the APA, and then

establishing a notice and comment procedure on the question of whether that action should be continued."). Allowing agencies to circumvent the APA in this way would greatly undermine the regulatory certainty that the APA's requirements are intended to promote. *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring) ("Changes in course … cannot be solely a matter of political winds and currents. … Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow.").

Ultimately, while the Secretary may have identified reasons to *reexamine* the regulations, he has not identified good reasons to *revise* them. "Without showing that the old policy is unreasonable," for an agency to say that "no policy is better than the old policy solely because a new policy *might* be put into place in the indefinite future is as silly as it sounds." *Pub. Citizen*, 733 F.2d at 102.

D. The Secretary has prevented meaningful comment on the Amendment.

The Amendment is also unlawful because it violates the basic requirement that agencies allow for meaningful comment on their rules. 5 U.S.C. § 553(c); *see Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) ("The purpose of the notice and comment requirement is to provide for meaningful public participation in the rule-making process."). "The important purposes of this notice and comment procedure cannot be overstated. … [T]he process helps ensure that the agency maintains a flexible and open-minded attitude towards its own rules … because the opportunity to comment must be a meaningful opportunity." *N.C. Growers*, 702 F.3d at 763 (citations and quotations omitted); *see also Prometheus Radio Project*, 652 F.3d at 450. Commenters must be given a chance to comment at a time when "the decisionmaker is still receptive to information and argument." *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979). The hasty rulemaking that led to the Amendment was the paradigm of meaning*less* notice and comment. Rushing against the clock to beat the January 2018 compliance deadline, the Secretary fundamentally undermined the value of notice and comment by determining the outcome of this

rulemaking before even receiving comment, and excluding as outside the scope of the rulemaking comments addressing the actual substance of the Waste Prevention Rule and the Amendment.

First, Secretary Zinke did not maintain an open mind toward the rulemaking. In June 2017, Secretary Zinke announced his three-step plan to ensure that operators never had to comply with the most significant provisions of the Waste Prevention Rule. A187. On October 20, 2017, after issuing the suspension proposal, but before receiving the public's comments, he represented to a federal court that he *would* suspend the Waste Prevention Rule. He informed that court not only that he would finalize the Amendment by December 8, 2017, but also that his final action would "provide the immediate relief sought by Petitioners" (i.e., relief from their January 17, 2018 compliance obligations) and "thereby obviate the need for judicial review." A224. Indeed, he represented that he would "utilize the twelve-month period *while the majority of the Waste Prevention Rule is suspended* to prepare and complete the Revision Rule." A223 (emphasis added). The Secretary's filing left no doubt that the Waste Prevention Rule would be suspended and that the public comment period was simply a meaningless exercise. *See Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008) ("Allowing the public to submit comments to an agency that has already made its decision is no different from prohibiting comments altogether.").[6]

Second, the Secretary rendered notice and comment meaningless by unlawfully treating the Amendment as a non-substantive revision and therefore failing to "solicit or receive comments regarding the substance or merits of" the Waste Prevention Rule. *N.C. Growers*, 702 F.3d at 770. As a result of the Secretary's mistaken belief that he was not undertaking a substantive change, the Secretary failed to provide any explanation in his proposal of how the Amendment is permissible

[6] Secretary Zinke's pledge was entirely consistent with his actions for the past year in doggedly pursuing any means to remove waste prevention protections. When he was still a Congressman, he characterized the Waste Prevention Rule as "duplicative and unnecessary," and voted to repeal it. A112. Once installed as Secretary, he lobbied Senators to repeal it, *id.*, and attempted to unilaterally suspend the Rule without notice and comment, *see supra* p. 3. When those efforts failed, he tried yet again through the Amendment. In his haste to remove any compliance obligations before the January 17, 2018 compliance deadline, he engaged in virtually no stakeholder outreach, conducted a woefully short 30-day public comment period despite premising his cost benefit analysis upon a brand new and radically different "interim" value for the costs of climate change, and then rushed the Amendment to finalization, providing little meaningful response to the majority of the comments received, and deeming many "outside the scope" of the rulemaking.

under his governing statutes or the factual basis for revising BLM's Waste Prevention Rule. Without knowing the Secretary's views on these important issues, the public could not effectively comment on the proposal.

Once he received comments, the Secretary declared that all comments regarding the substance of the Waste Prevention Rule or any revision of it were "outside the scope" of this rulemaking, *see, e.g.*, 82 Fed. Reg. at 58,059, 58,061 (A257, 259); *see supra* p. 5, including comments that bore directly on his rationale for removing protections, *see supra* p. 12. For example, he deemed "outside the scope" comments asserting that the Waste Prevention Rule was needed and would deliver gas savings beyond those attributable to EPA or state standards. A283. Comments asserting that the Waste Prevention Rule did not burden industry given companies' financial performance and job growth were likewise deemed "outside the scope." A276. By imposing these limitations, the Secretary ignored relevant public comment on matters directly relevant and important to the decision to waive the requirements of the Waste Prevention Rule. *See Riverbed Farms, Inc. v. Madigan*, 958 F.2d 1479, 1478 (9th Cir. 1992) ("[T]he purpose of notice and comment is to help the agency make an informed decision.").[7]

The Fourth Circuit recently rejected a similar attempt, by the Obama Administration, to suspend for nine months a Bush-era rule based upon a host of reasons, including that "the Department 'may differ' with the policy positions of the prior Administration," that stakeholders "require clear and consistent guidance," and that continuing to implement the regulation "would not be an efficient use of resources by stakeholders or the Department in the event the agency soon would issue a different rule." *N.C. Growers*, 702 F.3d at 760–61. There, as here, the agency refused comments on the substantive merits of the regulation, explaining that such comments "would be

[7] Even with respect to the rationale he did give, Secretary Zinke repeatedly references BLM's "initial review" of the Waste Prevention Rule, 82 Fed. Reg. at 58,050, 58,051, 58,059 (A248, 249, 257), describing it as the underpinning for the Amendment, but he has not provided this "initial review" to the public. Although Plaintiffs here have sought this review through Freedom of Information Act requests, the Secretary has refused to release it. A111. Without this basic background explaining the Amendment's bases and purposes, commenters could not provide meaningful comments on the Amendment. *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1089–90 & n.12 (9th Cir. 2011) (explaining that it is "a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment" (quotation omitted)).

appropriate when the merits of the program are actually at issue" in a future rulemaking. *Id*. at 768 (explaining that the merits were not currently at issue because the suspension was only "a temporary measure"). The court easily concluded that such a shoddy procedure was impermissible. *Id.* at 770; *see id.* at 772 (Wilkinson, concurring) ("It quite defies belief that the [proposed suspension] deemed comments on the merits of the regulations to be suspended … out of bounds. … This all risks giving the impression that the agency had already made up its mind and that the comment period was, at best, for show and provided only in an effort to do the minimum necessary to squeak by judicial review."). The same is true here. The Secretary's rushed process excluding the most significant relevant issues failed to provide for meaningful public comment in violation of the APA.

E. The Secretary's promise to conduct a notice-and-comment rulemaking later does not cure these errors.

The Secretary has promised that, in the future, he will "more thoroughly explore through notice-and-comment rulemaking whether" to revise or rescind the Waste Prevention Rule. *E.g.*, 82 Fed. Reg. at 58,053 (A251). But the Amendment has *already* revised these protections, and the Secretary's future promises do nothing to cure his failure to comply with the APA in this rulemaking.

The APA makes plain that the required reasoned analysis—including the legal and factual basis for the change and responses to public comments—must *precede* a regulatory change. *See* 5 U.S.C. § 553(c) ("*After* consideration of the relevant matter presented [in public comments], the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.") (emphasis added); *see also Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982) ("[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule." (quoting *Sharon Steel*, 597 F.2d at 381)); *NRDC*, 683 F.2d at 767 ("We hold that the period for comments after promulgation cannot substitute for the prior notice and comment required by the APA."). A contrary rule would allow an agency to sequentially delay or repeal rules with a mere promise of future rational explanation supporting its actions. *See supra* pp. 14–15.

Nor does it matter that the Amendment removes these obligations for one year and not indefinitely (though Secretary Zinke's third step appears likely to do so). *See Clean Air Council*, 862 F.3d at 8 (vacating 90-day stay); *Council of S. Mountains, Inc.*, 653 F.2d at 579, 580 n.28 (applying APA rules to 5-month stay); *N.C. Growers*, 702 F.3d at 760 (9-month stay). Indeed, as we describe below, the Amendment is highly consequential. BLM has removed the requirement to comply with all of the provisions of the Waste Prevention Rule that will reduce waste of natural gas, which, by BLM's own analysis, will waste 9 billion cubic feet of gas and result in the emissions of hundreds of thousands of tons of additional harmful air pollution before January 17, 2019. If BLM may remove critical protections before fulfilling the requirements of reasoned decisionmaking, there is no reason to think a future BLM could not impose such protections through a similarly hasty and unreasoned process. The Secretary's promise of future rational decisionmaking does nothing to cure his utter failure to comply with the APA in this rulemaking.

II. Plaintiffs Face Irreparable Harm Absent an Injunction.

Without a preliminary injunction of the Amendment, Plaintiffs will be irreparably harmed by the continued waste of publicly-owned natural gas and additional air pollution resulting from the Amendment. "[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004)) (quotations omitted). As BLM's own analysis indicates, the Amendment will cause substantial harm to the public: BLM estimates the Amendment will result in emissions of 175,000 additional tons of methane, 250,000 additional tons of VOCs, and 1,860 additional tons of hazardous air pollutants (HAPs) over the next year. 82 Fed. Reg. at 58,056–57 (A254–55); A469. The emissions will cause irreparable public health and environmental harm to Plaintiffs' members who live and work on or near public and tribal lands with oil and gas development.

Increased air pollution, even over a limited period, constitutes irreparable harm. *See, e.g., Beame v. Friends of the Earth*, 434 U.S. 1310, 1314 (1977) (Marshall, J., in chambers) (recognizing "the irreparable injury that air pollution may cause during [a two-month] period, particularly for

those with respiratory ailments"); *Penn. Transp. Auth. v. Bhd. of R.R. Signalmen*, 708 F. Supp. 659, 663–64 (E.D. Pa. 1989) (preliminarily enjoining subway workers from striking for even one day in part because "[t]he absence of commuter rail service will greatly increase the numbers of persons utilizing automobiles … and cause high levels of air pollution"), *aff'd*, 882 F.2d 778 (3d Cir. 1989). Air pollution is irreparable because once the pollution is in the air the damage is done and cannot be reversed. *See, e.g., Sierra Club v. U.S. Dep't of Agric., Rural Utils. Serv.*, 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (finding that coal plant expansion would "emit substantial quantities of air pollutants that endanger human health and the environment and thereby cause irreparable harm") (quotation omitted); *Diné Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209, 2015 WL 4997207, at *48 (D.N.M. Aug. 14, 2015), (finding irreparable injury because "even properly functioning directionally drilled and fracked wells produce environmental harm … includ[ing] air pollution") *aff'd*, 839 F.3d 1276 (10th Cir. 2016); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 256 (D.D.C. 1972) (similar).

Every day that the Amendment is in effect, many of Plaintiffs' members and similarly situated people will be exposed to excessive amounts of air pollution that would otherwise have been avoided if BLM's Waste Prevention Rule remained in force. According to declarant Dr. Renee McVay, more than 100,000 producing oil and gas wells are located on public or tribal lands or produce publicly-owned minerals, and are therefore subject to the Waste Prevention Rule's requirements. A776–77 (¶ 5). Absent the Amendment, the owners or operators of such wells were required, for example, to have completed a first round of monitoring for leaks by no later than January 17, 2018, and to fix identified leaks within 30 days of that initial inspection. 82 Fed. Reg. at 58,056 (A254); *id.* at 58,070 (A268). Similarly, absent the Amendment, operators of oil wells would have been required to limit their flaring of associated gas and instead capture 85% percent of the gas they produce in 2018, reducing natural gas waste and cutting air pollution. *Id.* at 58,052 (A250). The Amendment also removes other waste prevention standards that would prevent waste and reduce emissions, including required updates to pneumatic pumps, pneumatic controllers, and liquids unloading processes and equipment. *Id.* at 58,054–56 (A252–54). The loss of these protections will not be made up for through state or other federal regulation. For example, more than 80,000 wells

covered by BLM's waste prevention standards are not subject to separate state or EPA leak detection programs. A782 (¶ 13). Thus, these wells would avoid responsibility to conduct *any* inspections and repairs under the Amendment.

These additional emissions have irreparable consequences for Conservation and Tribal Citizen Groups' members' health. For example, Dr. McVay estimates that approximately 6,182 wells subject to the Waste Prevention Rule and not covered by state programs or EPA standards are located in counties designated as out of attainment with EPA's 2008 ozone ambient air quality standards and are therefore already suffering from unhealthy air. A786 (¶ 19). She projects that, as a result of the Amendment, leaks from such wells will emit up to an additional 2,089 tons of VOCs in these communities. *Id*. Plaintiffs' members living and recreating in these areas will suffer from this additional pollution. *See* A490 (¶ 11) (Environmental Defense Fund has over 5,400 members living in these communities); A683–85 (¶¶ 4, 8) (describing recreating in these affected areas). And leak detection is only one of the protections that the Amendment removes. *See* A784–87 (¶¶ 17–20) (identifying up to 20,000 tons of additional VOC emissions when considering other emission sources that would be left unregulated due to the Amendment).

Ozone exposure impairs lung functioning and leads to missed school and work days, hospital and emergency room visits, and serious cardiovascular and pulmonary problems such as shortness of breath, bronchitis, asthma attacks, stroke, heart attacks, and death. Children, the elderly, low-income communities, and people with pre-existing heart or lung conditions are particularly vulnerable to ozone. A737–38 (¶ 12). Likewise, exposure to hazardous air pollutants such as benzene and formaldehyde can cause serious illnesses, including cancer and neurological damage. *See* 81 Fed. Reg. at 83,077 (A71); A744–45 (¶ 24).

These adverse health effects are especially dangerous to people who live in close proximity to facilities. For example, Environmental Defense Fund member Francis Don Schreiber, a rancher who lives on split-estate lands in Rio Arriba County, New Mexico—a state without any meaningful controls on flaring, venting, or leaking natural gas—lives next to more than 120 BLM-managed wells that are either on or immediately adjacent to his ranch. A477, A480 (¶¶ 5, 13). Mr. Schreiber is aware that oil and gas development has contributed to elevated ozone levels in the San Juan Basin

where he lives, and that people with cardiovascular disease are at a higher risk for health impacts from elevated ozone. Because he has had open heart surgery for congestive heart failure, he worries about the impact of the Amendment on elevated ozone and its implications for his health and the health of others in the region. A479–80 (¶ 11).

Fort Berthold Protectors of Water and Earth Rights member Camille King is an enrolled member of the Three Affiliated Tribes and lives on her family's ranch on the Fort Berthold Reservation in North Dakota where there are BLM-managed wells "in every direction." A562 (¶¶ 2–4); *see also* A573 (map of wells). Ms. King was recently diagnosed with Chronic Obstructive Pulmonary Disease ("COPD"), takes medication to assist with her breathing, and her doctor has referred her for testing to determine if she has lung cancer. A563 (¶ 6). She is concerned that air pollution from oil and gas development may force her to leave her ancestral homeland—"[m]y health is failing and I am scared." A562–64 (¶¶ 3, 6, 10).

Center for Biological Diversity member Herm Hoops lives in Utah's Uinta Basin, which has significant BLM-managed oil and gas development and severe air pollution that frequently exceeds EPA's ambient ozone air quality standards. A532–35 (¶¶ 3, 8, 10, 18–19). Mr. Hoops also has COPD, and "[w]hen ozone levels are high," he "can't walk far," and has difficulty doing "ordinary tasks" like "walk[ing] up and down the aisles at Lowe's." A533–34 (¶ 13). The severity of Mr. Hoops' COPD is worsened by air pollution from oil and gas development, and he is concerned that without the Rule in place, his health will continue to suffer. A534–36 (¶¶ 13–14, 17, 21–25).

Sierra Club Member Christopher Sherman raises livestock in Kern County, CA—an ozone nonattainment area. A653 (¶¶ 2, 6, 7). There is a BLM-managed well just 300 feet from Mr. Sherman's house, and approximately 50 more within a 2-mile radius of his property. A654 (¶ 9), A656, A547. Mr. Sherman, a disabled veteran, recently developed a mass in his lung, and air pollution has forced him to restrict his outdoor activities, including riding horses and his bicycle. A653–55 (¶¶ 5, 11).

Many of Conservation and Tribal Citizen Groups' members face similar concerns regarding the impacts of the Amendment on their respiratory and cardiovascular health. *See, e.g.*, A629 (¶ 8); A570 (¶ 17); A513–14 (¶ 15); A718 (¶ 24). Tens of thousands of other Americans are similarly

situated and exposed. Health harms sustained as a result of these additional emissions, such as asthma attacks, heart attacks, or missed school or work days, cannot be reversed or undone.

Methane emissions will likewise be much greater as a result of the Amendment. During the time these emissions remain in the atmosphere, they will have the same 20-year climate impact as over 3,000,000 passenger vehicles driving for one year or over 16 billion pounds of coal burned. A499 (¶ 11). This methane ultimately decays into carbon dioxide, which then remains in the atmosphere for decades or even centuries, all the while trapping heat and disrupting the climate. Once in the atmosphere, there is no available mechanism to remove this climate pollution or reverse its disruptive effects. *Id.* Climate impacts include increased likelihood of extreme weather events, including drought and floods, rising sea levels, and the loss of native plant and animal species, all of which affect Plaintiffs' members. A496–99 (¶¶ 7–9); A515 (¶ 20) (discussing impacts of climate change on his livelihood as a farmer); A481 (¶ 14); A629–30 (¶ 9). Absent a preliminary injunction of the Amendment, Conservation and Tribal Citizen Groups will suffer irreparable harm.

III. The Public Interest and Balance of Equities Weigh Decisively in Favor of an Injunction.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences" when issuing an injunction. *Winter*, 555 U.S. at 24 (citation omitted). The public benefits of enjoining the Amendment are clear and significant. When natural gas is released into the atmosphere, burned unused, or leaked through inadequate infrastructure, the American public loses a valuable resource that could have been used productively, royalties that could be used to fund schools and infrastructure are lost, and dangerous air pollution is allowed to escape into the atmosphere. The Waste Prevention Rule was promulgated as a means of addressing the well-documented and pervasive problem of waste of publicly and tribally owned minerals. *See* 81 Fed. Reg. at 83,009–10 (A3–4). The Amendment removes all of the protections of the Waste Prevention Rule that "generate benefits of gas savings or reductions in methane emissions" for one year, 82 Fed. Reg. at 58,051 (A249), allowing the waste of this valuable resource to continue largely unmitigated, to the detriment of the general public.

As just explained, the Amendment will result in significant and serious environmental harm to the public. Because environmental injury is often irreparable, if such injury is sufficiently likely—

as it is here—"the balance of harms will usually favor the issuance of an injunction to protect the environment." *Bosworth*, 510 F.3d at 1033 (citation omitted).

The Amendment will also harm state, local, and tribal entities as well as individual Indian allottees, including the Conservation and Tribal Citizen Groups' members, that depend upon royalty revenue from oil and natural gas production. A570 (¶ 10–11), 718 (¶ 11), 719 (¶ 20). BLM projects a $2.6 million reduction in royalties during the year that the Amendment will be in effect. A420. Royalties are used by state, local, and tribal governments to fund critical public services such as education and infrastructure. A751–52, 755 (¶¶ 1(a), 2(a), 7) (local officials describing how royalties fund "education, public infrastructure investment for roads and bridges, and mitigation efforts to offset the impacts of energy development" and "provide essential funding for education needs"); A761 (¶¶ 11–12) (noting that "Navajo allottees benefit from royalties" and that "[p]ublic education funding is suffering due to lost royalty revenue from wasted natural gas"); A570 (¶ 12). These government entities and their citizens will suffer the consequences of allowing the Amendment to remain in effect.

Additionally, BLM's Waste Prevention Rule helps reduce noise and visual nuisance to local communities impacted by venting and flaring. 81 Fed. Reg. at 83,014 (A10). The Amendment will do away with this benefit, leaving neighbors of oil and gas production exposed to flares that create noise pollution as loud as a jet engine and light pollution that illuminates the night sky making it "difficult to sleep." A479 (¶ 9); A618–19 (¶¶ 16–19). These impacts, as well as the health impacts of the Amendment, will also interfere with individuals' ability to recreate on public lands that are in the vicinity of oil and gas development, to these individuals' personal detriment and to the detriment of businesses built on outdoor recreation. A640 (¶ 14) (explaining that flaring degrades the quality of "seeing the night sky and learning about Ancestral Puebloan astronomy," which is a "very special part of visiting Chaco [Culture National Park]"); A672–74 (¶ 13) (noting that flaring in the Pawnee

National Grassland "detracts from the natural scenery of the area and interferes with my ability to view wildlife and enjoy the public lands of this area"); A813–14 (¶¶ 5–8).[8]

The harms that will result absent an injunction of the Amendment are substantial and demonstrable; BLM's and operators' possible claims of harm if an injunction is issued pale in comparison. BLM's own projections show that the impact of the Amendment on operators' compliance costs is minimal. Even BLM's newly performed analysis shows that "the estimated per-entity reduction in compliance costs will result in an average increase in profit margin of 0.17 percentage points." 82 Fed. Reg. at 58,058 (A256); *see also id.* at 58,064 (A262) ("[T]he BLM believes that this final delay rule will not have a significant economic impact on a substantial number of small entities."). BLM also concedes that the Amendment "will not substantially alter the investment or employment decisions of firms." *Id.* at 58,057 (A255). If the Amendment is not expected to have a significant impact on operators' profits or their investment and employment decisions, then enjoining the Amendment will likewise have only a minimal impact on operators, who have already had over a year to prepare for compliance.

A preliminary injunction to prevent the Amendment from going into effect will provide the public with substantial economic, environmental, and public health benefits. These benefits far outweigh those that would result from the Amendment, which BLM itself has admitted will be minimal. Therefore, the balance of equities and the public interest favor enjoining the Amendment.

CONCLUSION

Plaintiffs Conservation and Tribal Citizen Groups respectfully request that this Court preliminarily enjoin the Amendment and immediately reinstate the Waste Prevention Rule in its entirety.

[8] Due to these injuries as well as those discussed *supra* pp. 19–23, which are all caused by the Amendment and would be remedied if the Amendment were set aside, Plaintiffs likewise have standing to seek injunctive relief. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182–84 (2000) (finding standing where pollution "directly affected … affiants' recreational, aesthetic and economic interests"); *Salix v. U.S. Forest Serv.*, 944 F. Supp. 2d 984, 1002 (D. Mont. 2013) ("Establishing injury-in-fact for the purposes of standing is less demanding than demonstrating irreparable harm to obtain injunctive relief."); *see also* A475–491, A509–731 (Plaintiffs' organizational and member declarations).

DATED: December 19, 2017

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