

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,  
Plaintiffs,  
v.  
BUREAU OF LAND MANAGEMENT, et  
al.,  
Defendants.

Case Nos. [17-cv-07186-WHO](#);  
[17-cv-07187-WHO](#)

**ORDER DENYING MOTION TO  
TRANSFER VENUE AND GRANTING  
PRELIMINARY INJUNCTION**

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SIERRA CLUB, et al.,  
Plaintiffs,  
v.  
RYAN ZINKE, in his official capacity as  
Secretary of the Interior, et al.,  
Defendants.

**INTRODUCTION**

This case addresses the burden a federal agency bears when it seeks to suspend a federal regulation for further analysis. Plaintiffs, the States of California and New Mexico, bring this action for a preliminary injunction enjoining the United States Bureau of Land Management (“BLM”), Katherine S. Macgregor, Acting Assistant Secretary for Land and Minerals Management, and Ryan Zinke, Secretary of the Interior, from instituting a rule suspending or delaying the requirements of the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule. A coalition of 17 conservation and tribal citizen groups separately brought

1 suit for a preliminary injunction against Zinke, the BLM, and the United States Department of the  
2 Interior seeking the same preliminary injunction. These two cases have been consolidated for  
3 review.

4 The States of North Dakota and Texas, along with three industry groups, the Western  
5 Energy Alliance (“WEA”), Independent Petroleum Association of America (“IPAA”), and  
6 American Petroleum Institute (“API”), have moved to intervene in these consolidated actions in  
7 opposition to the preliminary injunction. The BLM and the States of North Dakota and Texas  
8 have also moved to transfer venue of this case to the District of Wyoming, where a case  
9 challenging the underlying rule is pending.<sup>1</sup>

10 First, I deny the motion to change venue. As discussed below, the legal issues concerning  
11 the Waste Prevention Rule in the District of Wyoming go to the substance of that regulation; this  
12 lawsuit addresses the BLM’s alleged procedural failure to justify a different rule, the Suspension  
13 Rule. The legal issues are distinct. In light of plaintiffs’ choice of forum, venue is appropriate  
14 here.

15 Second, I grant Plaintiffs’ motion for a preliminary injunction. The BLM’s reasoning  
16 behind the Suspension Rule is untethered to evidence contradicting the reasons for implementing  
17 the Waste Prevention Rule, and so plaintiffs are likely to prevail on the merits. They have shown  
18 irreparable injury caused by the waste of publicly owned natural gas, increased air pollution and  
19 associated health impacts, and exacerbated climate impacts. Plaintiffs are entitled to a preliminary  
20 injunction on this record.

## 21 **BACKGROUND**

22 On November 18, 2016, after three years of development, the BLM published the final  
23 version of its regulations intended “to reduce waste of natural gas from venting, flaring, and leaks  
24 during oil and natural gas production activities on onshore Federal and Indian (other than Osage  
25 Tribe) leases.” *See* “Waste Prevention, Production Subject to Royalties, and Resource

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27 <sup>1</sup> “Plaintiffs” refers to the States of California and New Mexico as well as all 17 conservation and  
28 tribal citizen groups collectively. “BLM” refers to the named government defendants in both  
actions. “Defendants” refers to the named defendants in both actions as well as the proposed  
intervenor collectively.

1 Conservation: Final Rule,” 81 Fed. Reg. 83,008 (Nov. 18, 2016) (“Waste Prevention Rule”). The  
2 Waste Prevention Rule became effective on January 17, 2017, with many of its requirements to be  
3 phased in over time up until January 17, 2018.

4 In November of 2016, two industry groups, the Western Energy Alliance and the  
5 Independent Petroleum Association of America, as well as the states of Wyoming and Montana,  
6 separately filed lawsuits challenging the Waste Prevention Rule and seeking a preliminary  
7 injunction in the U.S. District Court for the District of Wyoming. *See W. Energy All. v. Zinke*, No.  
8 16-cv-0280 (D. Wyo. filed Nov. 15, 2016); *Wyoming v. U.S. Dep’t of Interior*, No. 16-cv-0285 (D.  
9 Wyo. filed Nov. 18, 2016). The two cases were consolidated, and the states of California and New  
10 Mexico, as well as a coalition of environmental groups, including all but one of the plaintiffs in  
11 this action, intervened in the lawsuits on the side of the government. The States of North Dakota  
12 and Texas intervened on the side of the petitioners. On January 16, 2017, the court denied the  
13 motions for preliminary injunction. *See Wyoming v. U.S. Dep’t of Interior*, Nos. 16-cv-0285, 16-  
14 cv-0280, 2017 WL 161428 (D. Wyo. Jan. 16, 2017).

15 On March 28, 2017, President Trump issued an Executive Order requiring the Secretary of  
16 the Interior to review the Waste Prevention Rule. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, §  
17 7(b) (Mar. 28, 2017). BLM reviewed the rule and drafted a proposed Revision Rule rescinding  
18 certain provisions of the Waste Prevention Rule and substantially revising others. BLM published  
19 the proposed rule in the Federal Register today, after conclusion of its review by the Office of  
20 Information and Regulatory Affairs. *See* “Waste Prevention, Production Subject to Royalties, and  
21 Resource Conservation: Rescission or Revision of Certain Requirements,” 83 Fed. Reg. 7924  
22 (proposed Feb. 22, 2018).

23 In the interim, BLM developed a rule to delay for one year the effective date of the  
24 provisions of the Waste Prevention Rule that had not yet become operative and suspend for one  
25 year the effectiveness of certain provisions already in effect (“Suspension Rule”).<sup>2</sup> 82 Fed. Reg.

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<sup>2</sup> The parties have used various naming conventions in reference to the Waste Prevention Rule and  
the Suspension Rule. They shall adopt these two naming conventions for purposes of this  
litigation.

1 58,050, 58,051 (Dec. 8, 2017). BLM published the proposed Suspension Rule on October 5,  
 2 2017, and on December 8, 2017, published the final Suspension Rule. *See* 82 Fed. Reg. 46,458,  
 3 58,050. It took effect on January 8, 2018. The rule temporarily suspended or delayed certain  
 4 requirements at the heart of the pending *Wyoming* litigation.

5 Plaintiffs in this action filed suit challenging the Suspension Rule on December 18, 2017,  
 6 and moving for a preliminary injunction. *California v. BLM*, No. 17-cv-07186 (N.D. Cal. filed  
 7 Dec. 19, 2017); *Sierra Club v. Zinke*, No. 17-cv-07187 (N.D. Cal. filed Dec. 19, 2017). On  
 8 December 29, 2017, the court in the *Wyoming* cases stayed those cases in light of the Suspension  
 9 Rule and BLM’s continued efforts to revise the Waste Prevention Rule, as well as the present  
 10 lawsuits, which raise procedural challenges to the Suspension Rule and seek to reinstate the Waste  
 11 Prevention Rule. *Wyoming*, Nos. 16-cv-0280, 16-cv-0285 (D. Wyo. Dec. 29, 2017) [Dkt. Nos.  
 12 184, 189]. In that decision, the court explained that “it is fair to say those actions are inextricably  
 13 intertwined with the cases before this Court and with the ultimate rules to be enforced.” *Id.* at 4.

## 14 LEGAL STANDARD

### 15 I. Transfer of Venue

16 A court may transfer an action to another district “where it might have been brought”  
 17 “[f]or the convenience of the parties and witnesses, in the interest of justice.” 28 U.S.C. §  
 18 1404(a). A motion for transfer lies within the broad discretion of the district court and must be  
 19 determined on an individualized basis. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th  
 20 Cir. 2000). Section 1404(a) requires the court to make a threshold determination of whether the  
 21 case could have been brought where the transfer is sought. If venue is appropriate in the  
 22 alternative venue, the court must weigh the convenience of the parties, the convenience of the  
 23 witnesses, and the interest of justice. *See* 28 U.S.C. § 1404(a). In making its determination, the  
 24 court may consider several factors, including: “(1) the location where the relevant agreements  
 25 were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the  
 26 plaintiff’s choice of forum, (4) the respective parties’ contacts with the forum, (5) the contacts  
 27 relating to the plaintiff’s cause of action in the chosen forum, (6) the differences in the costs of  
 28 litigation in the two forums, (7) the availability of compulsory process to compel attendance of

1 unwilling non-party witnesses, and (8) the ease of access to sources of proof.” *Jones*, 211 F.3d at  
2 498–99.

3 “The burden is on the party seeking transfer to show that when these factors are applied,  
4 the balance of convenience clearly favors transfer.” *Lax v. Toyota Motor Corp.*, 65 F. Supp. 3d  
5 772, 776 (N.D. Cal. 2014) (citing *Commodity Futures Trading Comm’n v. Savage*, 611 F.2d 270,  
6 279 (9th Cir. 1979)). “The defendant must make a strong showing of inconvenience to warrant  
7 upsetting the plaintiff’s choice of forum.” *Decker Coal Co. v. Commonwealth Edison Co.*, 805  
8 F.2d 834, 843 (9th Cir. 1986).

## 9 **II. Preliminary Injunction**

10 In order to obtain a preliminary injunction, a plaintiff must demonstrate four factors: (1)  
11 “that he is likely to succeed on the merits,” (2) “that he is likely to suffer irreparable harm in the  
12 absence of preliminary relief,” (3) “that the balance of equities tips in his favor,” and (4) “that an  
13 injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).  
14 While this is a four-part conjunctive test, the Ninth Circuit has held that a plaintiff may also obtain  
15 an injunction if it has demonstrated “serious questions going to the merits,” that the balance of  
16 hardship “tips sharply” in its favor, that it is likely to suffer irreparable harm, and that an  
17 injunction is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–  
18 35 (9th Cir. 2011). Injunctive relief is “an extraordinary remedy that may only be awarded upon a  
19 clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

## 20 **DISCUSSION**

### 21 **I. Motion to Transfer Venue**

22 The parties do not dispute that the District of Wyoming is a proper venue where this action  
23 could have been brought. Instead, they dispute how the convenience and interest of justice factors  
24 should be weighed. For the following reasons, I conclude that Defendants have not met their  
25 burden to show that the balance of all of the relevant factors clearly favors transfer such that I  
26 should upset Plaintiffs’ choice of forum in this district.

#### 27 **A. Convenience of the Parties and Witnesses**

28 Defendants’ primary argument in support of the “convenience” factors is that litigating this

1 case in the District of Wyoming would be more convenient because it would allow both the  
2 preceding *Wyoming* cases and this action to be litigated “in a coordinated fashion.” *See Elecs. for*  
3 *Imaging, Inc. v. Tesseron, Ltd.*, No. 07-cv-05534 CRB, 2008 WL 276567, at \*2 (N.D. Cal. Jan.  
4 29, 2008). They point to *Electronics for Imaging*, in which a lawsuit was filed in the District of  
5 Ohio raising a patent infringement claim based on two patents. One of the defendants in that  
6 action filed a second suit in the Northern District of California for declaratory relief, seeking to  
7 determine its rights to those two (among other) patents. The Hon. Charles R. Breyer transferred  
8 the second suit to the District of Ohio, reasoning that “the pertinent question is not simply whether  
9 *this* action would be more conveniently litigated in Ohio than California, but whether it would be  
10 more convenient to litigate the California and Ohio actions separately or in a coordinated fashion.”  
11 *Id.*

12 Those two cases each raised the issue of the parties’ rights under the same two patents.  
13 This matter shares no identical issues with the *Wyoming* cases. It is true that the cases pertain to  
14 related rules, but the legal issues are distinct. *Wyoming* concerns a challenge to the Waste  
15 Prevention Rule in which the petitioners argue that BLM exceeded its authority by impermissibly  
16 encroaching on both the EPA’s authority to regulate air pollution and states’ regulatory authority  
17 over certain state lands, as well as that the Waste Prevention Rule is arbitrary and capricious  
18 because its cost-benefit analysis takes into consideration air pollution benefits rather focusing on  
19 waste prevention. The matter here deals with the procedural propriety of the Suspension Rule  
20 under the APA, and whether the Suspension Rule is arbitrary and capricious because, among other  
21 reasons, it does not provide the requisite detailed justification for relying on inconsistent and  
22 contradictory facts to its prior findings. This matter does not deal with any issues regarding  
23 BLM’s authority to regulate air pollution, as is the focus of the *Wyoming* litigation. As the cases  
24 share no identical legal issues, there is no substantial convenience in litigating them “in a  
25 coordinated fashion” as there was in *Electronics for Imaging*. While the disposition of this matter  
26 may affect the proceedings in the *Wyoming* cases, the court’s issuance of the stay in that litigation  
27 ensures that the *Wyoming* court is not wasting judicial resources or coming to a premature decision  
28 pending the outcome of this litigation.

1 Defendants' remaining contentions in support of the convenience factors amount to  
2 arguments that Plaintiffs cannot show that the Northern District of California is a more convenient  
3 forum. That is not Plaintiffs' burden. Defendants must show that the convenience of the parties  
4 and the witnesses favors the District of Wyoming. Defendants assert that Plaintiffs' California  
5 connections are limited and tempered by their voluntary participation in the *Wyoming* litigation,  
6 that the Northern District of California is less convenient for Defendants than the District of  
7 Wyoming, and that Wyoming has just as much interest in and ties to these cases as California.  
8 Defendants' first and third points are true but not relevant to the question of convenience. That  
9 most of the plaintiffs in this matter are litigating a case in the District of Wyoming does not  
10 somehow mean that litigating a second case there is not an additional burden or inconvenience to  
11 them. Defendants' arguments boil down to the District of Wyoming being more convenient for  
12 themselves only, due to the cost of litigating a second set of cases in this district. The transfer of  
13 venue, however, "would merely shift rather than eliminate the inconvenience" from Defendants to  
14 Plaintiffs. *Decker Coal*, 805 F.2d at 843. This is insufficient to show that the convenience of the  
15 parties and witnesses weighs in favor of transferring the case to the District of Wyoming.

#### 16 **B. Interest of Justice**

17 Defendants argue that the interest of justice heavily favors transfer of these cases because  
18 of the strong interest in having a single court review issues arising out of the same rulemaking,  
19 emphasizing the District of Wyoming's familiarity with the Waste Prevention Rule. They urge the  
20 court to focus its attention on this analysis because "[t]he question of which forum will better  
21 serve the interest of justice is of predominant importance on the question of transfer, and factors  
22 involving convenience of parties and witnesses are in fact subordinate." *Wireless Consumers All.,*  
23 *Inc. v. T-Mobile USA, Inc.*, No. 03-cv-3711-MHP, 2003 WL 22387598, at \*4 (N.D. Cal. Oct. 14,  
24 2003). In opposition, Plaintiffs argue that Defendants mischaracterize the relationship between the  
25 two actions, and that none of the legal issues before the *Wyoming* court are before this one.

26 As discussed above, this case and the *Wyoming* litigation involve separate legal issues.  
27 That the subject matter at the heart of both of these actions is the same is hardly grounds for  
28 transfer. Indeed, many cases may arise from a single rule or statute. But Section 1404(a) "was

1 designed to prevent” “a situation in which two cases involving *precisely the same issues* are  
2 simultaneously pending in different District Courts.” *Elecs. for Imaging*, 2008 WL 276567, at \*1  
3 (emphasis added). It is not enough that these cases deal with and require me to become familiar  
4 with the substance of the Waste Prevention Rule; instead, Defendants must show that the two  
5 cases present the same legal questions so that litigating them separately would be a waste of  
6 judicial resources. This Defendants cannot do.

7 Defendants make much of the *Wyoming* court’s statement that these two cases are  
8 “inextricably intertwined.” *Wyoming*, Nos. 16-cv-0280, 16-cv-0285 (D. Wyo. Dec. 29, 2017)  
9 [Dkt. Nos. 184, 189] at 4. For purposes of the *Wyoming* court’s decision to issue the stay, I agree  
10 that the resolution of this litigation is “inextricably intertwined . . . with the ultimate rules to be  
11 enforced” because the resolution here determines the timing of the effectiveness of the Waste  
12 Prevention Rule’s provisions, and therefore which provisions the *Wyoming* court will review and  
13 the ripeness of those cases. While the cases can be said to be inextricably intertwined due to the  
14 implications on timing and effectiveness of the Waste Prevention Rule’s provisions, they are  
15 otherwise substantively distinct, and the challenges to each raise unique legal questions and  
16 require the evaluation of two separate rules promulgated for different reasons.

17 Given the distinctions between the two cases, Defendants’ arguments regarding the threat  
18 of “inconsistent judgments” are unfounded because this litigation does not require an evaluation of  
19 the Waste Prevention Rule. Defendants argue that disposition in this case will necessarily require  
20 me to review the underlying Waste Prevention Rule and evaluate its substantive provisions, as it  
21 serves as the benchmark by which the Suspension Rule will be judged. While it is true that I must  
22 review the Waste Prevention Rule insofar as I am required to determine whether, for example, the  
23 Suspension Rule rests on factual findings that contradict those underlying the Waste Prevention  
24 Rule, that is the extent to which I am required to review the Waste Prevention Rule. I need not  
25 evaluate the merits of its substance or the persuasiveness or propriety of its justifications. Indeed,  
26 I express no judgment whatsoever in this opinion on the merits of the Waste Prevention Rule.  
27 Instead, I need only look to see whether any contradictions exist between the two rules, and if so,  
28 whether the Suspension Rule provides the necessary detailed justification for such a contradiction.



1 For that reason, this case is distinguishable from *Bay.org v. Zinke*, Nos. 17-CV-03739-  
 2 YGR, 17-CV-3742-YGR, 2017 WL 3727467 (N.D. Cal. Aug. 30, 2017). In that case, an initial  
 3 suit was filed in the Eastern District of California in 2005 challenging the United States Fish and  
 4 Wildlife Service’s (“FWS”) biological opinions supporting two water projects, which plaintiffs  
 5 alleged would harm the delta smelt. *Id.* at \*2. A separate case was filed in 2017 in the Northern  
 6 District of California challenging the biological opinion underpinning a new FWS water project,  
 7 which plaintiffs alleged “[wa]s the latest in a long line of water diversion projects and policies,  
 8 including the [earlier two projects], which have had devastating effects” on the delta smelt. *Id.* at  
 9 \*3. Those cases required the court to make substantive determinations regarding the biological  
 10 opinions for three related water projects in the same region, all challenged on similar grounds, and  
 11 plaintiffs in both cases sought “an order instructing the FWS to reinstate consultation with the  
 12 relevant organizations to develop different plans.” *Id.* at \*5. Thus, there was both “overlap in the  
 13 issues” and a serious possibility for “inconsistent rulings,” a concern that is not present in the  
 14 instant case. Furthermore, it was more efficient for the court to promote “[c]onsistency with  
 15 respect to the nature and scope of [the sought] consultations, if any.” *Id.* Here, the remedy that  
 16 Plaintiffs seek does not require any coordination with the *Wyoming* case.

17 Nor would transferring these actions aid judicial efficiency. The *Wyoming* court has  
 18 already stayed those cases pending the outcomes here, and the most efficient and expedient option  
 19 is for this court to proceed with the motions for preliminary injunctions, which are fully briefed  
 20 and ripe for review. Granting Defendants’ transfer would require refile of all the briefing and  
 21 setting of a new hearing date in the District of Wyoming, incurring delay and contributing to  
 22 Plaintiffs’ alleged irreparable harm.

### 23 **C. Plaintiffs’ Choice of Forum**

24 An important additional factor is the plaintiff’s choice of forum.<sup>3</sup> Although it is not a  
 25 statutory requirement, the Supreme Court has placed a strong emphasis on the plaintiff’s choice of  
 26 forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (“[T]here is ordinarily a strong  
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28 <sup>3</sup> The parties agree that the other factors are irrelevant or neutral.

1 presumption in favor of the plaintiff's choice of forum, which may be overcome only when the  
2 private and public interest factors clearly point towards trial in the alternative forum."); *see also*  
3 *Ravelo Monegro v. Rosa*, 211 F.3d 509, 513 (9th Cir. 2000) (noting the "strong presumption in  
4 favor of a domestic plaintiff's forum choice"); *Ctr. for Biological Diversity v. McCarthy*, No. 14-  
5 cv-05138-WHO, 2015 WL 1535594, at \*3 (N.D. Cal. Apr. 6, 2015) (plaintiff's" choice of forum  
6 receives substantial deference, especially when the forum is within the plaintiff's home district or  
7 state") (citing *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)).

8 This forum is home to the State of California, a state sovereign, which contains a  
9 significant amount of land that stands to be affected by the outcome of this litigation. While  
10 Defendants argue that the State of Wyoming has a larger amount of federal and Indian oil and gas  
11 development impacted by the Suspension Rule, this does not diminish California's real interest.  
12 *See Mot.* at 15 ("[T]he federal minerals in the entire State of California produced 11.5 million  
13 barrels of oil and 12.2 billion cubic feet (Bcf) of natural gas."). The State of Wyoming has not  
14 sought to intervene in these cases to protect its interests.

15 Because Defendants have not shown that the convenience or interest of justice factors  
16 weigh strongly in favor of transfer, I will not disturb Plaintiffs' choice of venue. The most  
17 expedient result is for the case to remain in this district. Defendants' motion for transfer of venue  
18 to the District of Wyoming is DENIED.

## 19 II. Motion for Preliminary Injunction

20 Plaintiffs move for a preliminary injunction enjoining BLM from enforcing the Suspension  
21 Rule, effectively putting the Waste Prevention Rule back into place and requiring immediate  
22 compliance. While the parties dispute all of the elements of the preliminary injunction analysis,  
23 the most rigorous arguments focus on and the most challenging questions arise under Plaintiffs'  
24 likelihood of success on the merits. Plaintiffs raise several challenges to BLM's justifications for  
25 the Suspension Rule, contending that it is not supported by a reasoned analysis and is therefore  
26 arbitrary and capricious. These challenges, along with the arguments regarding irreparable harm,  
27 the balance of equities, and the public interest, will each be addressed in turn.

28

1                   **A. Likelihood of Success on the Merits**

2                   “The Administrative Procedure Act, 5 U.S.C. § 551 et seq., [] sets forth the full extent of  
3 judicial authority to review executive agency action for procedural correctness . . . .” *F.C.C. v.*  
4 *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). It permits a reviewing court to “hold  
5 unlawful and set aside agency action, findings, and conclusions found to be” either “arbitrary,  
6 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706.  
7 Under this standard of review, an agency must “examine the relevant data and articulate a  
8 satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State*  
9 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action is “arbitrary and capricious if  
10 the agency has . . . offered an explanation for its decision that runs counter to the evidence before  
11 the agency, or is so implausible that it could not be ascribed to a difference in view or the product  
12 of agency expertise.” *Id.* “[A] court is not to substitute its judgment for that of the agency.” *Fox*  
13 *Television Stations*, 556 U.S. at 513.

14                   When an agency takes an action that represents a policy change, it “must show that that  
15 there are good reasons for the new policy,” “[b]ut it need not demonstrate to a court’s satisfaction  
16 that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the  
17 new policy is permissible under the statute [and] that there are good reasons for it . . . .” *Fox*  
18 *Television Stations*, 556 U.S. at 515. The Supreme Court has advised that “when, for example, [an  
19 agency’s] new policy rests upon factual findings that contradict those which underlay its prior  
20 policy,” the agency must “provide a more detailed justification than what would suffice for a new  
21 policy created on a blank state.” *Id.* at 515; *see also Nat’l Cable & Telecomms. Ass’n v. Brand X*  
22 *Internet Servs.*, 545 U.S. 967, 981 (2005) (“Unexplained inconsistency” between agency actions is  
23 “a reason for holding an interpretation to be an arbitrary and capricious change.”). “In such cases  
24 it is not that further justification is demanded by the mere fact of the policy change; but that a  
25 reasoned explanation is needed for disregarding facts and circumstances that underlay or were  
26 engendered by the prior policy.” *Fox Television Stations*, 556 U.S. at 515–16; *see also Action for*  
27 *Children’s Television v. F.C.C.*, 821 F.2d 741, 745 (D.C. Cir. 1987) (“It is axiomatic that an  
28 agency choosing to alter its regulatory course must supply a reasoned analysis indicating its prior

1 policies and standards are being deliberately changed, not casually ignored.”).

2 BLM argues that Plaintiffs conflate the Suspension Rule with the proposed future revision  
3 of the Waste Prevention Rule. I agree that I must analyze the Suspension Rule as a discrete  
4 agency action separate from any proposed future revision. Because BLM has yet to pass any  
5 future revision, its substance, validity, and procedural propriety are not before this Court. But  
6 reviewing the Suspension Rule as a discrete action cuts both ways; while Plaintiffs may not  
7 conflate it with any future feared revision, BLM cannot use the purported proposed future  
8 revision, which has yet to be passed, as a justification for the Suspension Rule.

9 Any suggestion, however, that the Suspension Rule should be reviewed with less rigor than  
10 any future revision has no merit. *See Fox Television Stations*, 556 U.S. at 515. As BLM agrees  
11 with Plaintiffs that the Suspension Rule represents a substantive change in policy, *see* Opp. at 17,  
12 it is subject to the standard of review outlined by the Supreme Court in *Fox Television Stations*.  
13 BLM does not have to provide the same reasoned analysis in support of a temporary suspension  
14 that it would for a future substantive revision, but it must nonetheless provide good reasons for the  
15 Suspension Rule. To the extent that its reasoning contradicts the reasoning underlying the Waste  
16 Prevention Rule, it must be prepared to provide the requisite good reasons and detailed  
17 justification.

18 Under this framework, Plaintiffs argue that BLM’s Suspension Rule is arbitrary and  
19 capricious for several reasons. First, they assert that BLM has failed to provide a reasoned  
20 analysis for the Suspension Rule because its stated rationales are not legitimate and its  
21 justifications are inconsistent with and not supported by the evidentiary record. They also criticize  
22 the 2017 Regulatory Impact Analysis (“RIA”) underpinning BLM’s cost and benefit analysis.  
23 Beyond the substance, Plaintiffs argue that the Suspension Rule is inconsistent with BLM’s  
24 statutory duties and that BLM failed to provide meaningful notice and comment to the public.  
25 Each of these arguments, and Defendants’ responses, will be considered in turn.

26 **1. Whether BLM Provided A Reasoned Analysis for the Suspension Rule**

27 Plaintiffs contend that BLM failed to provide a reasoned analysis with legitimate rationales  
28 and justifications supported by the record for the Suspension Rule. BLM’s primary rationale in

1 the Suspension Rule is that it “has concerns regarding the statutory authority, cost, complexity,  
2 feasibility, and other implications of the [Waste Prevention] rule, and therefore wants to avoid  
3 imposing temporary or permanent compliance costs on operators for requirements that might be  
4 rescinded or significantly revised in the near future.” 82 Fed. Reg. at 58,050. BLM states that  
5 after an initial review of the Waste Prevention Rule in the spring of 2017, it concluded that certain  
6 provisions enacted just months earlier “add considerable regulatory burdens that unnecessarily  
7 encumber energy production, constrain economic growth, and prevent job creation.” *Id.*

8 Plaintiffs argue that this conclusion is contrary to and inconsistent with BLM’s earlier  
9 finding that the Waste Prevention Rule imposes “economical, cost-effective, and reasonable  
10 measures . . . to minimize gas waste.” 81 Fed. Reg. at 83,009. Because BLM’s new concerns  
11 appear to rest upon factual findings that contradict those underlying its prior policy, BLM must  
12 “provide a more detailed justification than what would suffice for a new policy created on a blank  
13 slate.” *Fox Television Stations*, 556 U.S. at 515.

14 As an example of the Waste Prevention Rule’s considerable regulatory burden, BLM first  
15 points to operators of marginal or low-producing wells, explaining that “[t]here is newfound  
16 concern that this additional burden would jeopardize the ability of operators to maintain or  
17 economically operate these wells.” 82 Fed. Reg. at 58,050. Plaintiffs argue, however, that BLM  
18 provides no analysis or factual data to support this concern. Reviewing the Suspension Rule’s  
19 discussion of marginal wells, I agree with Plaintiffs. BLM states that it is “reconsidering whether  
20 it was appropriate to assume that all marginal wells would receive exemptions from the rule’s  
21 requirements and whether the assumption might have masked adverse impacts of the [Waste  
22 Prevention Rule] on production from marginal wells.” *Id.* at 58,051. The Suspension Rule  
23 provides no basis for this reconsideration and points to no facts casting doubt on this assumption.

24 In its briefing, BLM offers that marginal wells “are less likely to support additional  
25 compliance costs associated with the LDAR [leak detection and repair] requirements,” and that  
26 these costs “could cause operators to shut-in marginal wells, thereby ceasing production and  
27 reducing economic benefits to local, State, tribal, and Federal governments,” citing its 2017  
28 Environmental Assessment in support. *Opp.* at 24 (internal quotation marks and citation omitted).

1 Yet the Environmental Assessment provides no citation or factual basis for that claim either, nor  
2 does it offer any more detail about what the additional compliance costs are, at what point they  
3 would cause shut-in of marginal wells, or the value of the supposed lost benefits. At the hearing  
4 on this matter, counsel for the government essentially conceded that it was in possession of no  
5 new facts or data underlying this “newfound” concern, but instead contended that it had no burden  
6 to point to any such data at this stage because BLM merely suspended the Waste Prevention Rule  
7 (as opposed to revoking or revising it). This is contrary to the law and the standard set forth by the  
8 Supreme Court under *Fox Television Stations*. Because BLM fails to point to any factual support  
9 underlying its concern, the marginal wells cannot serve as a justification for BLM’s Suspension  
10 Rule.

11 BLM also expresses concern that certain provisions would have “a disproportionate impact  
12 on small operators.” 82 Fed. Reg. at 58,051. Under the Waste Prevention Rule, BLM estimated  
13 “that average costs for a representative small operator would increase by about \$55,200, which  
14 would result in an average reduction in profit margin of 0.15 percentage points.” 81 Fed. Reg. at  
15 83,013–14. It concluded that this impact was “small, even for businesses with less than 500  
16 employees.” *Id.* at 83,013. In the Suspension Rule, BLM’s new analysis estimates “the potential  
17 reduction in compliance costs to be about \$60,000,” “result[ing] in an average increase in profit  
18 margin of 0.17 percentage points.” 82 Fed. Reg. at 58,058. BLM also concludes, in its section  
19 evaluating the economic effect on small entities under the Regulatory Flexibility Act (“RFA”),  
20 that “the average reduction in compliance costs associated with this final delay rule will be a small  
21 fraction of a percent of the profit margin for small companies, which is not a large enough impact  
22 to be considered significant.” *Id.* at 58,064.

23 Plaintiffs argue that there is no significant difference between the burden imposed by the  
24 Waste Prevention Rule and the reduction associated with the Suspension Rule, given that they  
25 both represent a fraction of a percentage point. BLM’s characterizations of those savings concede  
26 as much. Given that, BLM’s concern that small operators’ ability to maintain or economically  
27 operator their wells would be jeopardized is unfounded. While BLM attempts to explain that its  
28 significance finding was “not made as a general determination that \$60,000 savings is irrelevant

1 for a small business . . . , but rather as part of its analysis to determine whether it is required to  
2 prepare a regulatory flexibility analysis” per the RFA, Opp. at 23, the RFA requires BLM to  
3 evaluate whether a “rule would have a significant economic impact, either detrimental or  
4 beneficial, on a substantial number of small entities” so as “to ensure that government regulations  
5 do not unnecessarily or disproportionately burden small entities.” 82 Fed. Reg. at 58,064. BLM  
6 does not explain how or why it could conclude that the calculated costs could be so insignificant  
7 as not to unnecessarily or disproportionately burden small entities within the meaning of the RFA,  
8 and simultaneously conclude that there would be a disproportionate effect for other purposes. Nor  
9 could it, as these two positions are entirely inconsistent. Nor does BLM attempt to show in a  
10 concrete manner how the \$55,200 burden of the Waste Prevention Rule would affect small  
11 operators; BLM does not quantify how many would no longer be able to operate given the cost of  
12 compliance, nor does it provide any other metric for qualitatively evaluating the impact on small  
13 operators.<sup>4</sup> And even if BLM had provided such factual evidence, by itself it would not justify the  
14 Suspension Rule, as the rule is not properly tailored and does not merely suspend the Waste  
15 Prevention Rule as applied to small operators, but instead is a blanket suspension as to all  
16 operators, regardless of size. For these reasons, I agree with Plaintiffs that BLM’s concerns about  
17 small operators cannot serve as a justification for the change in policy that the Suspension Rule  
18 represents.

19 BLM similarly expresses concern about the Waste Prevention Rule’s calculation on  
20 impacts on royalties. BLM states that it is reexamining the 2016 RIA underlying the Waste  
21 Prevention Rule and its conclusion that royalty payments would increase under the Waste  
22 Prevention Rule. The basis for this reconsideration appears to be that

23 [s]ome commenters were concerned that the [Waste Prevention Rule] would impact oil and  
24 gas development on tribal reservations and royalties to tribes. Some tribes are located in  
25 known shale play areas and contain large amounts of undeveloped or underdeveloped  
26 areas. In particular, the commenters suggested that the [Waste Prevention Rule] could  
27 delay drilling on or drive industry away from tribal lands, reducing income flowing to

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28 <sup>4</sup> At the hearing on this matter, Defendants urged that many of these small entities were “mom and pop shops” with fewer than 15 employees. According to BLM’s “Detail of Small Businesses Impacts Analysis,” the average small entity reports 181 employees, and only two of the 26 examples provided had fewer than 15 employees. See 2016 RIA at 183.

1 Indian mineral owners and tribal economies.  
2 82 Fed. Reg. at 58,059. While these commenters' concerns might be valid, BLM does not provide  
3 any factual support for their concern, explain how the Waste Prevention Rule would result in such  
4 an impact, or attempt to calculate or even estimate any quantifiable effect on royalties. This  
5 concern is directly contradicted by the 2016 RIA, which estimated a significant increase in total  
6 royalties. *See id.* at 58,057. BLM's explanation falls short of meeting the requisite reasoned  
7 analysis, let alone the "more detailed justification" required when contradictory findings are  
8 involved. *See Fox Television Stations*, 556 U.S. at 515.

9 Plaintiffs further criticize the Suspension Rule for reaching conclusions in support of the  
10 Suspension Rule that contradict its stated factual findings. While BLM states that some provisions  
11 of the Waste Prevention Rule would "unnecessarily encumber energy production, constrain  
12 economic growth, and prevent job creation," 82 Fed. Reg. at 58,050, it provides no support for this  
13 claim, and later states that the Suspension Rule will not "significantly impact the price, supply or  
14 distribution of energy," nor "substantially alter the investment or employment decisions of firms,"  
15 *id.* at 58,057. BLM argues that these statements are taken out of context, and instead that the  
16 Suspension Rule will not significantly impact price supply, or distribution of energy worldwide  
17 because "relative changes in production compared to global levels are expected to be small." *Id.*  
18 While this may be true, BLM does not then point to any fact that justifies its assertion that the  
19 Waste Prevention Rule encumbers energy production. Its concern remains unfounded. BLM  
20 further argues that its finding regarding employment and investment decisions of firms was based  
21 on its findings in the 2016 RIA, which are under review. While this again may be true, that  
22 simply means that as of right now, the 2016 RIA remains the most recent factual finding on that  
23 point. BLM fails to point to contradictory evidence that could support an alternate conclusion.

24 Perhaps the BLM's best justification for the Suspension Rule is its concern that not all of  
25 the Waste Prevention Rule's provisions will survive judicial review. *See* 82 Fed. Reg. at 58,050.  
26 BLM states that the *Wyoming* court "express[ed] concerns that the BLM may have usurped the  
27 authority of the Environmental Protection Agency (EPA) and the States under the Clean Air Act,  
28 and questioned whether it was appropriate for the Waste Prevention Rule to be justified based on



1 its environmental and societal benefits, rather than on its resource conservation benefits alone.”  
2 *Id.*; see also *Wyoming*, 2017 WL 161428, at \*8, \*10. Unlike several other of BLM’s concerns,  
3 this one is grounded in a federal judge’s reasoned skepticism outlined in a judicial order regarding  
4 the propriety of the Waste Prevention Rule. While this concern for judicial review may serve to  
5 justify a suspension or delay of specific provisions addressed by the court in order to evaluate  
6 BLM’s authority with respect to EPA’s, BLM concedes that the Suspension Rule was not tailored  
7 with this in mind, but rather “tailored [] to achieve its goal of relieving operators and the agency of  
8 the burden of complying with a rule that may shortly change.” *Opp.* at 22. To the extent that  
9 BLM’s concern regarding judicial review is a legitimate one, the Suspension Rule is an  
10 inappropriate response because it is not tailored to address that issue.<sup>5</sup>

11 BLM argues that for this Court to require it to provide the necessary factual underpinnings  
12 in support of the Suspension Rule, BLM would be at risk of a predetermination challenge. BLM  
13 misunderstands its burden. It need not provide a level of analysis equivalent to the Waste  
14 Prevention Rule in support of the Suspension or equivalent to any future revision rule. But it must  
15 provide at least some basis—indeed, a “detailed justification”—to explain why it is changing  
16 course after its three years of study and deliberation resulting in the Waste Prevention Rule. New  
17 facts or evidence coming to light, considerations that BLM left out in its previous analysis, or  
18 some other concrete basis supported in the record—these are the types of “good reasons” that the  
19 law seeks. Instead, it appears that BLM is simply “casually ignoring” all of its previous findings  
20 and arbitrarily changing course. See *Action for Children’s Television*, 821 F.2d at 745. Given the  
21 various concerns that contradict the factual findings underpinning the Waste Prevention Rule, and  
22 BLM’s failure to provide the detailed justifications necessary to explain such contradictions in  
23 support of the Suspension Rule, Plaintiffs have shown a reasonable likelihood of success on the  
24 merits of their claim that the Suspension Rule is not grounded in a reasoned analysis and is  
25 therefore arbitrary and capricious.

26  
27  
28 <sup>5</sup> Indeed, if BLM had not moved in June of 2017 to extend the briefing schedule by 90 days in the Wyoming litigation, that court might have completed its review of the record and resolved the BLM’s concerns in this regard.

1 That said, I will continue to address all of the parties' arguments regarding Plaintiffs'  
2 likelihood of success on the merits.

### 3 **2. Whether the Suspension Rule is Based on a Flawed RIA**

4 Plaintiffs next contend that the Suspension Rule is based on a flawed RIA. They launch  
5 three attacks on the RIA to argue that because it improperly calculates the costs and benefits of the  
6 Waste Prevention Rule, the Suspension Rule is not the result of a reasoned analysis.

7 First, Plaintiffs argue that the BLM assumes that the Waste Prevention Rule will only be  
8 delayed for one year, then instituted in its current form, while BLM has made clear that it intends  
9 to rescind or revise most of the Waste Prevention Rule's suspended provisions. Regardless of  
10 BLM's plans or intentions, however, it has yet to pass a future revision. Neither Plaintiffs nor  
11 BLM nor I can say with any certainty, at this time, what form the future revision will take, if any.  
12 It would be improper for BLM to base its calculations on anything but what is known today.

13 Currently, after the year of the Suspension Rule is over, the Waste Prevention Rule is set to  
14 go back into effect in its unrevised form. For this reason, the RIA's assumption that the air quality  
15 and climate benefits of the Waste Prevention Rule will only be lost for one year is acceptable.  
16 What is not acceptable, however, is that the Suspension Rule then includes the reductions in  
17 compliance cost in its calculations of net benefits, as though such reductions would be permanent  
18 and no costs would be incurred in 2019 after the Suspension Rule expires and the Waste  
19 Prevention Rule is put into place. The BLM estimates such reductions to be between \$110 to  
20 \$114 million. *See* 2017 RIA at 37.

21 BLM cannot have it both ways: either the air quality and climate benefits will be lost  
22 indefinitely and not for only one year because the Waste Prevention Rule is not going into effect,  
23 and thus industry will never incur the compliance costs, or the air quality and climate benefits are  
24 lost for only one year, and there are no reductions in compliance cost because those costs are  
25 simply delayed for one year. BLM cannot base its calculations on inconsistent assumptions to  
26 inflate its calculation of the net benefits. Given this serious flaw, the RIA's calculation of total net  
27 benefits from 2017 to 2027, which depending on discount rate ranges from \$19 to \$52 million, *see*  
28 *id.* at 46, either deeply underestimates the lost air quality and climate benefits, or overestimates the

1 reduction in compliance costs. The total net figure is likely negative.

2 Plaintiffs' second argument is that BLM assumes without evidence in its calculations that  
3 no operators have undergone any compliance activities to meet the original January 17, 2018  
4 deadlines under the Waste Prevention Rule, thereby likely overestimating the industry cost  
5 savings. The Waste Prevention Rule was effective on January 17, 2017, and in effect for the next  
6 five months before BLM attempted to postpone the rule on June 15, 2017. BLM responds that  
7 "[t]here is not [] a public count of operators who have not complied with the Waste Prevention]  
8 Rule, rendering a precise estimate of compliance cost savings elusive," and thus it determined  
9 "that many operators are not poised to comply with the [Waste Prevention] Rule," calling its  
10 determination "a judgment call." Opp. at 39. But BLM does not provide any factual basis for this  
11 arbitrary assumption. Moreover, the monetary amount that operators have already spent or will  
12 need to spend in order to come into compliance is a numerical figure capable of being determined,  
13 even if neither party has taken steps to calculate that number.

14 Obtaining factual, objective data and values is not subject to "judgment calls." Judgment  
15 calls are for the determination of subjective values, such as what the "best" course of action is or  
16 what constitutes reasonable doubt. Contrary to BLM's assertion, its baseless calculation of  
17 industry cost savings is not a "judgment call" entitled to deference, but rather an estimated figure  
18 that lacks a reasonable basis.

19 Plaintiffs' third attack on the 2017 RIA concerns BLM's failure to consider the global  
20 costs of increased methane emissions, which Plaintiffs characterize as effectively dismissing 90  
21 percent of the associated costs. Cal. Mot. at 21. BLM justifies this change for two reasons. First,  
22 BLM argues that Executive Order 13783 directed agencies to ensure their analyses are consistent  
23 with the guidance in the Office of Management and Budget ("OMB") Circular A-4, which  
24 emphasizes that any regulatory analysis "should focus on benefits and costs that accrue to the  
25 citizens and residents of the United States." While Plaintiffs argue that the same Circular directs  
26 BLM to encompass "all the important benefits and costs likely to result from the rule," including  
27 "any important ancillary benefits," it does not specifically mandate that agencies consider global  
28 impacts. BLM also explains that since the 2016 RIA, "Section 5 of Executive Order 13793

1 withdrew the technical support documents on which the 2016 RIA relied for the valuation of the  
2 changes in methane emissions using a global metric.” Opp. at 39. BLM has a broad mission and  
3 is in a better position than the plaintiffs to consider what constitutes an “important” benefit. It has  
4 provided a factual basis for its change in position (the OMB circular and Executive Order 13793)  
5 as well as demonstrated that the change is within its discretion, at least with respect to this aspect  
6 of the RIA.

7 While not all of Plaintiffs’ criticisms of the 2017 RIA have merit, Plaintiffs are correct that  
8 its estimated cost savings is likely seriously inflated due to the flawed and inconsistent  
9 assumptions underpinning the compliance cost calculation and the reduction in compliance costs.  
10 These flaws in the RIA provide a separate reason that the Suspension Rule is not based on a  
11 reasoned analysis.

### 12 **3. Whether BLM Failed to Consider Its Statutory Duties**

13 Plaintiffs also argue that the Suspension Rule is arbitrary and capricious because BLM has  
14 “entirely failed to consider an important aspect of the problem,” *State Farm*, 463 U.S. at 42–43, in  
15 this case, its mandated statutory duties to prevent waste of public natural resources. Plaintiffs  
16 point to BLM’s earlier findings that “measures to conserve gas and avoid waste may significantly  
17 benefit local communities, public health, and the environment,” 81 Fed. Reg. at 83,009, as well as  
18 that its existing regulations, dating back to 1979, were “not particularly effective in minimizing  
19 waste of public minerals,” *id.* at 83,017. BLM stated that it “has independent legal and proprietary  
20 responsibilities to prevent waste in the production of Federal and tribal minerals, as well as to  
21 ensure the safe, responsible, and environmentally protective use of BLM-managed lands and  
22 resources.” *Id.* at 83,018. Plaintiffs characterize the Suspension Rule, on the other hand, as  
23 undermining BLM’s statutory duties without explanation, ignoring the reasons articulated for  
24 promulgation of the Waste Prevention Rule.

25 BLM counters that the Suspension Rule is an exercise of its broad authority, under the  
26 Mineral Leasing Act of 1920, Federal Oil and Gas Royalty Management Act of 1982, and Indian  
27 Mineral Leasing Act of 1938, which grant BLM broad authority to manage mineral development  
28 on public and Indian lands. Opp. at 27–28. Its directive under these statutes is not solely to

1 prevent waste of resources, but also “to promote the orderly development of the oil and gas  
2 deposits in the publicly owned lands of the United States through private enterprise.” *Harvey v.*  
3 *Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (citing S. Subcomm. of the Comm. on Interior &  
4 Insular Affairs, *The Investigation of Oil and Gas Lease Practices*, 84th Cong., 2d Sess. 2 (1957)).  
5 BLM points to other responsibilities as well, including to “ensure that Indian tribes receive the  
6 maximum benefit from mineral deposits on their lands,” *Jicarilla Apache Tribe v. Supron Energy*  
7 *Corp.*, 728 F.2d 1555, 1568 (10th Cir. 1984), to protect “the safety and welfare of workers,” 30  
8 U.S.C. § 187, to ensure minerals produced on public lands are sold “to the United States and to the  
9 public at reasonable prices,” *id.*, “to diversify and expand the Nation’s onshore leasing program to  
10 ensure the best return to the Federal taxpayer,” 30 U.S.C. §226(b)(1)(C), and others. It argues that  
11 it has been delegated the authority to balance its broad range of responsibilities and is in the best  
12 position to evaluate how to weigh competing concerns.

13 I agree with BLM that given its range of statutorily-mandated duties and responsibilities, it  
14 is best suited to evaluate its competing options and choose a course of action. The Suspension  
15 Rule, when considered as a discrete action and without guessing as to the content of any future  
16 proposed revision, does not necessarily represent an abdication of BLM’s duty to prevent waste.  
17 Its effect is to delay the Waste Prevention Rule’s provisions for one year, at which point the Rule  
18 is set to go into effect. Thus, Plaintiffs’ contention that the Suspension Rule is arbitrary and  
19 capricious because it does not consider BLM’s statutory duties fails. Simply because BLM does  
20 not fulfill its statutory duties in the manner that Plaintiffs would prefer does not mean that it failed  
21 to consider them.

#### 22 4. **Whether BLM Has Prevented Meaningful Comment on the Suspension** 23 **Rule**

24 Plaintiffs finally argue that the Suspension Rule is unlawful because it violates the basic  
25 requirement that agencies allow for meaningful comment on their proposed rules. *See* 5 U.S.C. §  
26 553(c); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) (“The purpose of  
27 the notice and comment requirements is to provide for meaningful public participation in the rule-  
28 making process.”). Plaintiffs argue that the notice and comment in this case was not meaningful

1 because Secretary Zinke had already determined the outcome of the rulemaking before receiving  
2 comment and limited the scope of the rulemaking comments so as not to consider those addressing  
3 the substance of the Waste Prevention Rule or Suspension Rule.

4 BLM responds that “predetermination” is a high standard, citing cases arising in the  
5 context of environmental impact reviews under the National Environmental Protection Act  
6 (“NEPA”). *See* Opp. at 33. BLM cites no cases showing that this standard for predetermination,  
7 however, has ever been applied outside the context of NEPA environmental impact reviews.  
8 Instead, other circuit courts have evaluated whether comment was meaningful by evaluating  
9 whether an agency “remained ‘open-minded’ about the issues raised and engage[d] with the  
10 substantive responses submitted.” *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 453 (3d  
11 Cir. 2011) (internal citations omitted); *Rural Cellular Ass’n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C.  
12 Cir. 2009) (“The opportunity for comment must be a meaningful opportunity, and we have held  
13 that in order to satisfy this requirement, an agency must also remain sufficiently open-minded.”)  
14 (internal citations omitted).<sup>6</sup>

15 In *Prometheus Radio Project*, for example, the Third Circuit concluded that an agency did  
16 not keep the requisite open mind where a draft of the proposed rule was circulated internally two  
17 weeks before the comment period closed and before most of the comments were received, and the  
18 final vote occurred within a week of the response deadline. 652 F.3d at 453. In contrast, in *Rural*  
19 *Cellular*, the D.C. Circuit noted that the agency “compiled a record that included 113 sets of  
20 comments from interested parties, considered those comments” by properly taking the views of  
21 both supporters and critics into account and responding to specific critiques of the rule in the final  
22 order, and “did not issue the Order until the required rulemaking was complete. Nothing else is  
23

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24 <sup>6</sup> While these formulations are similar to that in *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp.  
25 2d 830, 847 (E.D. Cal. 2008), which Plaintiffs cite in support of their argument, these cases are  
26 more directly on point because they deal specifically with the meaningfulness of the comment  
27 period under the APA, whereas *Nehemiah* and the authority it cites discuss disqualification of an  
28 official for prejudgment. As the issue of disqualification is not presently before me, I follow the  
standards expressed by *Prometheus Radio Project* and *Rural Cellular*. It is nonetheless worth  
noting, however, that in *Nehemiah*, the court explained that “[m]ere proof that the official has  
taken a public position, or has expressed strong views, or holds an underlying philosophy with  
respect to an issue in dispute is not enough to overcome the presumption that an official is  
objective and fair.” 546 F. Supp. 2d at 847 (internal quotation marks and citation omitted).

1 required.” 588 F.3d at 1101.

2 In this case, BLM has followed the required procedures and addressed specific comments  
3 in support of and in opposition to the Suspension Rule in an 89-page response. Nothing in the  
4 timeline of its process shows an impermissible predetermination or closed mindedness, as was the  
5 case in *Prometheus Radio Project*. Nor does the response to the comments suggest that BLM  
6 simply ignored the public participation in the deliberative process.

7 Plaintiffs’ argument regarding the Secretary’s limitation of the scope of the comments,  
8 however, has more merit. Secretary Zinke refused to consider comments regarding the substance  
9 or merits of the Waste Prevention Rule, determining that they were outside the scope of the  
10 Prevention Rule. For example, Secretary Zinke deemed comments asserting that the Waste  
11 Prevention Rule did not burden industry given companies’ financial performance and job growth  
12 as outside the scope of the Suspension Rule. These comments, however, bear directly upon the  
13 Secretary’s stated rationales for the Suspension Rule; indeed, the Suspension Rule explains that  
14 “[o]perators have raised concerns regarding the cost, complexity, and other implications of [the  
15 Waste Prevention Rule].” 82 Fed. Reg. at 58,058. The Secretary cannot, on the one hand, use  
16 concerns about cost and complexity to industry as a justification for the Suspension Rule, only to  
17 deny comments about the financial and economic burden to industry as outside the scope of the  
18 Suspension Rule, on the other.

19 Similarly, the Suspension Rule repeatedly expresses concerns that the Waste Prevention  
20 Rule is unnecessarily burdensome on industry, but the Secretary excluded comments that the  
21 Waste Prevention Rule “is not burdensome to operators because jobs have not been lost and []  
22 drilling activity is increasing.” Opp. at 34–35 (internal quotation marks and citations omitted).  
23 The relevant burden of the Waste Prevention Rule cannot serve as a justification for the  
24 Suspension Rule and yet at the same time be outside the scope for purposes of comment. While  
25 his actions in this case are certainly not as egregious those in *North Carolina Growers’ Ass’n, Inc.*  
26 *v. United Farm Workers*, 702 F.3d 755, 769 (4th Cir. 2012), the matters that the Secretary refused  
27 to consider were “not only ‘relevant and important,’ but were integral to the proposed agency  
28 action.” For these reasons, the Secretary’s content restrictions on the comments to the Suspension

1 Rule prevented meaningful comment on key justifications underpinning the Suspension Rule.  
2 That is insufficient to satisfy the APA.

3 Taking all parties' concerns into consideration, I agree with Plaintiffs that BLM has failed  
4 to provide the requisite reasoned analysis in support of the Suspension Rule, and it is therefore  
5 arbitrary and capricious within the meaning of the APA. BLM's contention that this result would  
6 mean that "an agency would never temporarily suspend a rule pending reconsideration—  
7 regardless of the costs imposed by the rule in the interim—because it would have to engage in the  
8 same level of analysis for the suspension as it would for any future substantive revision," Opp. at  
9 36–37, is incorrect. Instead, I simply conclude that on the record before me, Plaintiffs are likely to  
10 succeed on their claim that BLM failed to consider the scope of commentary that it should have in  
11 promulgating the Suspension Rule and relied on opinions untethered to evidence, which is  
12 required to give a reasoned explanation to suspend the Waste Prevention Rule (that had an  
13 evidentiary basis).

#### 14 **B. Irreparable Harm**

15 Plaintiffs argue that without a preliminary injunction of the Suspension Rule, they will  
16 suffer irreparable harm in the form of waste of publicly-owned natural gas, increased air pollution  
17 and related health impacts, exacerbated climate harms, and other environmental injury such as  
18 noise and light pollution. In order to obtain a preliminary injunction, "a plaintiff must  
19 *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief."  
20 *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis in original). The  
21 Ninth Circuit recognizes the "well-established public interest in preserving nature and avoiding  
22 irreparable environmental injury." *Cottrell*, 632 F.3d at 1138 (internal quotation marks and  
23 citation omitted). "While . . . it would be incorrect to hold that all potential environmental injury  
24 warrants an injunction, . . . [t]he Supreme Court has instructed us that [e]nvironmental injury, by  
25 its nature, can seldom be adequately remedied by money damages and is often permanent or at  
26 least of long duration, i.e., irreparable." *League of Wilderness Defenders/Blue Mountains*  
27 *Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (citing *Lands Council v.*  
28 *McNair*, 537 F.3d 981, 1004 (9th Cir.2008) (en banc)).



1           In *League of Wilderness Defenders*, for example, the Ninth Circuit found that “the logging  
2 of thousands of mature trees” was a likely, irreparable harm that “c[ould not] be remedied easily if  
3 at all” by the “planting of new seedlings nor the paying of money damages.” 537 F.3d at 764. On  
4 the other hand, in *Idaho Rivers United v. U.S. Army Corps of Eng’rs*, 156 F. Supp. 3d 1252, 1261–  
5 62 (W.D. Wash. 2015), the district court concluded that plaintiffs’ assertion that “likely *potential*  
6 impacts and harm to Pacific lamprey *can* result from disturbance from dredge activities” fell short  
7 of demonstrating the requisite likely irreparable harm sufficient for the court to issue a preliminary  
8 injunction.

9           While Plaintiffs’ assertions do not involve logging or damage to wildlife habitats, they do  
10 involve other concrete harms that BLM’s own data suggests are significant and imminent. BLM  
11 estimates that the Suspension Rule *will* result in emissions of 175,000 additional tons of methane,  
12 250,000 additional tons of volatile organic compounds, and 1,860 additional tons of hazardous air  
13 pollutants over the course of the year. 82 Fed. Reg. at 58,056–57. These numbers support  
14 Plaintiffs’ concerns that the additional emissions will cause irreparable public health and  
15 environmental harm to Plaintiffs’ members who live and work on or near public and tribal lands  
16 with oil and gas development. BLM characterizes the methane emissions, for example, as  
17 “infinitesimal,” or “roughly 0.61 percent of the total U.S. methane emissions in 2015.” Opp. at  
18 12. But Plaintiffs submit affidavits from scientists who posit otherwise. Dr. Ilissa B. Ocko,  
19 climate scientist, states that the 175,000 additional tons of methane that will result during the one-  
20 year suspension is “equivalent to the 20-year climate impact of over 3,000,000 passenger vehicles  
21 driving for one year or over 16 billion pounds of coal burned.” See App’x to Sierra Club Mot. at  
22 499 ¶ 11. Dr. Renee McVay, whose research focuses on atmospheric chemistry, estimates that  
23 approximately 6,182 wells subject to the Waste Prevention Rule are located in counties already  
24 suffering from unhealthy air with elevated ozone levels. See *id.* at 786 ¶ 19. The Suspension Rule  
25 will result in additional emissions of 2,089 tons of VOCs in these already at-risk communities,  
26 where many of the conservation and tribal group plaintiffs’ members reside, leading to and  
27 exacerbating impaired lung functioning, serious cardiovascular and pulmonary problems, and  
28 cancer and neurological damage. See *id.*; Sierra Club Mot. at 21.

1 Plaintiffs also provide several sworn affidavits from their individual members, attesting to  
2 the imminent and particularized harms from which they do and will suffer as a result of the  
3 Suspension Rule. Environmental Defense Fund member Francis Don Schreiber, for example,  
4 resides on a ranch in Governador, New Mexico, where there are 122 oil and gas wells either on or  
5 immediately adjacent to his land, all managed by BLM and subject to the Suspension Rule. *See*  
6 App'x to Sierra Club Mot. at 476–77. He notices an “extremely strong” “near-constant smell from  
7 leaking wells,” which “make[s] breathing uncomfortable” and causes concern that he and his wife  
8 “are breathing harmful hydrocarbons.” *Id.* at 479. As Schreiber suffers from a heart condition and  
9 has already had open heart surgery, he is “at a higher risk from breathing ozone,” and is  
10 “constantly concerned about the impact of the air quality on [his] heart condition.” *Id.* at 480.  
11 Plaintiffs provide similar affidavits from several other members. *See, e.g., id.* at 510–16, 532–36,  
12 562–64, 569–72, 627–31, 653–55, 717–22.

13 Nor does BLM dispute Plaintiffs’ assertion that once such pollutants are emitted, they  
14 cannot be removed. The State of California, for example, asserts that once methane is released  
15 into the atmosphere, it contributes to irreparable harms, including a reduction in average annual  
16 snowpack (and therefore water supply), increased erosion and flooding from rising sea levels, as  
17 well as extreme weather events. *See* Cal. Mot. at 23. The State of New Mexico faces increased  
18 instances of water and electricity supply disruptions, drought, insect outbreak, and wildfire. *Id.* at  
19 24. These are serious and irreparable harms that are directly linked to methane emissions.

20 Moreover, contrary to BLM’s contention that increased air pollution is “incremental in  
21 nature” and does not require immediate relief, several courts, including the Supreme Court, have  
22 found that increased air pollution can constitute irreparable harm. *See, e.g., Beame v. Friends of*  
23 *the Earth*, 434 U.S. 1310, 1314 (1977) (Marshall, J., in chambers) (recognizing “irreparable injury  
24 that air pollution may cause during [a two month] period, particularly for those with respiratory  
25 ailments); *Sierra Club v. U.S. Dep’t of Agriculture, Rural Utils. Serv.*, 841 F. Supp. 2d 349, 358  
26 (D.C. Cir. 2012) (concluding that plaintiff demonstrated irreparable harm where coal plant  
27 expansion would “emit substantial quantities of air pollutants that endanger human health and the  
28 environment”). Similar to *Sierra Club v. U.S. Department of Agriculture*, Plaintiffs have provided

1 affidavits from climate scientists and researchers supporting their assertions that the exposure to  
 2 air pollution resulting from the Suspension Rule will have irreparable consequences for public  
 3 health. *Compare Sierra Club v. U.S. Dep't of Agriculture*, 841 F. Supp. 2d at 358–59, with *Sierra*  
 4 *Club Mot.* at 20–22. Plaintiffs have also offered affidavits from individual members showing  
 5 concrete and particularized harms to respiratory health. *See Beame*, 434 U.S. at 1314. These  
 6 affidavits are acceptable and sufficient to establish the requisite irreparable harm.<sup>7</sup>

7 BLM argues that Plaintiffs nonetheless cannot show that any alleged harms are  
 8 “imminent” because operators are not ready to comply and will be unable to do so immediately.  
 9 The relationship between these two contentions is unclear. Whether or not operators are ready to  
 10 comply does not negate the imminence of Plaintiffs’ harms; that operators are not currently poised  
 11 to comply with the Waste Prevention Rule suggests that the harms to Plaintiffs from waste of  
 12 natural gas and pollution would be even greater than estimated the longer that operators fail to  
 13 comply. All the while, the wasted gas and emissions will continue to increase, leading to further  
 14 irreparable harm.

15 Plaintiffs list several environmental injuries with effects statewide, to the general public,  
 16 and on the personal level, any of which might be sufficient to establish likely irreparable harm.  
 17 Considered collectively, plaintiffs easily meet their burden. Defendants’ attempts to diminish  
 18 these harms as merely incremental is unsupported by science as well as case law. For these  
 19 reasons, I conclude that Plaintiffs have sufficiently demonstrated irreparable harm.

### 20 C. Balance of Equities and Public Interest

21 Finally, Plaintiffs must show that “the balance of equities tips in his favor, and that an

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22  
 23 <sup>7</sup> BLM cites *Asarco, Inc. v. EPA*, 606 F.2d 1153, 1160 (9th Cir. 1980), and other cases for the  
 24 proposition that the Court may not consider the “extra-record declarations” submitted by Plaintiffs  
 25 “in evaluating the ‘correctness or wisdom’ of BLM’s decision.” *See Opp.* at 14 n.10. BLM is  
 26 correct that it would be improper to consider these affidavits for purposes of substantive  
 27 evaluation of the Suspension Rule under the APA. *See Asarco*, 606 F.2d at 1160 (“The same  
 28 cases make clear that judicial consideration of evidence relevant to the substantive merits of the  
 agency action but not included in the administrative record raises fundamentally different  
 concerns.”). I do not consider these affidavits in my analysis of the merits of the Suspension Rule  
 and the arbitrary and capricious inquiry, as it would be inappropriate to look beyond the  
 administrative record in so doing. The separate question of irreparable harm, however, is not  
 limited to the administrative record, *see Sierra Club v. U.S. Dep't of Agriculture*, 841 F. Supp. 2d  
 at 358–59, and none of the cases BLM cites discuss irreparable harm.

1 injunction is in the public interest.” *Winter*, 555 U.S. at 20. The court “must balance the  
2 competing claims of injury and must consider the effect on each party of the granting or  
3 withholding of the requested relief.” *Id.* at 24. All parties contend that the public benefits of their  
4 desired outcome are significant and urge the Court to find in their favor.

5 Plaintiffs focus on the loss of valuable natural resources through wasted gas, reduced  
6 royalties to local, state, and tribal entities, increased air pollution, the serious environmental harm  
7 to the public, as well as noise and visual nuisance. Defendants, for their part, argue that the  
8 Suspension Rule conserves the resources of operators and the agency while BLM reconsiders the  
9 Waste Prevention Rule. BLM estimates these costs to be approximately \$110 to \$114 million  
10 (depending on discount rates to annualize capital costs). *See* Opp. at 15. BLM also estimates that  
11 the initial upfront unrecoverable costs in 2018 would be \$91 million. *Id.* They argue that “savings  
12 in compliance costs as compared to the monetized value of the increase in emissions and reduced  
13 captured gas results in a net benefit of \$64–68 million, or \$83–86 million depending on the  
14 discount rate used, during the suspension year.” *Id.* at 15–16.

15 As previously discussed, these calculations are flawed because BLM assumes that  
16 compliance costs would never be incurred by industry, which is inconsistent with the Suspension  
17 Rule. Because it purports to merely suspend or delay compliance with the Waste Prevention Rule  
18 by only one year, those compliance costs are not saved, merely delayed. Even if I were to take  
19 these costs into consideration, placing these figures in context helps to understand their impact.  
20 Plaintiffs note that the average impact on individual businesses is insignificant; as previously  
21 discussed, even small operators will see an expected increase in profits of only 0.17%, a marginal  
22 amount, as a result of the Suspension Rule. Weighed against the likely environmental injury,  
23 which cannot be undone, the financial costs of compliance are not as significant as the increased  
24 gas emissions, public health harms, and pollution. *See, e.g., Mexichem Specialty Resins, Inc. v.*  
25 *E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015) (“[I]t is well settled that economic loss does not, in and  
26 of itself, constitute irreparable harm.”) (internal quotation marks and citation omitted); *accord Los*  
27 *Angeles Memorial Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1204 (9th Cir.  
28 1980) (concluding that where plaintiff “has not shown that it will suffer any injury apart from

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1 economic injury,” its “injury is, therefore, not irreparable”) (Wallace, J., concurring). Plaintiffs  
2 have demonstrated that these harms will have substantial detrimental effects on public health, and  
3 unlike economic loss, cannot be recovered. Thus, balancing the equities and considering both  
4 sides’ impacts and costs, as well as the public interest, I conclude that the balance weighs in favor  
5 of granting the preliminary injunction.

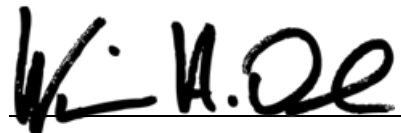
6 Plaintiffs have provided several reasons that the Suspension Rule is arbitrary and  
7 capricious, both for substantive reasons, as a result of the lack of a reasoned analysis, and  
8 procedural ones, due to the lack of meaningful notice and comment. They have demonstrated  
9 irreparable harm and that the balance of equities and public interest strongly favor issuing the  
10 preliminary injunction sought. Because I conclude that they have met their burden on each  
11 element, I GRANT Plaintiffs’ preliminary injunction enjoining enforcement of the Suspension  
12 Rule.

13 **CONCLUSION**

14 For the foregoing reasons, Defendants’ motion to transfer venue to the District of  
15 Wyoming is denied. Plaintiffs’ motion for a preliminary injunction is GRANTED.

16 **IT IS SO ORDERED.**

17 Dated: February 22, 2018

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19  
20 William H. Orrick  
United States District Judge

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