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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, et al., Plaintiffs, v. U.S. BUREAU OF LAND MANAGEMENT, et al. Defendants.	Case No. 3:17-cv-07186-WHO Related to No. 3:17-cv-07187-WHO **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR A PRELIMINARY INJUNCTION** Date: February 7, 2018 Time: 2:00 pm Judge: Hon. William H. Orrick Courtroom 2, 17th Floor 450 Golden Gate Ave., San Francisco, CA
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INTRODUCTION

After publishing the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("2016 Rule") in November 2016, the Bureau of Land Management ("BLM") conducted a review required by Executive Order to determine whether the rule unnecessarily encumbered energy production and constrained economic growth. It decided to reconsider the 2016 Rule, through a notice and comment rulemaking process that is currently underway, to reassess the need for the rule, including whether its benefits justified its costs, whether the complexities of the 2016 Rule rendered it infeasible in practice, and whether a revised rule would better fit BLM's statutory authority. Because the reconsideration process for such a complex rule would take time, BLM sought to pause implementation of the 2016 Rule in the interim to avoid imposing significant upfront and unrecoverable compliance costs on operators and the agency itself. To do this, on December 8, 2017, after going through the notice and comment process, BLM published a rule that temporarily suspended and delayed certain provisions of the 2016 Rule for one year ("Suspension Rule").

Plaintiffs would have this Court believe that the Suspension Rule fundamentally revises the 2016 Rule. This is false. The Suspension Rule merely postpones the most expensive compliance requirements of the 2016 Rule for one year, while BLM considers whether to substantively revise the 2016 Rule through a separate rulemaking process. It is a temporary and commonsense solution to the agency's pragmatic concerns: operators should not be required to make expensive equipment investments to meet requirements that may be rescinded or significantly revised in the near future, and it is not a good use of scarce agency resources to implement a rule that is likely to change.

Even though the Suspension Rule imposes no independent requirements, authorizes no independent activities, and effectively maintains the status quo, Plaintiffs nonetheless seek the extraordinary remedy of a preliminary injunction to force the agency to implement the 2016 Rule. But Plaintiffs fail to carry their burden to show that the extraordinary remedy of a preliminary injunction is warranted. First, Plaintiffs cannot demonstrate imminent or irreparable harm. The 2016 Rule was intended to prevent waste, and thereby also reduce emissions, over

time. As explained in the Environmental Assessment for the Suspension Rule, a delay in the implementation of the 2016 Rule by one year, let alone the few months necessary for the parties to brief the merits of this case, will not result in significant emissions. 2017 EA at 24 (VFD_000048).[1] Moreover, Plaintiffs are not asking this Court to stop ongoing harms, but rather seek an injunction compelling BLM to implement the 2016 Rule. The 2016 Rule cannot simply be switched on and off. It takes significant time and resources for operators to comply with its requirements, and many operators have not yet made those investments given the regulatory uncertainty surrounding the 2016 Rule. Thus, even if the Court enjoined the Suspension Rule, operators would not be able to immediately comply with the 2016 Rule, and the alleged benefits of the 2016 Rule would not immediately take effect. Merits briefing should thus be able to proceed in the next few months without preliminary injunctive relief.

Second, Plaintiffs cannot show a likelihood of success on the merits. To support their arguments, they have conflated the Suspension Rule with BLM's future proposed revision of the 2016 Rule, creating a strawman that could be more easily attacked. BLM complied with the Administrative Procedure Act's ("APA") requirements for the action it actually took—a temporary, one-year suspension of certain provisions of the 2016 Rule. It had no duty to address its future revision of the 2016 Rule in the suspension rulemaking; indeed, any positions that the agency took on the future revision in the Suspension Rule would have constituted predetermination in violation of the APA.

Third, the Suspension Rule is in the public interest. It saves operators approximately $110 million in compliance costs during the one year suspension period. Those saved costs outweigh the benefits that the 2016 Rule would have otherwise produced during the suspension in the form of reduced emissions and captured gas by approximately $64-68 million, or $83-86 million, depending on the discount rate used. 2017 RIA at 51-54 (VFD_000105-108); 82 Fed. Reg. 58,050, 58,057 (Dec. 8, 2017). Essentially, then, Plaintiffs are claiming that BLM should

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[1] Citations to "VFD_######" are to the Preliminary Administrative Record for the Suspension Rule, which Defendants lodged with the Court on January 16, 2018. *See* ECF No. 65, No. 17-cv-7186; ECF No. 58, No. 17-cv-7187.

have required operators to spend $110 million in unrecoverable costs to comply with a rule that may change significantly, even though those costs are not justified by the benefits.

In short, the Suspension Rule is a commonsense, time-limited solution to a practical problem. Its benefits outweigh its costs and it produces no imminent harm. Plaintiffs have not met their burden of demonstrating that extraordinary relief is merited, and their motions should be denied.[2]

FACTUAL BACKGROUND

I. The 2016 Rule

On November 18, 2016, BLM issued the 2016 Rule. 81 Fed. Reg. 83,008-01 (Nov. 18, 2016). The 2016 Rule applies to the development of federal and Indian minerals nationwide. It prohibits the venting of natural gas by oil and gas operators except in certain limited situations, and requires that operators capture a certain percentage of the gas they produce each month. *Id.* at 83,023-24; 43 C.F.R. §§ 3179.6-3179.7. The 2016 Rule also requires that operators inspect equipment for leaks and update equipment that contributes to the loss of natural gas during oil and gas production. 81 Fed. Reg. at 83,011-12, 83,022; 43 C.F.R. §§ 3179.201-3179.204, 3179.301-3179.304.

While the 2016 Rule went into effect on January 17, 2017, many of the 2016 Rule's requirements, including those related to gas capture, measurement of vented and flared gas volumes, pneumatic controller equipment, pneumatic diaphragm pumps, storage vessels, and leak detection and repair, were to be phased in over time to allow operators time to come into compliance. 81 Fed. Reg. at 83,023-24, 83,033; 43 C.F.R. §§ 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, 3179.301-3179.305. These phased-in requirements would not become operative until January 17, 2018. *Id.*

[2] As explained in their recently filed Motion to Transfer, Defendants maintain that the U.S. District Court for the District of Wyoming is in the best position to decide Plaintiffs' preliminary injunction motions, as it is intimately familiar with the 2016 Rule and BLM's reconsideration process. Defs.' Mot. to Transfer, Nos. 17-cv-7186, 17-cv-7187, ECF Nos. 52, 55.

In its Regulatory Impact Analysis of the 2016 Rule ("2016 RIA"), BLM determined that the 2016 Rule would result in net benefits, with most of those benefits flowing from reduced methane emissions. 2016 RIA at 107, 111 (VFD_002615, 2619). BLM used a global measure of the social cost of methane to value the emissions reductions. *Id.* at 31-37 (VFD_002539-45). BLM estimated that the 2016 Rule would require compliance costs of $110-$279 million per year. *Id.* at 105 (VFD_002613). Most of those costs resulted from the 2016 Rule's gas capture and leak detection and repair requirements, both of which would take effect in January 2018. *Id.* at 105-06 (VFD_002613-14). BLM determined that operators would have to spend approximately $110-$114 million during 2017 to prepare for the portions of the Rule that were set to come into effect in January 2018. *Id.* at 106 (VFD_002614).

In November 2016, the States of Wyoming and Montana, and two industry groups—Western Energy Alliance and the Independent Petroleum Association of America—challenged the 2016 Rule in the U.S. District Court for the District of Wyoming. *W. Energy All. v. Zinke*, No. 16-cv-280 (D. Wyo. filed Nov. 15, 2016); *Wyoming v. U.S. Dep't of Interior*, No. 16-cv-285 (D. Wyo. filed Nov. 18, 2016). The States of California and New Mexico, and a coalition of environmental groups that includes all but one of the Plaintiffs in this case, intervened on the side of the government. The States of North Dakota and Texas intervened on the side of petitioners. In January 2017, the Wyoming court denied petitioners' motions to enjoin the 2016 Rule, but expressed "concerns" with BLM's consideration of the "environmental and related social benefits" of the 2016 Rule. *Wyoming v. U.S. Dep't of Interior*, Nos. 2:16-cv-0280-SWS, 2:16-cv-0285-SWS, 2017 WL 161428, at *10 (D. Wyo. Jan. 16, 2017). On December 29, 2017, the court stayed the litigation before it pending BLM's reconsideration of the 2016 Rule. In its decision, the court noted that the instant Suspension Rule lawsuits are "inextricably intertwined" with the Wyoming litigation. ECF No. 52-1 at 4.

II. BLM's Reconsideration of the 2016 Rule

On March 28, 2017, President Donald J. Trump issued an Executive Order requiring that the Secretary of the Interior "review" the 2016 Rule and "if appropriate, . . . as soon as practicable, . . . publish for notice and comment proposed rules suspending, revising, or

rescinding" the 2016 Rule. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, § 7(b) (Mar. 28, 2017). As directed, BLM reviewed the 2016 Rule and determined that it does not align with the policy set forth in Executive Order 13,783, which states that it is "in the national interest to promote the clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." *Id.* at 16,093; 82 Fed. Reg. 46,458, 46,459-60 (Oct. 5, 2017).

BLM has drafted a proposed Revision Rule that would rescind certain provisions of the 2016 Rule and substantially revise others. Pursuant to Executive Order 12,866, the proposed rule is currently under review by the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget ("OMB") to ensure that it is consistent with applicable law and the President's priorities, and does not conflict with the actions or policies of other agencies.[3] *See* 58 Fed. Reg. 51,735 (Sept. 30, 1993). BLM has also submitted a draft regulatory impact analysis and draft environmental assessment for the proposed rule to OIRA. Decl. of James Tichenor ¶ 6, Ex. A. OIRA has circulated the proposed rule for interagency review. *Id.* Once OIRA concludes its review process, BLM will publish the proposed rule in the Federal Register for public comment. *Id.* BLM anticipates publication in the Federal Register in January 2018. *Id.*

III. The Suspension Rule

In the interim, to "avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future," BLM developed the Suspension Rule to delay for one year the effective date of provisions of the 2016 Rule that had not yet become operative and suspend for one year the effectiveness of certain provisions that were already in effect. 82 Fed. Reg. at 58,051. BLM published the proposed Suspension Rule on October 5, 2017, along with a draft Regulatory Impact Analysis and draft

[3] As of the date of filing, OIRA's website lists the proposed Revision Rule as currently under review. *See* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=1004-AE53.

Environmental Assessment. 82 Fed. Reg. at 46,458. The agency sought public comment on the proposed rule for thirty days. *Id.* On December 8, 2017, after reviewing the comments received, BLM published the final Suspension Rule, final Regulatory Impact Analysis ("2017 RIA"), final Environmental Assessment ("2017 EA"), and a Finding of No Significant Impact ("FONSI"). 82 Fed. Reg. 58,050. The Suspension Rule took effect January 8, 2018.[4] *Id.*

For provisions of the 2016 Rule that were set to take effect in January 2018, the Suspension Rule "temporarily postpone[s] the implementation dates until January 17, 2019, or for one year."[5] *Id.* For certain provisions of the 2016 Rule that had already taken effect, the Suspension Rule "temporarily suspend[s] their effectiveness until January 17, 2019." *Id.* In sum, the Suspension Rule suspends or delays the following provisions of the 2016 Rule: drilling applications and plans (43 C.F.R. § 3162.3-1(j)); gas capture requirements (§ 3179.7); measuring and reporting volumes of gas vented and flared from wells (§ 3179.9); determinations regarding royalty-free flaring (§ 3197.10); well drilling (§ 3179.101); well completion and related operations (§ 3179.102); equipment requirements for pneumatic controllers (§3179.201); requirements for pneumatic diaphragm pumps (§3179.202); requirements for storage vessels (§ 3179.203); downhole well maintenance and liquids unloading (§3179.204); and operator responsibility for leak detection, repair, and reporting requirements (§§ 3179.301-305). 82 Fed.

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[4] Plaintiffs suggest that BLM reversed its position on whether the Suspension Rule qualified as a "major rule" under Executive Order 13771, such that it would become effective 60 days after publication, to ensure the Suspension Rule became effective before January 17, 2018. Sierra Club Mot. 5 n.2, ECF No. 4-1. In fact, the determination of whether a rule is a major rule under EO 13771 is made by OIRA, not BLM, and turns on that agency's determination of, among other things, whether a rule will have an annual effect on the economy of $100 million or more. 5 U.S.C. § 804; *see also* 2017 RIA at 9 (VFD_000063). This determination is not subject to judicial review. 5 U.S.C. § 805.

[5] BLM previously sought to postpone these same provisions in June 2017 pursuant to 5 U.S.C. § 705. 82 Fed. Reg. 27,430-01 (June 15, 2017). The same plaintiffs in these cases challenged that action. *California v. BLM*, No. 17-cv-3804-EDL (N.D. Cal. filed July 5, 2017); *Sierra Club v. Zinke*, No. 17-cv-3885-EDL (N.D. Cal. filed July 10, 2017). On October 4, 2017, Magistrate Judge Laporte held that BLM lacked authority to postpone future compliance dates under Section 705 and vacated the postponement. *California v. BLM*, Nos. 17-cv-03804-EDL, 17-cv-3885-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017).

Reg. at 58,051-56; *see also* 2017 RIA 11-15 (VFD_000065-69) (chart indicating status of each provision of the 2016 Rule in light of the Suspension Rule).

A number of royalty-related provisions of the 2016 Rule will remain in effect during the one-year suspension period, including definitions clarifying when lost gas is "avoidably lost," and therefore subject to royalties (43 C.F.R. § 3179.4); restrictions on the practice of venting (43 C.F.R. § 3179.6); limitations on royalty-free venting and flaring during initial production testing (43 C.F.R. § 3179.103); limitations on royalty-free flaring during subsequent well tests (43 C.F.R. § 3179.104); and, restrictions on royalty-free venting and flaring during "emergencies" (43 C.F.R. § 3179.105).[6] 82 Fed. Reg. at 58,051-52. Although these royalty provisions "may ultimately be revised in the near future" in BLM's rulemaking to revise the 2016 Rule, BLM did not suspend them "because it does not, at this time, believe that suspension is necessary, because the cost and other implications do not pose immediate concerns for operators." 82 Fed. Reg. at 58,051.

BLM published a 78-page economic analysis of the Suspension Rule, the 2017 RIA, weighing the costs of a temporary suspension, such as any additional emissions produced during the one-year suspension period, against the benefits, namely the reduction in compliance costs. 2017 RIA at 5-6 (VFD_000059-60). The 2017 RIA drew heavily from the 2016 RIA's analysis but shifted the impacts estimated for the 2016 Rule into the future. *Id.* at 5 (VFD_000059). During the one-year suspension period, BLM concluded that the Suspension Rule would result in positive net benefits of $64-68 million or $83-86 million (depending on whether a 3% or 7% discount rate is used to calculate the social cost of methane) when the reduction in compliance

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[6] In addition to these provisions, the Suspension Rule also does not suspend 43 C.F.R. §§ 3103.3-1 (aligning royalty rate with Mineral Leasing Act); 3160.0-5 (removing definition of "avoidably lost"), 3178.1-.10 (regulating royalty-free use of oil and gas in operation and production), 3179.1-.3 (purpose and definition sections), 3179.5 (royalties due on "avoidably lost" gas), 3179.8 (allows BLM to approve lower gas capture limit), 3179.11 (acknowledges BLM's existing authority under other laws to limit production to avoid waste), 3179.12 (allows BLM to coordinate with States), 3179.401 (allows States or tribes to apply for variances). These provisions have no significant compliance costs, *see* 2017 RIA at 32 (VFD_000086), and many are inoperative in light of the suspension of other provisions.

costs is weighed against the reduction in cost savings due to product recovery and forgone emissions reductions. 2017 RIA at 5, 51-54 (VFD_000059, 105-108); 82 Fed. Reg. at 58,057. Over the 11-year evaluation period, BLM estimated total net benefits ranging from $19 million to $52 million. *Id.* To calculate these benefits, BLM employed a domestic measure of the social cost of methane. 2017 RIA at 25, 55-59 (VFD_000079, 109-113). BLM also published a 21-page Environmental Assessment that analyzed the potential environmental impacts from temporarily suspending certain provisions of the 2016 Rule until January 17, 2019. EA at 1 (VFD_000025).

Plaintiffs filed the instant lawsuits challenging BLM's Suspension Rule in the U.S. District Court for the Northern District of California on December 19, 2017, and immediately moved for a preliminary injunction. Compl. & Mot. for Prelim. Inj., *California v. BLM*, No. 17-cv-7186 (N.D. Cal. filed Dec. 19, 2017), ECF Nos. 1, 3; Compl. & Mot. for Prelim. Inj., *Sierra Club v. Zinke*, No. 17-cv-7187 (N.D. Cal. filed Dec. 19, 2017), ECF Nos. 1, 4. Plaintiffs seek vacatur of the Suspension Rule and reinstatement of the 2016 Rule. Compl. 32, *Sierra Club*, No. 17-cv-7187, ECF No. 1; Compl. 22, *California*, No. 17-cv-7186, ECF No. 1.

STATUTORY BACKGROUND AND STANDARD OF REVIEW

I. Review of Agency Action under the APA

To succeed, challenges to an agency's decision brought under the APA must show that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Agency action will be upheld if the agency has considered the relevant factors and articulated a rational connection between the facts found and choice made. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) (citation omitted). The scope of review is narrow, and the court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. Standard for Demonstrating Entitlement to Extraordinary and Preliminary Relief

An injunction "is a matter of equitable discretion" and is "an extraordinary remedy that may only be awarded upon a clear showing that the [petitioner] is entitled to such relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22, 31-32 (2008). An injunction "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURES § 2948 (2d ed. 1995)).

To obtain a preliminary injunction, a plaintiff must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. When the government is a party, the public interest and balance of equities factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citation omitted). Under controlling Supreme Court precedent, an injunction "is not a remedy which issues as of course," even where success on the merits is likely. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citation omitted) (reversing determination that an injunction was required to address unpermitted discharges following a finding of liability under the Clean Water Act).

III. The Stricter Standard for a Mandatory Injunction Applies in These Cases

There are two kinds of preliminary injunctions—prohibitory and mandatory. "A prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits." *Animal Legal Def. Fund v. USDA*, No. 17-CV-00949-WHO, 2017 WL 2352009, at *3 (N.D. Cal. May 31, 2017) (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009)). A mandatory injunction, in contrast, compels action on the part of the enjoined party. *See Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). Mandatory injunctions are "particularly disfavored" and "are not granted unless extreme or very serious damage will result." *Anderson v. United States*, 612 F.2d 1112, 1114-15 (9th Cir. 1980) (quoting *Martinez v. Mathews*, 544 F.2d 1233,

1243 (5th Cir. 1976) and *Clune v. Publishers' Ass'n of New York City*, 214 F. Supp. 520, 531 (S.D.N.Y.), *aff'd per curiam*, 314 F.2d 343 (2d Cir. 1963)).

Although Plaintiffs style the relief they seek as merely enjoining the Suspension Rule from taking effect, as a practical matter, Plaintiffs ask this Court to compel BLM to implement the provisions of the 2016 Rule that the Suspension Rule has suspended or delayed. Sierra Club Mot. 2 (requesting that Court "reinstate the January 17, 2018 deadline for complying with BLM's Waste Prevention Rule"); Cal. Mot. 4 (same). Thus, Plaintiffs seek a mandatory injunction as they request that this Court compel BLM to perform an affirmative act—implement stayed compliance obligations. *Animal Legal Def. Fund*, 2017 WL 2352009, at *4 (mandatory injunction because Plaintiffs sought to compel agency to release thousands of documents). The inverse of this reasoning further illuminates this point: because the Suspension Rule largely imposes no new requirements on operators and preserves the status quo, the injunctive relief sought in Plaintiffs' motions involves the implementation of a new regulatory regime. A "stricter standard" therefore applies to this suit and Plaintiffs must plead and prove that "the facts and law clearly favor" a preliminary injunction. *Id.* (internal quotations omitted).

ARGUMENT

This Court should deny Plaintiffs' motions for a preliminary injunction because they have failed to meet the four factors required for such extraordinary relief. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) ("An injunction should issue only if the traditional four-factor test is satisfied."). No imminent harms flow from the Suspension Rule because, even absent a suspension, the benefits of the 2016 Rule would not take effect immediately. Plaintiffs are unlikely to succeed on the merits because BLM has broad statutory authority to determine the best way to manage oil and gas development on public and Indian lands, and because the agency reasonably explained and supported the action it has actually taken—a short-term, temporary suspension of certain provisions of the 2016 Rule—and provided for notice and comment on the Suspension Rule. An injunction is not in the public interest, and the balance of equities weighs against it, because it would result in the imposition of

approximately $110 million in compliance costs on operators and the use of scarce agency resources to implement a rule that may be rescinded or significantly revised in the near future.

I. Plaintiffs Have Failed to Demonstrate the Requisite Certain, Irreparable Harm

To obtain a preliminary injunction, Plaintiffs must show an immediate threat of irreparable injury and that the injunction will alleviate the alleged injury. *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022-23 (9th Cir. 2016). The mere "possibility" of harm is not sufficient—Plaintiffs must make a clear showing that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22; *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011). In the context of the environment, the Ninth Circuit has "decline[d] to adopt a rule that any potential environmental injury automatically merits an injunction." *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008), *overruled on other grounds by Winter*, 555 U.S. 7 (2008). The alleged environmental harm must instead be likely, imminent, and irreparable. *See All. for the Wild Rockies*, 632 F.3d at 1135.

Plaintiffs cannot meet this standard. First, Plaintiffs cannot show that any alleged harms from the temporary suspension or delay of certain provisions of the 2016 Rule are imminent. Plaintiffs' assumption that, absent the Suspension Rule, the 2016 Rule would be fully in effect and producing environmental benefits on January 17, 2018 is incorrect. Operators initially had a full year to comply with many of the requirements of the 2016 Rule. *See* 81 Fed. Reg. 83,008. However, given the regulatory uncertainty surrounding the 2016 Rule—including ongoing litigation challenging the 2016 Rule in Wyoming and a four-month postponement of the January 2018 compliance deadlines from June to October—the operators who have not already complied with the 2016 Rule voluntarily are not likely poised to do so by January 17. 2017 RIA at 32 & n.26, 36 (VFD_000086, 90). Nor will be they able to do so immediately. Compliance with the 2016 Rule requires, among other things, equipment acquisition and installation, protocol changes, and training. Ex. A ¶ 8.

Moreover, Plaintiffs' complained-of harms from increased air pollution by virtue of the suspension of the 2016 Rule are incremental in nature and do not require immediate relief. While Plaintiffs complain that the Suspension Rule postpones the implementation of leak

detection and gas capture requirements and the installation of upgraded equipment, Sierra Club Mot. 19, 25, none of these measures are currently in place and none can plausibly immediately ameliorate air pollution. The 2016 Rule was intended to prevent waste, and thereby also reduce emissions, over time. As explained in the EA for the Suspension Rule, a delay in the implementation of the 2016 Rule by one year, let alone the few months necessary for the parties to brief the merits of this case, will not result in significant emissions. 2017 EA at 16-17 (VFD_000040-41). In fact, the amount of methane emissions attributable to the suspension is infinitesimal at roughly 0.61 percent of the total U.S. methane emissions in 2015. *Id.*; Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1995-2015 – Executive Summary, U.S. Environmental Protection Agency (April 13, 2017), pp. ES-6 (stating that in 2015 U.S. methane emissions were about 655.7 million metric tons of carbon dioxide equivalent). Merits briefing should thus be able to proceed in the next few months without the need for injunctive relief to preserve the status quo.[7] *See S. Fork Band Council of W. Shoshone of Nev. v. Dep't of Interior*, 588 F.3d 718, 721 (9th Cir. 2009) (per curiam) (the relevant inquiry for preliminary injunctions focuses on whether plaintiffs will suffer irreparable harm before a decision on the merits). In short, because Plaintiffs complain about the delayed implementation of prophylactic requirements—here, requirements in the 2016 Rule that will unavoidably be delayed anyway due to the regulatory uncertainty that has surrounded the 2016 Rule—the proper course is for the parties to engage in expedited merits briefing.

Second, Plaintiffs cannot show that their harms are irreparable. Plaintiffs argue that any temporary increases in air pollution constitute irreparable harm, citing the negative effects of air pollution on the population generally and the health of a few of their members or citizens specifically. Sierra Club Mot. 19, 20-21; Cal. Mot. 21-24. There is not, however, a presumption that any project that increases air pollution causes irreparable harm warranting the imposition of the extraordinary remedy of an injunction. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S.

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[7] BLM is poised to lodge a final administrative record in the next day 30 days, which would allow briefing on the merits to proceed expeditiously. Decl. of Erica Pionke ¶ 3, Ex. B.

531, 545 (1987) (noting that injunctions are not presumed in environmental cases). While Plaintiffs cite several cases in which a court characterizes air pollution from a particular project as "irreparable," none of these cases stand for the general proposition that harms from air pollution are presumptively irreparable and none involved the imposition of a preliminary injunction primarily based on a finding that air pollution alone caused irreparable harm.[8] Moreover, certain states with significant oil and gas development on public lands such as Wyoming, Montana, and North Dakota already have measures in place limiting the venting and flaring of gas, further undermining Plaintiffs' harms arguments.[9] 2017 RIA at 17-19, 24-26 (VFD_000071-73, 78-80). Although Plaintiffs state that these regulations fail to fill the gap, they again erroneously equate any increase in air pollution as tantamount to imminent irreparable harm. Sierra Club Mot. 20-21; Cal. Mot. 22-24. There is no such bright line presumption.

The record does not support a finding of anything other than a "mere possibility" of harm. *Winter*, 555 U.S. at 22. BLM assessed Plaintiffs' claimed harms to their citizens' and members' health and acknowledged that the Suspension Rule would lead to a short-term increase in the amount of methane and volatile organic compounds ("VOCs") emitted during the one-year

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[8] *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313-14 (1977) (weighing numerous factors in addition to air pollution, including traffic, delivery times, attractiveness of the City to businesses and tourists, in denying stay of enforcement of plan under the Clean Air Act); *Sierra Club v. USDA, Rural Utilities Serv.*, 841 F. Supp. 2d 349, 359 (D.D.C. 2012) (citing various adverse environmental effects—not merely air pollution—as reason for permanent injunctive remedy after summary judgment briefing); *S. E. Pennsylvania Transp. Auth. v. Int'l Ass'n of Machinists & Aerospace Workers*, 708 F. Supp. 659, 663–64 (E.D. Pa.), *aff'd sub nom. Se. Pennsylvania Transp. Auth. v. Bhd. of R.R. Signalmen*, 882 F.2d 778 (3d Cir. 1989) (enjoining workers' strike in light of variety of factors, such disruption of commuter rail service to the detriment of the public, potential for undetected hazardous conditions, and increased traffic congestion); *Diné Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209 JB/SCY, 2015 WL 4997207, at *46-47 (D.N.M. Aug. 14, 2015), *aff'd sub nom. Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016) (denying motion for injunctive relief despite finding irreparable harm from the drilling of oil and gas wells, including surface impacts, air pollution, and water usage).

[9] These states represent 39.6% of federally-managed oil wells. https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics. In addition, similar EPA venting and flaring regulations apply to all new and modified oil and gas facilities. 2017 RIA at 16, 24 (VFD_000070, 78).

postponement period compared to the 2016 Rule. 82 Fed. Reg. at 58,062. However, given the short duration of the Suspension Rule, the agency found that "there will be essentially no increase over the 11-year evaluation period." *Id.*; 2017 RIA at 42 (VFD_000096). BLM also considered concerns as to the Suspension Rule's effects on air quality and health, noting the short duration of the Rule and that it "is not expected to materially affect methane emissions compared to the baseline data. . . ." 82 Fed. Reg. at 58,062. To the extent Plaintiffs challenge those findings through the submission of extra-record expert testimony, such testimony is improper in a record-review action and may not be used to second-guess BLM's technical judgments.[10] Moreover, the alleged injuries of Plaintiffs' standing declarants—such as interference with the use and enjoyment of property, air pollution from venting and flaring, health effects and loss of royalty receipts—are too speculative to establish imminent and irreparable harm. None can demonstrate that the minimal additional emissions resulting from a one year suspension are the cause of their harms. The fact that the Suspension Rule does not authorize anything but merely preserves the status quo further undermines Plaintiffs' claims of irreparable harm.

In short, Plaintiffs' claims of harm are based on the tenuous argument that any increase in methane and VOCs, even if relatively insignificant, is irreparable. But, as discussed above, Plaintiffs cannot show imminent and irreparable harm in light of the temporary and relatively inconsequential nature of the emissions at issue.

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[10] The 38 extra-record declarations consisting of approximately 336 pages submitted by Plaintiffs purportedly analyzing the potential effects of the suspension are entitled to no weight and may not be relied upon by the Court in evaluating the "correctness or wisdom" of BLM's decision. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980); *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579,582-83 (D.C. Cir. 2001). Furthermore, beyond establishing standing, the declarations should not be considered because they were prepared exclusively for litigation and were not submitted to the agency during the administrative process. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Defense Council*, 435 U.S. 519, 553-54 (1978).

II. An Injunction Would Not Serve the Public's Interest and a Balancing of the Equities also Militates Against an Injunction

The public interest and balance of the equities weigh in favor of denial of Plaintiffs' motions because the Suspension Rule conserves the resources of operators and the agency while BLM is undertaking a rulemaking to reconsider the 2016 Rule. Absent the Suspension Rule, by January 17, 2018, the 2016 Rule would have required operators to, among other things, replace pneumatic controllers with a bleed rate of more than 6 standard cubic feet per hour; replace certain pneumatic diaphragm pumps; replace storage vessels that emit more than 6 tons per year of VOCs; and install equipment needed to capture and store at least 85% of produced gas. 82 Fed. Reg. 58,052-55. Rather than require operators to comply with requirements that may soon change, it is in the public interest to press pause on these more onerous requirements of the 2016 Rule while the agency reconsiders it.

The Suspension Rule ensures that operators do not have to bear the financial burden of complying with provisions of the 2016 Rule that are currently under review and may be revised in the near future. Ex. A ¶ 8. Compliance with many of the requirements set to take effect on January 17, 2018 would require financial outlays that could not be later recovered should BLM subsequently revise or rescind the 2016 Rule. *Id.* In the 2017 RIA, BLM concluded that, under the Suspension Rule in 2018, regulated entities will delay incurring compliance costs of $114 million (using a 7% discount rate to annualize capital costs) or $110 million (using a 3% discount rate to annualize capital costs). 2017 RIA at 37-38 (VFD_000091-92). This determination was based on total estimated capital expenditures (that would not be recovered) of: (1) $13 million for replacement pneumatic controllers; (2) $31 million for replacement pneumatic diaphragm pumps or site modifications; (3) $40 million for equipment to comply with the storage vessel requirements; (4) $21 million for equipment to comply with downhole well maintenance and liquids unloading requirements; and (5) $18 million for flare meters. Ex. A ¶ 10. In addition to these expenditures, the initial upfront unrecoverable costs in 2018 alone would be $91 million ($84 million to comply with Leak Detection and Repair ("LDAR") requirements and $7 million to comply with administrative requirements). *Id.* ¶ 11. BLM also aims to avoid

expending scarce agency resources on rule implementation. 82 Fed. Reg. at 58,051. Among the costs associated with implementing a new rule are internal training, operator outreach and education, answering industry questions, and developing clarifying guidance. Ex. A ¶ 12.

As discussed above, BLM is undertaking a new rulemaking because it has concluded that certain provisions of the 2016 Rule add considerable regulatory burdens that do not align with the President's policies of promoting energy production, jobs, and economic growth. 82 Fed. Reg. at 58,050. And while this proposed rule is not before this Court, the agency's policy determination that it is not a wise expenditure of agency or industry resources to implement a rule under active reconsideration is. Plaintiffs maintain that the Suspension Rule does not promote the public interest, relying on the alleged benefits of the 2016 Rule. But a one-year suspension is not a repeal of the 2016 Rule. The agency's temporary postponement of certain requirements of the 2016 Rule are appropriately assessed based on the annual impacts of the suspension, not the predicted impact of the proposed Revision Rule. *See infra* Section III.A. Here, the agency acknowledged that there would be a temporary reduction in royalties and an increase in emissions during the one-year postponement period. 82 Fed. Reg. at 58,057. Offsetting these harms, BLM found that some provisions of the 2016 Rule would pose a particular compliance burden to operators of marginal or low-producing wells and this additional burden could jeopardize the ability of operators to maintain or economically operate these wells. *Id.* at 58,056-58. In light of the short time period involved, BLM also concluded that the potential adverse impacts on operators, and small operators in particular, outweighed these harms. *Id.* In assessing the public interest and balancing the equities, BLM is entitled to give weight to these economic considerations. *See McNair*, 537 F.3d at 1005 (affirming finding that the balance of harms did not tip in environmental organization's favor where a Forest Service project would "further the public's interest in aiding the struggling local economy and preventing job loss." (citation omitted)).

When compared to BLM's pragmatic concerns and the substantial cost to operators, the minimal increase in emissions alleged by Plaintiffs is far outweighed. In fact, savings in compliance costs as compared to the monetized value of the increase in emissions and reduced

captured gas results in a net benefit of $64-68 million, or $83-86 million depending on the discount rate used, during the suspension year. The agency's common sense determination that it is not in the public interest to invest scarce agency resources to implement a rule that might be transitory or to impose costly requirements on operators that may be rescinded in the near future is a reasonable one and militates against an injunction.

III. Plaintiffs Have Not Established A Likelihood Of Success On The Merits

A. The Suspension Rule Is Not An Improper Substantive Revision of the 2016 Rule

Plaintiffs have taken pains to characterize the Suspension Rule as a "substantive amendment" of the 2016 Rule, Sierra Club Mot. 7-9; Cal. Mot. 10, 12-13, and in doing so have conflated the Suspension Rule—a temporary, one year suspension of certain provisions of the 2016 Rule—with BLM's proposed future revision of the 2016 Rule. This argument fails.

As an initial matter, Defendants do not dispute that the Suspension Rule is "substantive" as that term is used in APA jurisprudence or that it has "palpable effects" on the regulated industry.[11] *See* Sierra Club Mot. 9. Nor do Defendants dispute that such rules are subject to the APA's notice and comment requirement. It is precisely for that reason that BLM followed the APA's procedures and held a comment period on the proposed Suspension Rule.[12]

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[11] Under the APA, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are exempted from notice and comment. 5 U.S.C. § 553(b)(A). All other rules are "substantive" and therefore subject to notice and comment unless they qualify for another exemption. *See Wilson v. Lynch*, 835 F.3d 1083, 1098-99 (9th Cir. 2016) (distinguishing between "interpretative rules" that "merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule" and "legislative rules" which "create rights, impose obligations, or effect a change in existing law" (quoting *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003)); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) (differentiating between "interpretative rule" and "substantive rule" that has "palpable effects upon the regulated industry and the public in general" (citation omitted)). BLM has not invoked 5 U.S.C. § 553(b)(A)'s exemption from notice and comment here.

[12] The cases cited by Plaintiffs are inapposite as all involved situations in which an agency failed to conduct notice and comment in advance of rulemaking. *Council of S. Mountains*, 653 F.2d at 580-82 & n.28 (finding rule was "substantive" rather than "interpretative" and therefore subject to notice and comment, but that rule nevertheless qualified for APA's good cause exemption

But it is a very different matter for Plaintiffs to argue that the Suspension Rule must cover the same ground, be held to all the same requirements, and be judged by the same standard as BLM's proposed future revision of the 2016 Rule. The Suspension Rule does not alter the contents of the 2016 Rule, it imposes no new obligations on operators, and makes no assumptions as to what provisions of the 2016 Rule will ultimately be revised, if any. All it does is postpone implementation of the compliance requirements for certain provisions of the 2016 Rule for one year. Indeed, the fact that BLM is separately undertaking a rulemaking to revise the 2016 Rule is evidence that the Suspension Rule is a separate, discrete agency action.

Plaintiffs' arguments are not aided by *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984). The agency in that case issued an "indefinite suspension" of regulations that had previously been in effect for years, *id.* at 96-97, and then argued that a "less precise explanation of the bases for the decision" would suffice to survive judicial review because it had merely suspended the regulations rather than revoking them. *Id.* at 98. The court rejected the argument, reasonably concluding that the suspension amounted to a revocation because it would remain in effect indefinitely. *Id.* *Public Citizen* has no bearing here because the challenged Suspension Rule is expressly limited to one year and many of its requirements have not yet taken in effect. Thus, consistent with the legal principles recognized in *Public Citizen*, 733 F.2d at 98-99, BLM need only explain why it chose to suspend the 2016 Rule for one year; it need not delve into all of the rationales or justifications relating to whatever action BLM may take in a separate rulemaking action to revise the 2016 Rule. *See id.* at 98 ("The inquiry required by the APA is a familiar one. The 'agency must cogently explain why it has exercised its discretion in a given manner.'" (citation omitted)).

To the extent Plaintiffs suggest that BLM's Suspension Rule must be treated as a "revocation" of the 2016 Rule because "it is designed to allow the agency sufficient time" to

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from notice and comment); *Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 817 (D.C. Cir. 1983) (finding EPA policy subject to notice and comment); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 205-06 (2d Cir. 2004) (finding delay of rule's effective date improperly issued without notice and comment).

revise the 2016 Rule, they engage in the very predetermination for which they have chastised the agency. Cal. Mot. 13. The Suspension Rule revokes nothing. And while Plaintiffs complain that BLM's reconsideration of the 2016 Rule could lead to its rescission or revision, that has no bearing on the Court's analysis here. Plaintiffs will have ample opportunity to participate in that separate rulemaking action through the notice and comment process, and they will have the option to also seek judicial review if they object to BLM's final decision in that separate rulemaking process. 5 U.S.C. §§ 702, 704. BLM has ample discretion to structure its reconsideration of the 2016 Rule into two separate rulemakings—one to allow time to complete the reconsideration without imposing potentially unnecessary costs on operators and the agency and one to actually reconsider the 2016 Rule. *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 332 (5th Cir. 1988) (The government need not "choose between attacking every aspect of a problem or not attacking the problem at all." (quoting *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970))); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984) (finding that the Circuit has "recognized the reasonableness of [an agency's] decision to engage in incremental rulemaking and to defer resolution of issues raised in a rulemaking" given that "an agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken" (citations omitted)). Each of these is a discrete agency action and must be evaluated at such, on the basis of its individual purpose and record.

B. BLM Has Provided Evidence Supporting its Concerns About the 2016 Rule and Justifying the Need for a Suspension of the Rule During the Reconsideration

In attacking BLM's decision to temporarily suspend the 2016 Rule, Plaintiffs have used the agency's forthcoming proposed Revision Rule as a strawman, arguing that BLM has failed to support and explain its reasons for revising the 2016 Rule. But, as discussed above, the action challenged in these two lawsuits is not a revision of the 2016 Rule; it is merely a one-year temporary suspension of certain provisions of the 2016 Rule. Thus, under the APA, BLM does not have an obligation to explain why it may or may not choose to substantively revise the 2016 Rule in a future rulemaking, but rather why it chose to temporarily suspend the 2016 Rule for one year in light of the facts before it. *State Farm*, 463 U.S. at 42-43.

BLM has done just that. First, it identified a range of concerns with the "statutory authority, cost, complexity, feasibility, and other implications of the 2016 final rule" that justify reconsideration of the rule. It then considered the best way forward in light of these concerns. Given the time necessary for the agency to fully reconsider the 2016 Rule, BLM decided to temporarily suspend certain provision of the 2016 Rule to avoid imposing unrecoverable capital expenditures on operators or misdirecting scarce agency resources on rule implementation efforts. 82 Fed. Reg. at 58,051. Each of these decisions is supported by evidence in the record.

As support for its concerns with the 2016 Rule and its decision to reconsider that Rule, BLM has provided a section-by-section analysis of the 2016 Rule, and explained for each provision its particular concerns and why the provision is being suspended. 82 Fed. Reg. at 58,052-56. For example, for the gas capture requirements, operators have raised concerns that the capture-percentage framework is "unnecessarily complex and infeasible in some regions because it may cause wells to be shut-in repeatedly . . . until sufficient gas infrastructure is in place." *Id.* at 58,052. In addition, the agency's own economic analysis of the 2016 Rule found that the costs of these requirements (up to $162 million/year) outweigh the savings from product recovery (up to $124 million/year). *Id.* BLM is therefore considering whether it can address improper flaring and encourage gas capture in other ways, such as using market-based incentives like royalty obligations facilitating infrastructure development. *Id.* at 58,053. Given the gas capture requirements' potential infeasibility and the significant costs of compliance, BLM reasonably decided to delay those requirements for one year. *Id.*

BLM has also identified specific concerns with the economic analysis underlying the 2016 Rule. "Since publication of the 2016 RIA, several documents upon which the 2016 final rule RIA relied have been rescinded," including documents that BLM relied on in valuing "changes in methane emissions." 82 Fed. Reg. at 58,060; *see also id.* at 58,051. In addition, the 2016 RIA failed to follow the guidance of OMB Circular A–4, which requires an agency's analysis of a regulation to "focus on the benefits and costs that accrue to citizens and residents of the United States." OMB Circular A–4 at E.1 (VFD_016551). "Where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects

should be reported separately." *Id.* By combining its analysis of the domestic and global effects of emissions, the 2016 RIA failed to report those effects separately, and to "focus on the benefits and costs that accrue" domestically. *See* 2017 RIA at 34 (VFD_000088); 82 Fed. Reg. 58,051, 58,062. This failure may have skewed the agency's analysis, causing it to "overestimate[] benefits." 82 Fed. Reg. at 58,051.

The 2016 RIA also relied on assumptions that BLM now questions. For example, it assumed "that all marginal wells would receive exemptions from the [2016] rule's requirements" and that these exemptions could be processed without any additional delay. 82 Fed. Reg. at 58,051. BLM now questions whether these assumptions were made without sufficient support and thereby "masked adverse impacts of the 2016 final rule on production from marginal wells." *Id.* Likewise, the 2016 RIA's analysis of the costs and benefits of the 2016 Rule's leak detection and repair provisions relied primarily on data from EPA regulations, causing BLM to question whether it was "based on the best the available information and science." *Id.*

The fact that many of BLM's concerns derive, at least in part, from the comments of States and operators, is evidence of the agency doing its job: listening to the regulated community and other stakeholders, and evaluating new evidence and information. Moreover, BLM has good reason to take their concerns seriously: last year the District Court for the District of Wyoming reiterated these same concerns in its Order on state and industry motions to enjoin the 2016 Rule, finding that "the Rule has potential conflict and inconsistency with the implementation and enforcement provisions of the [Clean Air Act]," "question[ing] whether the 'social cost of methane' is an appropriate factor for BLM to consider in promulgating a resource conservation rule pursuant to its MLA authority," and questioning BLM's reliance on emissions reductions to justify the costs of the 2016 Rule. *Wyoming*, 2017 WL 161428, at *8, *10; *see also* 82 Fed. Reg. at 58,050 (noting that BLM "is not confident that all provisions of the 2016 final rule would survive judicial review" in the District of Wyoming).

BLM also provided ample support for its decision temporarily postpone certain provisions of the 2016 Rule to provide the time needed to evaluate these concerns, while relieving operators and the agency itself from the expenditure of significant time and money

complying with a rule that may soon change. BLM developed a 78-page economic analysis of the Suspension Rule to determine whether the costs of a temporary suspension, such as any additional emissions produced during that period, would outweigh the benefits, namely the reduction in compliance costs. The agency determined that the Suspension Rule will result in net benefits of $64-68 million or $83-86 million during the one year suspension period (depending on whether the social cost of methane is calculated using a 3% or 7% discount rate). 2017 RIA at 5, 51-54; 82 Fed. Reg. at 58,057. These numbers account for the postponement of the $110-$114 million in unrecoverable compliance costs that operators would have had to spend to comply with the 2016 Rule from January 17, 2018 to January 17, 2019. Ex. A ¶¶ 9-11. Over the eleven year period in which the 2016 Rule is fully phased in, after the one year suspension, the Suspension Rule would result in total net benefits of $19-29 million or $35-52 million, again depending on whether the social cost of methane is calculated using a 3% or 7% discount rate. 82 Fed. Reg. 58,057; 2017 RIA at 46 (VFD_000100).

In addition, BLM narrowly tailored the Suspension Rule to achieve its goal of relieving operators and the agency of the burden of complying with a rule that may shortly change. 82 Fed. Reg. at 58,051. The Suspension Rule suspends and delays only provisions of the 2016 Rule that have substantial compliance costs. *Id.* Many other provisions, including the provisions governing the royalty-free use of natural gas and royalty-bearing "avoidable" losses of oil or gas, remain in effect during the suspension period. *Id.* at 58,051, 58,063; 2017 RIA at 11-15 (VFD_000065-69) (chart explaining effect of Suspension Rule on each provision of 2016 Rule). Notably, these provisions are the portions of the 2016 Rule that address the issues covered by BLM's prior policy, Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost ("NTL-4A"). That is, BLM has suspended the portions of the 2016 Rule that added new obligations and costs for operators, but it has left in place the updates to its prior policy.

In the face of BLM's thorough and well-reasoned explanation for the Suspension Rule, Plaintiffs are forced to conflate the future Revision Rule with the Suspension Rule to find support for their arguments. When the trappings are removed, however, Plaintiffs are essentially

claiming that BLM should have required operators to spend $110 million on compliance with a rule that may change within the next year, even if the total benefits of leaving the 2016 Rule intact for that year are far less than $110 million. Unsurprisingly, Plaintiffs are unable to support this conclusion.

Plaintiffs begin by attacking BLM's conclusion that operators may be "unnecessarily burdened by regulatory requirements that are subject to change" on the ground that the 2016 Rule's requirements are not, in fact, burdensome. Sierra Club Mot. 12; Cal. Mot. 15. But clearly, the expenditure of $110 million to comply with a rule that is ultimately revised would be an unnecessary burden.

Instead of confronting this reality head-on, Plaintiffs claim that BLM has provided no support for its specific concerns about the 2016 Rule's impact on small businesses and marginal wells. As for small businesses, the RIA for the Suspension Rule concludes that the suspension will increase the profit margin for small operators on average by $60,000 or about 0.17%, whereas leaving the 2016 Rule in place would decrease the profit margin by 0.15%. 2017 RIA at 61 (VFD_000115); 82 Fed. Reg. at 58,058. Plaintiffs claim that $60,000 in compliance costs is too small to be burdensome, as evidenced by BLM's conclusion that the Suspension Rule "would not have a significant economic impact on a substantial number of small entities." 2017 RIA at 67 (VFD_000121); Cal. Mot. 15; Sierra Club 13. What Plaintiffs fail to note, however, is that BLM's significance finding was made not as a general determination that a $60,000 savings is irrelevant for a small business as Plaintiffs suggest, but rather as part of its analysis to determine whether it is required to prepare a regulatory flexibility analysis per the Regulatory Flexibility Act ("RFA"). 2017 RIA at 67 (VFD_000121). The agency's determination that the Suspension Rule's effect on small business's profit margins was not significant for purposes of the RFA does not alter the fact that a $60,000 savings—especially where that money would have been spent on unrecoverable costs of compliance with a rule that might change—is, for many small businesses, very significant. This finding has particular resonance where, as here, many of these small businesses are operating wells that have limited profitability. 2017 EA at 23 (VFD_000047).

As for marginal wells, Plaintiffs argue that BLM's concern—that the 2016 Rule may "pose a particular compliance burden to operators of marginal or low-producing wells," 82 Fed. Reg. at 58,050—is unsupported. In fact, as explained above, the 2016 RIA based its cost-benefit analysis on an assumption that "all marginal wells would receive exemptions from the rule's requirements." 82 Fed. Reg. at 58,081. Marginal wells represent "69.1 and 75.9 percent of the nations' oil and gas wells, respectively," and are "less likely to support additional compliance costs associated with the LDAR [leak detection and repair] requirements." 2017 EA at 23 (VFD_000047). Because additional compliance costs could "cause operators to shut-in marginal wells, thereby ceasing production and reducing economic benefits to local, State, tribal, and Federal governments," *id.*, BLM has reasonably questioned whether the 2016 RIA's assumption "masked adverse impacts of the 2016 final rule." 82 Fed. Reg. at 58,051.

Plaintiffs next allege that BLM's statements finding that the Suspension Rule will not "significantly impact the price, supply, or distribution of energy" or operators' "investment or employment decisions," 82 Fed. Reg. at 58,057, are evidence that the suspension is unnecessary. To begin with, Plaintiffs omit the context for these statements. BLM's statement that the Suspension Rule will not significantly impact the price, supply, and distribution of energy is in comparison to "global levels" of production. *Id.* That is, the Suspension Rule will not significantly impact the price, supply, or distribution of energy worldwide because "relative changes in production compared to global levels are expected to be small." *Id.*; *see also* 2017 RIA at 55 (VFD_000109). And, regarding operators' employment and investment decisions, BLM necessarily based its conclusion on the findings contained in the 2016 RIA for the 2016 Rule, but acknowledged that the assumptions underlying the 2016 RIA are "under review" as part of the revision rulemaking process. 82 Fed. Reg. at 58,057; 2017 RIA at 60 (VFD_000114). More fundamentally, however, even if the unnecessary expenditure of $110 million will not significantly impact the price, supply, or distribution of energy, or alter operators' investment and employment decisions on a national or global level, it still does not erode BLM's pragmatic concerns about imposing potentially unnecessary compliance costs on operators.

To the extent Plaintiffs claim that BLM should have produced "factual data" to demonstrate the truth of its concerns about the 2016 Rule, Cal. Mot. 15-16; Sierra Club Mot. 13, they misunderstand the agency action at issue. BLM's explanation and reasoning must support the action that it has actually taken—a temporary suspension of certain provisions of the 2016 Rule while the agency completes its reconsideration of the Rule.[13] *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 499 F.3d 1108, 1115 (9th Cir. 2007) (finding agency must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choices made." (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004))). Plaintiffs are asking BLM to put the cart before the horse: BLM cannot be expected to evaluate fully its concerns with the 2016 Rule—including marshalling the facts and data to assess those concerns—until it undertakes the requisite notice and comment rulemaking. To do otherwise would risk predetermining the result of the revision rulemaking, which would violate the APA and render the later revision superfluous.[14] Given that BLM is not making any permanent revisions to the 2016 Rule, but is instead merely suspending some of its provisions for one year, it need not undergo a full analysis of the 2016 Rule as Plaintiffs suggest but must only demonstrate that its concerns are sufficiently serious and legitimate that they merit a temporary suspension to prevent operators, and the agency, from incurring potentially unnecessary costs while BLM investigates the concerns. *See Nat'l Ass'n of Broadcasters*, 740 F.2d at 1210.

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[13] Plaintiffs make a similar error when they claim that BLM should have considered alternatives to the one year suspension such as "the issuance of guidance or making adjustments" to the 2016 Rule. Cal. Mot. 14. Issuing guidance or making adjustments to the 2016 Rule are not alternatives to a temporary suspension; they are alternatives to the revision of the 2016 Rule. That is, they are ways of improving or altering the substance of the 2016 Rule's requirements and not ways of providing interim relief to the regulated community. They are, in fact, substantive amendments to the 2016 Rule, which Plaintiffs also argue the agency cannot do in this posture. *See infra* at Section III.A.

[14] Plaintiffs treat BLM's refusal to predetermine its revision as an "admission" that is somehow harmful to the agency. *See* Cal. Mot. 13 ("BLM admits that although it 'is currently considering revisions to the 2016 final rule, it cannot definitively determine what form those revisions will take until it completes the notice-and-comment rulemaking process.'"). In fact, BLM is properly abiding by the APA in refusing to predict the outcome of its revision rulemaking process.

Plaintiffs' attempt to analogize this case to *Organized Village of Kake v. USDA*, 795 F.3d 956 (9th Cir. 2015), must be rejected. *Kake* involved a challenge to the Forest Service's decision finding that the Tongass National Forest should be exempted from the Roadless Rule, which was a reversal of its prior decision that the Tongass should not be exempted. 795 F.3d at 967. The Forest Service reached contradictory factual findings in support of each decision, but did not explain why its findings had changed though the underlying data and information had not. *Id.* at 968-69. The Ninth Circuit found that the Forest Service's failure to explain its contradictory findings violated the APA. *Id.* at 969. In contrast, here, BLM has not taken a new position on the best way to prevent the waste of federal and Indian oil and gas resources, let alone made contradictory factual findings to support that new position.[15] It has merely identified concerns with the 2016 Rule that it intends to investigate through the revision rulemaking process. An agency's decision to consider changing its position is not subject to the same standard of review as its decision to actually reverse course.

Finally, Plaintiffs' concern that BLM is exploiting a "loophole," whereby it can suspend a regulation by merely stating that is reconsidering the rule is unfounded. Sierra Club Mot. 14. First, the suspension is not premised on a mere announcement that BLM is reconsidering the 2016 Rule. BLM has explained its concerns with the 2016 Rule at length. *See supra*. Second, unlike some other regulations that could be left in place during the reconsideration process without causing anyone much harm, the 2016 Rule would have imposed $110 million in immediate compliance costs if not suspended. Third, BLM has not found a "loophole" or done an end run around the APA; it has fully complied with all of the statute's procedural requirements.[16] In short, Plaintiffs' warning that "[a]gencies could effectuate major changes in

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[15] To the extent BLM's decision to use the domestic social cost of methane to calculate the costs and benefits of the Suspension Rule could be considered a change in its position, the agency thoroughly explained that decision, as required by *Kake*. *See supra* & *infra* Section III.E; 2017 RIA at 33-34, 71-77 (VFD_000087-88, 125-131); 82 Fed. Reg. at 58,051, 58,062.

[16] Plaintiffs' reliance on *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982), to support their allegations is misleading. Sierra Club Mot. 14. There, the court found that subsequent notice and comment could not cure an agency's failure to initially

policy without explaining their reasoning or supporting their decision in the administrative record just by promising future reexaminations," Sierra Club Mot. 14, ignores not only the action actually taken by BLM—a temporary suspension—but also the specific facts of this case that make such a suspension reasonable.

In sum, BLM has done all that is required of it under the APA, and Plaintiffs' arguments to the contrary improperly conflate a future revision of the 2016 Rule with the temporary suspension actually at issue in this case. BLM has a duty to provide a reasoned explanation for the action it has actually taken, and not for a future action that it may or may not take. It has done that here by identifying serious concerns with the 2016 Rule that require investigation as well as serious concerns with the significant compliance costs imposed by a rule that may change. The Suspension Rule addresses these concerns by giving BLM time to reconsider the 2016 Rule without imposing potentially unnecessary and unrecoverable costs on both the regulated community and BLM.

C. BLM Has Statutory Authority to Suspend the 2016 Rule for One Year

BLM's authority to temporarily suspend certain provisions of the 2016 Rule flows from its broad authority to regulate the development of federal and Indian minerals under the Mineral Leasing Act of 1920 ("MLA"), Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), and Indian Mineral Leasing Act of 1938 ("IMLA").[17] "Agencies obviously have broad discretion to reconsider a regulation at any time" so long as an agency acts pursuant to the "authority delegated to [it] by Congress." *Clean Air Council v. Pruitt*, 862 F.3d 1, 8-9 (D.C. Cir. 2017) (citation and quotations omitted). "[T]he delegation of general authority to promulgate regulations extends to all matters 'within the agency's substantive field.'" *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1109 (10th Cir. 2015) (quoting *City of Arlington v. FCC*,

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postpone a rule without notice and comment. That concern is inapplicable here where BLM conducted notice and comment for the Suspension Rule.

[17] *See also, e.g.*, the Mineral Leasing Act for Acquired Lands of 1947; the Act of March 3, 1909; and the Indian Mineral Development Act of 1982. 43 C.F.R. 3160.0-3 provides a complete list of authorities for regulating oil and gas operations on federal and Indian lands.

569 U.S. 290, 306 (2012)). Where Congress has unambiguously vested authority in an agency to administer a statute, "courts need not try to discern whether '*the particular issue* was committed to agency discretion.'" *Id.* (quoting *City of Arlington*, 569 U.S. at 306); *see also Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (A court's inquiry into whether Congress has delegated rulemaking authority to an agency "does not turn on whether Congress's delegation of authority was general or specific.").

Rather, a court applies the two step test under *Chevron, U.S.A., Inc. v. Natural. Resources Defense Council*, 467 U.S. 837 (1984), and asks "whether the statutory text forecloses the agency's assertion of authority." *City of Arlington*, 69 U.S. at 301. If the statute is "silent or ambiguous with respect to the specific issue," the court proceeds to *Chevron* step two to consider "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 296 (quoting *Chevron*, 467 U.S. at 843). In light of these principles, the question here is not whether the MLA, FOGRMA, and IMLA specifically grant BLM the authority to temporarily suspend a regulation, but rather whether they unambiguously grant BLM broad authority to regulate the development of federal and Indian oil and gas in a manner that the agency deems efficient and in the public interest. The answer to that question is "yes."

Congress has unambiguously delegated to the Secretary of the Interior broad authority to manage mineral development on public and Indian lands via a range of statutes, including the MLA, FOGRMA, and IMLA. While these statutes each include a range of objectives, all are concerned with promoting the development of oil and gas on public lands to provide a source of domestic energy and ensure that U.S. taxpayers and Indian tribes receive fair compensation for public and Indian resources. For example, the MLA, which establishes a program for leasing minerals on federal lands, is intended "to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise." *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (quoting S. Subcomm. of the Comm. on Interior and Insular Affairs, The Investigation of Oil and Gas Lease Practices, 84th Cong., 2nd Sess. 2 (1957)). FOGRMA sets forth a framework for the management of royalties in order to "ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United

States and Indian lessors and those inuring to the benefit of States." 30 U.S.C. § 1701(b)(3). And under IMLA, BLM has a duty to "ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands." *Jicarilla Apache Tribe, v. Supron Energy Corp.*, 728 F.2d 1555, 1568 (10th Cir. 1984).

While the MLA, FOGRMA, and IMLA give the Secretary of the Interior the authority to prevent the waste of federal and Indian mineral resources, they also include a wide range of other directives, such as:

- Protecting "the safety and welfare" of workers, 30 U.S.C. § 187;
- Ensuring minerals produced on public lands are sold "to the United States and to the public at reasonable prices," *Id.*;
- Protecting "the interests of the United States," *Id.*;
- "Diversify[ing] and expand[ing] the Nation's onshore leasing program to ensure the best return to the Federal taxpayer," 30 U.S.C. § 226(b)(1)(C);
- Ensuring "oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed" are "collect[ed] and account[ed] for . . . in a timely manner," 30 U.S.C. § 1711(a); and
- "[A]ggressively carry[ing] out his trust responsibility in the administration of Indian oil and gas," 30 U.S.C. § 1701(a)(4).

In recognition of this broad range of responsibilities, Congress gave the Secretary of the Interior broad grants of rulemaking authority with the understanding that the expert agency is best situated to determine how to carry out and balance these often competing objectives. Under the MLA, the Secretary, through BLM, may "prescribe necessary and proper rules and regulations" and "do any and all things necessary to carry out and accomplish the purposes" of the Act. 30 U.S.C. § 189. FOGRMA states that "[t]he Secretary shall prescribe such rules and regulations as he deems reasonably necessary to carry out" the statute. 30 U.S.C. § 1751. And the IMLA makes all oil and gas operations on Indian lands subject "to the rules and regulations promulgated by the Secretary." 25 U.S.C. § 396d. "[S]uch 'express congressional authorizations to engage in the process of rulemaking' [are] 'a very good indicator of delegation

meriting *Chevron* treatment.'" *Mayo Found.*, 562 U.S. at 57 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

The Suspension Rule is an exercise of these broad authorities to regulate oil and gas development in a manner that the agency deems necessary to achieve the many and varied objectives of these statutes. BLM has reasonably determined—based on comments from the public, including the regulated community; issues raised in ongoing litigation over the 2016 Rule; new guidance regarding the calculation of emissions; and its own review of the data supporting the 2016 Rule—that the Rule may not be the most effective or efficient way to regulate the waste of federal and Indian oil and gas resources. 82 Fed. Reg. at 58,051. In particular, BLM has serious concerns about the economic analysis underpinning the 2016 Rule, including "whether the 2016 RIA may have underestimated costs" and "overestimated benefits." *Id.* at 58,050. It has also questioned whether the 2016 Rule may "unnecessarily encumber energy production, constrain economic growth, and prevent job creation," by, for example, rendering it uneconomic for operators to continue to operate marginal or low-producing wells. *Id.* Instead of requiring the regulated community to invest significant time, money, and resources into complying with a rule that the agency is in the midst of reconsidering, BLM reasonably chose to temporarily suspend the Rule pursuant to its broad authority to regulate oil and gas development. *Id.* at 58,051 & n.1.

Plaintiffs argue that the Suspension Rule is impermissible because it is not designed to prevent waste. But that argument misses the point for three reasons. First, the portions of the 2016 Rule that remain in effect do, in fact, reduce waste. *See* 82 Fed. Reg. at 58,051-52. Plaintiffs complain that BLM has failed to reinstate its prior regulations, NTL-4A, during the one year suspension period, thereby abdicating its duty to prevent waste. But the portions of the 2016 Rule that remain in effect are the portions that cover the same issues addressed by NTL-4A: limitations on royalty-free venting and flaring.[18] For example, 43 C.F.R. § 3179.6 prohibits

[18] The full title of NTL-4A—Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost—makes clear that the policy

the venting or flaring of gas-well gas, unless that gas is unavoidably lost, and Section 3179.4 sets forth the limited situations in which a loss of gas may be deemed "unavoidable," and therefore not royalty-bearing. Section 3179.103 limits royalty-free flaring during initial production testing, Section 3179.104 imposes royalties on flaring during well tests, and Section 3179.105 identifies specific situations in which the flaring of gas is not royalty-free. BLM retains the authority to enforce the portions of the 2016 Rule that remain in effect, including shutting down operations "where continued operations could result in immediate, substantial, and adverse impacts on public health and safety, the environment, production accountability, or royalty income." 43 C.F.R. § 3163.1(a)(3). Taken together, these provisions discourage the waste of natural gas by imposing royalties on "avoidable" and excessive losses of gas.

Second, although the portions of the 2016 Rule that have been suspended provided for additional means of preventing waste, BLM's authority to manage oil and gas development is not limited to the prevention of waste, and not every regulation the agency promulgates must achieve that particular goal. *Mobil Oil Expl. v. United Distrib. Co.*, 498 U.S. 211, 231 (1991) ("[A]n agency need not solve every problem before it in the same proceeding."). The Suspension Rule achieves other statutory objectives, such as promoting the development of oil and gas and the generation of royalty revenues by providing regulatory certainty to operators during the reconsideration process and relief from the potentially unnecessary expenditure of millions of dollars.

Third, BLM has discretion to address the difficult balance between preventing waste and promoting mineral development incrementally. The government need not "choose between attacking every aspect of a problem or not attacking the problem at all." *Louisiana ex rel. Guste*, 853 F.2d at 332 (quoting *Dandridge*, 397 U.S. at 486–87); *see also TC Ravenwood, LLC v. FERC*, 331 F. App'x 8, 9 (D.C. Cir. 2009) ("An incremental approach to a problem is certainly within the scope of the Commission's discretion . . . ."). BLM's decision to temporarily suspend

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governed royalties. VFD_000340. NTL-4A did not limit the total amount of gas that an operator could flare; rather it imposed royalties on excess flaring. *Id.*

certain provisions of the 2016 Rule to avoid potentially unnecessary burdens on domestic oil and gas production while it reconsiders the Rule represents one step in a broader process. The next step is the revision rulemaking process, which is already underway and will specifically address whether and how the 2016 Rule achieves BLM's statutory mandates, including its approach to preventing the waste of federal and Indian resources.[19] BLM's decision to structure its reconsideration process in this fashion is reasonable, and well within its discretion as the expert agency.

While Plaintiffs may prefer that the agency manage its statutory objectives in a different fashion, BLM's determination of how best to administer a "complex and highly technical regulatory program" for oil and gas development is owed "broad deference." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)). This is particularly true here, where Plaintiffs "challenge[] agency decisions that balance competing statutory mandates and involve technical, predictive judgments within the agency's special area of expertise." *Delta Air Lines, Inc. v. Exp.-Imp. Bank of United States*, 85 F. Supp. 3d 436, 446–47 (D.D.C. 2015) (citing *Marsh*, 490 U.S. at 377). BLM is well within the broad authority granted to it by the MLA, FOGRMA, and IMLA to reconsider its approach to waste prevention and to provide for a temporary suspension of the 2016 Rule during that reconsideration process.

D. The Notice And Comment Period Allowed For Meaningful Comment

No one disputes that BLM published a proposed Suspension Rule, allowed for a 30-day comment period on the proposed rule, received approximately 158,000 comments, including 750 unique comments, and responded to all of them in the preamble to the Suspension Rule or in an 89-page response to comments document. 82 Fed. Reg. at 58,052, 58,058-64; Resp. to Comments (VFD_000142-230). These actions satisfy the agency's obligation under the APA to

[19] Plaintiffs' argument assumes that reducing methane emissions through the methods identified in the 2016 Rule is the only way to reduce waste. This assumption is incorrect. BLM has discretion to interpret, and determine how best to accomplish, its statutory mandates, and it will exercise that discretion during the revision rulemaking process.

provide for notice and comment on a rulemaking. 5 U.S.C. § 553(c). Nonetheless, Plaintiffs find fault, alleging that the comment period was not "meaningful" because BLM predetermined the outcome of its rulemaking process and failed to address the merits of the 2016 Rule in its response to comments. Sierra Club Mot. 15. These arguments fail.

"A petitioner must meet a high standard to prove predetermination." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010). "[P]redetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action" in advance of its analysis. *Id.* That an agency had a preferred course of action in mind when it solicited comments does not mean that the agency predetermined the outcome. *Crenshaw Subway Coal. v. L.A. Cty. Metro. Transp. Auth.*, 2015 WL 6150847, at *18-19 (C.D. Cal. Sept. 23, 2015); *Forest Guardians*, 611 F.3d at 712; *see also Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1185 (9th Cir. 1997) ("[A]n agency can formulate a proposal or even identify a preferred course of action before completing an EIS.")

Plaintiffs have not met this high standard.[20] As evidence of the alleged predetermination they cite to only one document: an October 20, 2017 extension motion filed in the District of Wyoming litigation in which counsel for BLM explained that the agency had issued the proposed Suspension Rule on October 5, 2017 and intended to issue a final rule by December 8, 2017. *See* Sierra Club Mot. 16. Counsel appropriately used the subjunctive to describe what the Suspension Rule "would" accomplish if finalized—at that time, a possible, though not definite, future. *Id.* Though Plaintiffs have carefully cherry-picked the few statements in which counsel

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[20] Plaintiffs argue in a footnote that "commenters could not provide meaningful comments" on the Suspension Rule because BLM failed to produce its "initial review" of the 2016 Rule. Sierra Club Mot. 17 n.7. The "initial review" referenced in the proposed and final Suspension Rules, *see* 82 Fed. Reg. at 46,459; 82 Fed. Reg. at 58,050, occurred mainly via oral communications that cannot be produced. To the extent any internal BLM documents discuss the initial review, they are subject to the deliberative process privilege and properly withheld from production under FOIA and in the administrative record. *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 979 (9th Cir. 2009) (explaining deliberative process privilege covers predecisional and deliberative intra-agency communications); *Desert Survivors v. U.S. Dep't of Interior*, 231 F. Supp. 3d 368, 386 (N.D. Cal. 2017) (finding deliberative process privilege applies to APA cases).

used "will" instead of "would," read in the context of the full motion those statements are, at worst, imprecise wording by counsel, but far from sufficient to demonstrate that BLM "irreversibly and inextricably" committed itself to a particular outcome. Indeed, any claim of predetermination is belied by BLM's 89-page response to comments demonstrating that the agency meaningfully considered the hundreds of unique comments received. Resp. to Comments (VFD_000142-230).

Plaintiffs next argue that BLM's notice and comment process was insufficient because the agency should have considered comments regarding the substance of the 2016 Rule in its rulemaking process for the Suspension Rule.[21] Sierra Club Mot. 17. This argument, once again, conflates the Suspension Rule with the agency's future revision rulemaking. BLM properly deemed comments that addressed the proposed revision of the 2016 Rule "beyond the scope" of the suspension rulemaking, as consideration of the merits of the 2016 Rule would undermine the purpose of a temporary suspension—to allow the agency time to conduct a later, more thorough review of the 2016 Rule. It also applied this approach even-handedly, refusing to consider comments in support of the 2016 Rule as well as comments urging revision. *See, e.g.*, Resp. to Comments at 8, 10 (VFD_000149, 151).

Despite the fact that many commenters nevertheless commented on whether the 2016 Rule should be revised, BLM took the time to examine each comment and respond to any portion of it that could be read as addressing the proposed suspension. For example, Plaintiffs cite a comment which said that it is evident the 2016 Rule is not burdensome to operators

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[21] Plaintiffs claim, in passing, that BLM's proposed Suspension Rule hindered their ability to comment by failing to explain "how the [Suspension Rule] is permissible under [BLM's] governing statutes" and "the factual basis for revising" the 2016 Rule. Sierra Club Mot. 16-17. In fact, BLM cited and discussed its statutory authority to promote and manage oil and gas development in the proposed rule. 82 Fed. Reg. at 46,460 & n.1. Although BLM outlined its general concerns with the 2016 Rule, it did not provide its reasons for "revising" the 2016 Rule because the proposed suspension was not a revision. Instead, the agency properly provided its reasons for temporarily suspending the 2016 Rule, including a section-by-section discussion of the concerns driving its reconsideration and its preliminary economic analysis of a one-year suspension. *Id.* at 46,460-66

because "jobs have not been lost and [] drilling activity is increasing." Resp. to Comments at 4 (VFD_000145); Sierra Club Mot. 17. To the extent this comment could be read to argue that a suspension would not be beneficial, BLM addressed the claim noting that the RIA for the Suspension Rule "documents the respective costs and benefits of delaying compliance requirements for certain provisions" of the 2016 Rule "and shows that the avoided costs exceed forgone benefits." Resp. to Comments at 4 (VFD_000145). But to the extent the comment was intended to argue that the 2016 Rule should not be revised, BLM properly found it "beyond the scope" of the suspension rulemaking. *Id.* As BLM explained, "[t]he 2017 final delay rule does not substantively change the 2016 final rule, it merely postpones implementation of the compliance requirements for certain provisions of the 2016 final rule for 1 year. These comments are therefore outside the scope of this rule." 82 Fed. Reg. at 58,061.

This approach of parsing each comment to the best of the agency's ability and addressing only issues pertaining to the Suspension Rule was entirely reasonable given the limited scope of this action and BLM's ongoing revision rulemaking. Any factual findings or statements that the agency made regarding the merits of the 2016 Rule in its response to comments in the suspension rulemaking could potentially bind it during the revision rulemaking process. Instead of allowing the two rulemakings to run together, blurring the lines between the suspension and the revision, BLM chose to keep them separate and to postpone its consideration of the merits of the 2016 Rule to the revision rulemaking. Not only was this approach reasonable, it also does not prejudice Plaintiffs, or any other members of the public, as all will have an opportunity to comment on the proposed Revision Rule.

Plaintiffs rely on a Fourth Circuit case, *N.C. Growers Ass'n v. United Farm Workers*, 702 F.3d 755, 769-70 (4th Cir. 2012), to argue that BLM failed to adequately consider comments regarding whether and how the 2016 Rule should ultimately be revised.[22] In that case, the

[22] Plaintiffs also cite *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 445 (D.C. Cir. 1982), *NRDC*, 683 F.2d at 760, *Clean Air Council*, 862 F.3d at 5, and *Council of S. Mountains*, 653 F.2d at 580, but those cases are inapposite. In those cases, the agency did not do *any* notice

agency requested comment on a proposed suspension of new regulations and reinstatement of old regulations, but left the comment period open for only ten days and specifically stated in its notice that it would not consider comments on the "substance or merits" of either the new regulations to be suspended or the old regulations to be reinstated. *Id.* at 761. The court found that the agency's refusal to even receive comments on the merits of the regulations, let alone explain its position on those comments, prevented a meaningful opportunity for comment in violation of the APA. *Id.* at 770. This is not what happened in this case. Here, BLM allowed for a 30-day comment period,[23] did not restrict the content of its comments, and reviewed, summarized, and affirmatively responded to every single unique comment received. Resp. to Comments (VFD_000142-230). While the agency deemed certain comments "outside the scope" of the Suspension Rule, it explained why. Thus, this is not a situation where the agency "ignored important aspects of the problem," *NC Growers*, 702 F.3d at 770 (citing *Ohio River Valley Envtl. Coal. v. Kempthorne*, 473 F.3d 94, 103 (4th Cir. 2006)), but rather a situation where the agency confronted those important issues head-on and explained its position.

Under Plaintiffs' theory, an agency would never temporarily suspend a rule pending reconsideration—regardless of the costs imposed by the rule in the interim—because it would have to engage in the same level of analysis for the suspension as it would for any future

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and comment before finalizing a rulemaking. Here, in contrast, BLM issued a proposed rule, sought comment for 30 days, and responded to those comments before publishing the final rule.

[23] Plaintiffs suggest without citation that a 30-day comment period was insufficient. Sierra Club Mot. 16 n.6. As BLM explained, "[g]iven the narrow scope of the proposal, short delay, and recent comments on the 2016 final rule, BLM determined a 30-day comment period to be appropriate . . . ." 82 Fed. Reg. at 58,062. This determination was reasonable as thirty days is a standard length of time for a comment period on a discrete agency action, and there is no evidence that Plaintiffs—or anyone else—were unable to submit comments within that time period. Moreover, Plaintiffs' characterization of BLM's methane estimates in the RIA for the Suspension Rule as "radically different" from those in the 2016 RIA is misleading. Sierra Club Mot. 16 n.6. While the numbers may have changed due to BLM's use of domestic rather than global estimates and the methodologies are slightly different, as explained in the appendix to the 2017 RIA, the values in the 2016 RIA and 2017 RIA can easily be compared. 2017 RIA at 71-77 (VFD_000125-131); *Compare* 2017 RIA at 34-35 (VFD_000088-89) *with* 2016 RIA at 35 (VFD_002543).

substantive revision. Thus, no matter how potentially burdensome the original rule, and regardless of the fact that a temporary suspension is an inherently different action, an agency could not relieve a regulated community of the obligation to spend millions of dollars to comply with a rule that could fundamentally change. This is a patently unreasonable result, and one which the APA does not demand.

E. The RIA For The Suspension Rule Is Well-Supported

The Suspension Rule's RIA provides a robust analysis of the year-long suspension of certain provisions of the 2016 Rule, including a detailed description of the suspension's costs and benefits.[24] 2017 RIA at 24-39 (VFD_000078-93); *see infra* at Section III.B. Plaintiffs nonetheless find fault with the 2017 RIA, arguing that BLM's analysis is flawed because it: (1) limits its analysis to a one-year suspension period; (2) assumes operators are not ready to comply with the 2016 Rule by January 17, 2018; and (3) uses a domestic metric to calculate the impacts of methane emissions. Plaintiffs' quarrel appears to be with the fact that BLM is investigating various issues raised concerning, and is now in the process of revising, the 2016 Rule—but the Suspension Rule, not a proposed revision, is before this Court.[25] To the extent that Plaintiffs do challenge the substance of the 2017 RIA, Plaintiffs' points of contention are with BLM's

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[24] Given this robust analysis of costs and benefits, this case is unlike the precedent that Plaintiffs cite. This is not a case where an agency's analysis is based on an unsupported assumption, *Ctr. for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1149–50 (N.D. Cal. 2006) (finding "no factual basis in the record" to support a critical assumption upon which the agency's analysis was based), or where the agency failed to consider the benefits of compliance with the 2016 Rule. *California*, 2017 WL 4416409, at *11 (finding agency's action arbitrary and capricious because the agency entirely failed to consider the benefits of the postponed provision).

[25] "Agencies are entitled to change their minds." *Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1262 (9th Cir. 2017) (citing *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 946 (9th Cir. 2010)); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it"); *Arkema Inc. v. Envt. Prot. Agency*, 618 F.3d 1, 6 (D.D.C. 2010) ("[T]he Agency is entitled to change its mind as long as its new direction falls within the ambit of its authorizing statute and the policy shift is adequately explained . . . . [T]here is no requirement that the policy change be justified by reasons more substantial than those the agency relied on to adopt the policy in the first place.").

methodology. But courts defer to the agency's technical judgments and Plaintiffs' mere disagreement with the agency's methodological choices is insufficient to establish likelihood of success on the merits. *See, e.g.*, *Lands Council v. McNair*, 537 F.3d at 993 (emphasizing that courts defer to an agency's determinations in areas involving a "high level of technical expertise."); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir.), *amended*, 387 F.3d 968 (9th Cir. 2004) ("An agency's scientific methodology is owed substantial deference . . . .").

First, the Suspension Rule's RIA properly analyzes the effects of the one-year suspension and the effects of implementing the 2016 Rule thereafter, rather than speculating as to what a revised rule might look like. State Plaintiffs nonetheless contend that BLM improperly limited its cost-benefit analysis to one year because BLM is in the process of revising the 2016 Rule. Cal. Mot. 19. But BLM cannot know if—and to what extent—it will revise the 2016 Rule until it undergoes notice and comment rulemaking. Nor can it predetermine the outcome of that rulemaking. *See WildWest Inst. v. Bull*, 547 F.3d 1162, 1168 (9th Cir. 2008); *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). In that new rulemaking, BLM could elect to reintroduce certain provisions currently suspended under the Suspension Rule or the agency could significantly revise them, or rescind them altogether.[26] To the extent that Plaintiffs are challenging the presumed environmental costs of a future Revision Rule, the proper forum to do so is through the submission of comments on the proposed Revision Rule.

Second, State Plaintiffs take issue with BLM's assumption in the 2017 RIA that operators are not ready to comply with the 2016 Rule by January 2018. BLM's assumption of limited operator compliance reflects the regulatory uncertainty surrounding the 2016 Rule. 2017 RIA at 32, 36 (VFD_000086, 90). Given that the 2016 Rule has been in flux since early 2017, BLM reasonably concluded many operators likely have not yet complied with the 2016 Rule. *Id.*

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[26] As the BLM explained, "[a]lthough the BLM is currently considering revisions to the 2016 final rule, it cannot definitively determine what form those revisions will take until it completes the notice and- comment rulemaking process." 82 Fed. Reg. at 58,061. BLM therefore assumed that the 2016 Rule will be fully implemented starting in January 2019.

There is not, however, a public count of operators who have not complied with the 2016 Rule, rendering a precise estimate of compliance cost savings elusive. As Plaintiffs note, the 2017 RIA acknowledges that certain compliance savings estimates may be too high for this reason. *Id.* at 33 (VFD_000087). Conversely, to the extent that certain operators have already complied with the 2016 Rule, the reported environmental harms in the RIA—which Plaintiffs rely on for their irreparable harms—would be overstated. The agency's determination that many operators are not poised to comply with the 2016 Rule involves a judgment call by the agency that is entitled to significant deference. *See Sierra Club v. U.S. Forest Serv.*, 857 F.Supp.2d 1167, 1173 (D. Utah 2012) (As "[t]he NEPA process involves an almost endless series of judgment calls," and "[t]he line-drawing decisions . . . are vested in the agencies, not the courts," deference must be given to BLM. (quoting *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987))).

Third, Plaintiffs challenge how BLM calculated foregone climate benefits in the 2017 RIA, arguing that BLM must consider the global impacts of its rulemaking. But no rule or regulation requires BLM to estimate the global impacts of domestic regulations, and BLM is afforded deference in its choice of methodology. *See Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985). In the 2017 RIA, BLM estimated the foregone climate benefits of the Suspension Rule using the domestic cost of methane.[27] 2017 RIA at 33 (VFD_000087). Plaintiffs take issue with this calculation because they believe it underreports the 2016 Rule's benefits compared to the 2016 RIA, which relied on a global metric. But Section 5 of Executive Order 13783 withdrew the technical support documents on which the 2016 RIA relied for the valuation of the changes in methane emissions using a global metric, noting that they are "no longer representative of government policy." 82 Fed. Reg. at 16,095. The Executive Order further stated that agencies must ensure that analyses are consistent with the guidance contained in OMB Circular A–4, "including with respect to the consideration of

[27] The social cost of methane monetizes the domestic impacts associated with changes in methane emissions each year. 2017 RIA at 33 (VFD_000087).

domestic versus international impacts and the consideration of appropriate discount rates." *Id.* at 16,096. OMB Circular A–4 was published in 2003 and provides the OMB's guidance to federal agencies on the development of regulatory analyses for purposes of Executive Order 12866 and other related authorities.

OMB Circular A–4 emphasizes that any regulatory analysis "should focus on benefits and costs that accrue to the citizens and residents of the United States." Office of Mgmt. & Budget, Office of the President, OMB Circular A–4, at E-1 (2003) (VFD_016551). This is precisely what the 2017 RIA does by utilizing a domestic metric for the social cost of methane. Furthermore, OMB Circular A–4 indicates that a regulation with "effects beyond the borders of the United States" should be reported separately, which, as discussed above, the RIA for the 2016 Rule failed to do. *Id.* Notably, the Circular does not mandate that agencies consider global impacts, as Plaintiffs suggest. It was thus entirely appropriate for the agency to revise the RIA to harmonize its analysis with OMB guidance. And while Plaintiffs emphasize that BLM should have employed a global metric for the social cost of methane, Plaintiffs themselves view this as a regulation with predominantly local effects as their declarations attest. Plaintiffs' complaint about the agency's reasonable determination to use a calculation of benefits consistent with OMB guidance is entitled to little weight. *See, e.g., Lands Council*, 537 F.3d at 993.

CONCLUSION

Because Plaintiffs have not met their burden of demonstrating the four factors necessary for a preliminary injunction, the Court should deny their motions and set a schedule for the filing of the administrative record and briefing on the merits.

Respectfully submitted this 16th day of January, 2018.

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