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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through Xavier Becerra, Attorney General; and STATE OF NEW MEXICO, by and through Hector Balderas, Attorney General, et al.,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 17-cv-03804-EDL
Related: Case No. 17-cv-3885-EDL

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hearing: Sept. 25, 2017, 10:00 a.m.
Judge: Hon. Elizabeth D. Laporte

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The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] submits this brief as *amicus curiae* in support of plaintiffs' motions for summary judgment seeking vacatur of the Bureau of Land Management's ("BLM") Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017) ("Stay"), in the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Waste Prevention Rule").

INTEREST OF AMICUS CURIAE

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy, with a particular focus on natural resources, environmental, and economic issues.

An area of special concern for Policy Integrity is the proper use of economic analysis in natural resource extraction. Policy Integrity's economists and legal scholars are among the nation's leading experts on the economic analysis underlying federal natural resources extraction and regulation, having published numerous papers, reports, scholarly articles, and comments on this topic. Policy Integrity also has expertise in the proper scope and estimation of costs and benefits and the application of economic principles to regulatory decisionmaking. Our director, Richard L. Revesz, has published more than fifty articles and books on environmental and administrative law, including several works that address the legal and economic principles that inform rational regulatory decisions.[2]

Policy Integrity has filed *amicus curiae* briefs addressing agency analysis of costs and benefits in many cases. For example, Policy Integrity filed an amicus brief discussing the agency's failure to conduct a proper assessment of costs and benefits in a similar challenge to a stay issued by the

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[1] This brief does not purport to represent the views of New York University School of Law, if any.

[2] *See* Publications of Richard L. Revesz, NYU Law, http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.publications&personid=20228 (last visited Aug. 25, 2017).

Environmental Protection Agency ("EPA"). *See* Br. for Institute for Policy Integrity as *Amicus Curiae*, *Clean Water Action v. Pruitt*, No. 17-817 (D. D.C. June 27, 2017), ECF No. 25. In addition, Policy Integrity filed briefs in the Supreme Court and U.S. Court of Appeals for the D.C. Circuit addressing EPA's calculation of costs and benefits in its regulation of mercury emissions from power plants. *See* Br. for Institute for Policy Integrity as *Amicus Curiae*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015); Br. for Institute for Policy Integrity as *Amicus Curiae*, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Jan. 25, 2017). Policy Integrity also filed a brief in the D.C. Circuit discussing the cost-benefit analysis that EPA prepared in connection with the recent revision to national ozone standards. *See* Br. for Institute for Policy Integrity as *Amicus Curiae*, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. Aug. 4, 2016). And Policy Integrity has submitted comments regarding the economic analyses of recently proposed repeals and stays issued by EPA and other agencies, which are similar to the Stay at issue in this case.[3] Policy Integrity's expertise in cost-benefit analysis and experience with these cases gives it a unique perspective from which to evaluate plaintiffs' claims that the Stay should be vacated.[4]

QUESTION PRESENTED

Did BLM's failure to consider the costs of the Stay, in the form of forgone benefits to human health and the environment, violate the Administrative Procedure Act ("APA")?

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[3] *See, e.g.*, Policy Integrity Comments on EPA's Further Stay of the Deadlines in EPA's Emission Standards for Methane Emissions from New, Reconstructed, and Modified Sources (Aug. 9, 2017); Policy Integrity Comments on Dep't of Interior's Proposed Repeal of the Coal Valuation Reform (May 4, 2017); Policy Integrity Comments on EPA's Proposed Further Delay of the Effective Date of amendments to the Risk Management Program (May 19, 2017). Website links to these documents provided in the table of authorities.

[4] No publicly held entity owns an interest of more than ten percent in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public. Additionally, no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

BLM's Waste Prevention Rule sought to prevent oil and gas companies from wasting natural gas produced on public land. 81 Fed. Reg. at 83,008. In the Stay, BLM relied on Section 705 of the APA, 5 U.S.C. § 705, to put off indefinitely the Waste Prevention Rule's key compliance deadlines. 82 Fed. Reg. at 27,431. As plaintiffs argue, the Stay violates the law because (1) Section 705 does not authorize BLM to postpone the Waste Prevention Rule's deadlines after the rule's effective date and (2) BLM did not comply with the APA's notice and comment requirements.

But even if BLM had not fun afoul of the APA in those two ways, the Stay would still be illegal because BLM did not comply with the APA's requirement to provide a reasoned explanation for the Stay. First, BLM failed to examine the costs of the Stay. Costs can come in the form of compliance costs, which industry pays, or in the form of forgone benefits, which are costs that society as a whole pays. Either way, BLM must acknowledge, calculate, and examine these costs. But here, BLM failed to even acknowledge the costs of forgoing the Waste Prevention Rule's significant societal benefits.

Second, BLM failed to provide an adequate explanation for forgoing the Waste Prevention Rule's benefits. BLM imposed the Stay in order to save industry from making "substantial" expenditures to comply with the Waste Prevention Rule. *Id.* But reference to compliance costs is insufficient without any discussion of the societal costs of the Stay. BLM claims that the Stay merely preserves the "status quo," but this is inaccurate. The status quo is a world in which the Waste Prevention Rule is in effect and legally enforceable. Without accounting for the indefinitely suspended societal benefits, BLM cannot justify its decision under the APA.

ARGUMENT

BLM FAILED TO PROVIDE A REASONED EXPLANATION FOR THE STAY

As plaintiffs argue, the Stay is invalid because BLM does not have authority to postpone the Waste Prevention Rule under 5 U.S.C. § 705 and because BLM did not seek public comment on the

Stay prior to issuing it.[5] *See* Pls.' Mem. of Points and Authorities at 8-11, *California v. Zinke*, No. 17-cv-03804 (N.D. Cal. Jul. 26, 2017), ECF No. 11 ("State Pls. Mem."). But even if these problems did not exist, the Stay would be arbitrary and capricious because BLM cannot change the compliance dates of the Waste Prevention Rule without providing a "reasoned explanation" for the change. *F.C.C. v. Fox Television Stations, Inc. ("Fox")*, 556 U.S. 502, 515 (2009).

The Stay is a final agency action that is subject to review under the APA's arbitrary and capricious standard, set out in 5 U.S.C. § 706(2). *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6-8 (D.C. Cir. 2017) (stay under section 307 of the Clean Air Act is a final agency action reviewable under the APA); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 18 (D. D.C. 2012) (stay under 5 U.S.C. § 705 is subject to the APA's arbitrary and capricious standard). Indeed, courts have long recognized that an indefinite stay such as this one is "tantamount to a revocation" and should be subject to the same APA requirements that apply to repeals. *Nat. Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 763 n.23 (3d Cir. 1982); *see also Becerra v. Interior*, No. 17-cv-02376, slip op. at 10-12 (N.D. Cal. Aug. 30, 2017) (reviewing 5 U.S.C. § 705 stay under § 706).

Under the APA's arbitrary and capricious standard, an agency must (1) "examine the relevant data" and (2) "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *Pub. Citizen v. Steed*, 733 F.2d

[5] As the Secretary of Labor recently acknowledged, the requirement that agencies seek public comment on delays "is not red tape." Alexander Acosta, Deregulators Must Follow the Law, So Regulators Will Too, *Wall Street Journal* (May 22, 2017). That requirement exists so "that agency heads do not act on whims, but rather only after considering the views of all Americans." *Id.*

93, 98 (D.C. Cir. 1984) (explaining that agencies must "cogently explain" a suspension ((quoting *State Farm*, 463 U.S. at 48).) BLM's explanation failed to meet this standard.[6]

A. BLM Failed to Examine the Costs of the Stay

An important category of "relevant data" that BLM failed to examine is the cost of the Stay, in the form of the forgone benefits of the Waste Prevention Rule. "'[C]ost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Indeed, costs include "harms that regulation might do to human health or the environment." *Id.*; *see also Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 326-27 (D.C. Cir. 1992) (holding that the agency should have considered costs in the form of safety risks associated with the smaller size of more fuel-efficient cars). For this reason, Executive Order 12,866, issued in 1993 and currently the leading White House order governing agency cost-benefit analysis,[7] requires agencies to consider "any adverse effects . . . on health, safety and the natural environment" when assessing a regulation's costs, prior to issuing the regulation. Exec. Order No. 12,866 § 6(a)(3)(C)(ii), 58 Fed. Reg. 51,735 (Sept. 30, 1993) ("Executive Order 12,866"). An agency's

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[6] As plaintiffs explain, there is no need to await the administrative record to address this point, because BLM's failure to address the costs of the Stay, in the form of the forgone benefits of the Waste Prevention Rule, is obvious from the face of the Stay or from judicially noticeable documents. *See* Conservation and Tribal Citizen Groups' Memorandum of Points & Authorities in Support at 7, n.7, *Sierra Club v. Zinke*, No. 17-cv-3885 (N.D. Cal. Jul. 27, 2017), ECF No. 37 ("Conservation Pls.' Mem."); State Pls.' Mem. at 6-7. Moreover, BLM's claim that this Court "cannot know what BLM did or did not consider" prior to BLM's filing of the administrative record, only highlights the procedural impropriety of BLM's Stay. *See* Defs.' Opp. to Pls.' Motions for Summ. J. at 17, *California v. Zinke*, No. 17-cv-03804 (N.D. Cal. Aug. 25, 2017), ECF No. 52 ("BLM Opp."). BLM is not permitted to base its decision on documents or reasoning that it only reveals after the fact. BLM is required to consult the public and give all parties an opportunity to comment on the "wisdom" of this action, not hide its reasoning until litigation is commenced and it eventually files an administrative record. *See Envt'l Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816-17 (D.C. Cir. 1983) (internal quotation marks omitted).

[7] *See* Office of Mgmt. & Budget, Memorandum: Implementing Executive Order 13,771, Titled "Reducing Regulation and Controlling Regulatory Costs," part II (Apr. 5, 2017) ("Guidance on Executive Order 13,771").

explanations provided in compliance with Executive Order 12,866 are subject to review under the APA's arbitrary and capricious standard. *See e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.").

The costs imposed by BLM's decision to stay the compliance deadlines in the Waste Prevention Rule are the forgone benefits of the Waste Prevention Rule, which were quantified in the Waste Prevention Rule's underlying Regulatory Impact Analysis. Regulatory Impact Analysis for the Waste Prevention Rule at 5-6 (Nov. 10, 2016) ("RIA").[8] As Circular A-4, a guide for agencies on regulatory cost-benefit analysis issued by the Office of Management and Budget under President George W. Bush, recognizes, the timing of a rule's compliance dates may "have an important effect on its net benefits." Office of Mgmt. & Budget, OMB Circular A-4 at 7 (2003) ("Circular A-4").[9] For example, a delay of an emissions limit can cause "significant deleterious effects on the environment." *See Sierra Club*, 833 F. Supp. 2d at 36 (vacating agency stay for failure to comply with APA procedures); *see also Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1458 (D.C. Cir. 1997) (describing substantial emissions that vacating EPA's emissions limit would impose during the time it took EPA to reissue the rule). Other agencies, under President Trump, have acknowledged that delaying a rule can cause significant forgone benefits. For example, the Department of Labor recently acknowledged that delaying a rule designed to improve financial advice to retirement investors could cause those investors to miss out on millions of dollars in investment gains.[10] And the Food and Drug

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[8] BLM submitted excerpts from the RIA with its opposition to plaintiffs' motion. *See* BLM Opp., Ex. A. The full copy is available at https://www.regulations.gov/document?D=BLM-2016-0001-9127.

[9] The Trump administration recently instructed agencies to follow Circular A-4, originally issued under President George W. Bush. *See* Guidance on Executive Order 13,771, *supra* note 7.

[10] *See* Proposed Extension of Applicability Dates, Definition of the Term "Fiduciary"; Conflict of Interest Rule, 82 Fed. Reg. 12,319, 12,320 (March 2, 2017).

Administration acknowledged that delaying a nutritional labeling requirement would lead to millions of dollars in lost health benefits.[11]

Here, the Waste Prevention Rule is aimed at preventing natural gas leaks at oil and gas production sites on public land. The rule would conserve an important public resource and save industry money by requiring companies to conserve more natural gas to sell or reuse at the well site. RIA at 5; 81 Fed. Reg. at 83,009. Saving natural gas will lead to additional royalty payments to the federal, state and local governments. 81 Fed. Reg. at 83,014. And because methane is the "primary constituent" of natural gas and a potent greenhouse gas, reducing natural gas leaks reduces harmful methane emissions and provides significant health and environmental benefits. *See id.* at 83,009. As a result, the Waste Prevention Rule will lead to $209 to $403 million per year in industry savings and other benefits. RIA at 6. In addition, the rule promises to provide significant unquantified benefits in the form of reduced emissions of volatile organic compounds and hazardous air pollutants. RIA at 6-7; *see also* Conservation Pls.' Mem. at 18. BLM's decision to cancel the compliance deadlines will cause industry and the public to lose all of these significant benefits.

Ignoring these forgone benefits was arbitrary and capricious for two reasons. First, any rule "that does not explain why the costs saved were worth the benefits sacrificed" is arbitrary and

[11] Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, 82 Fed. Reg. 20,825, 20,828 (May 4, 2017).

capricious. *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003).[12] In reviewing an agency's cost-benefit analysis, courts examine whether the agency's analysis was reasonable and reverse where "there is such an absence of overall rational support as to warrant the description 'arbitrary or capricious.'" *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985).[13] Under this standard, it is well-settled that ignoring the costs of a regulatory action while relying on the benefits is arbitrary and capricious under the APA. *Competitive Enter. Inst.*, 956 F.2d at 326-27 (holding that agency was required to explain whether safety concerns outweighed benefits of energy savings in new fuel economy standards and stating, "[t]he requirement of reasoned decisionmaking…prevents officials from cowering behind bureaucratic mumbo-jumbo"); *New York v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding rule where agency failed to explain how economic benefits would justify forgoing promised air benefits); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding, with respect to an environmental impact statement, that when an agency "trumpet[s]" the economic benefits of a project, it must also disclose costs, and that "logic, fairness, and the premises of cost-benefit analysis, let alone NEPA, demand that a cost-benefit analysis be carried out objectively"); *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983) (remanding an environmental study because it made "no mention" of a crucial factor that would make the action net costly).

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[12] *See also Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (faulting the agency for ignoring "economic consequences of a proposed regulation"); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008) (agency's failure to calculate the cost of carbon emissions was arbitrary and capricious because "while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero"); Richard J. Pierce, Jr., *The Appropriate Role of Costs in Environmental Regulation*, 54 Admin. L. Rev. 1237, 1247 (2002) (It is difficult "for a regulatory agency to make a rational decision without considering costs in some way" because "[a]ll individuals and institutions naturally and instinctively consider costs in making any important decision."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 493 (1989) (explaining that rational regulations look at the benefits of a rule and assess those benefits "in comparison to the costs"); Circular A-4 at 19 (instructing agencies to monetize "foregone benefits" when calculating the costs and benefits of the alternatives under consideration).

[13] *See also* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 Geo. Mason L. Rev. 575 (2015) (cataloging and analyzing cases involving judicial review of agency cost-benefit analysis).

Here, BLM justified the Stay on the basis of the benefits of the Stay when it cited the "substantial cost" that industry would otherwise incur under the Waste Prevention Rule absent the Stay. 82 Fed. Reg. at 27,431. But BLM did not calculate or even mention the Stay's costs, caused by forgoing the benefits of the Waste Prevention Rule. That kind of lopsided analysis is irrational and renders the Stay arbitrary and capricious. *See, e.g.*, *New York*, 969 F.2d at 1153; *Competitive Enter. Inst.*, 956 F.2d at 326-27; *Sigler*, 695 F.2d at 979.

Second, when amending a regulation, through a suspension or otherwise, an agency must provide an explanation for disregarding the "facts and circumstances that underlay" the original. *Fox*, 556 U.S. at 516. Under that standard, when an agency relies on the costs and benefits of its actions to issue a rule, an agency may not ignore those issues when changing the regulation. *See id.*; *Nat'l Ass'n of Home Builders*, 682 F.3d at 1039 (finding that the agency properly calculated the costs of amending a regulation); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 730 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (considering the costs of a repeal "is common sense and settled law").

When issuing the Waste Prevention Rule, BLM relied on a calculation of the rule's costs and benefits and found that the Waste Prevention Rule was justified given its significant net benefits. 81 Fed. Reg. at 83,013. When suspending the Waste Prevention Rule's key compliance deadlines, however, BLM ignored the benefits of the Waste Prevention Rule altogether, acknowledging only the cost of compliance. BLM had the data readily at hand to calculate the costs and benefits of the Stay, because they are directly related to the previously-calculated benefits of the Waste Prevention Rule. *Compare* 82 Fed. Reg. at 27,431 (listing the provisions that are suspended) *with* RIA at 109 (listing the benefits for each of those provisions). By looking at the original RIA, BLM could have easily determined that the cost of the Stay is close to $209 to $403 million per year, plus an additional amount of substantial unquantified costs. *See* RIA at 5. BLM's failure to calculate the cost of the Stay, in the form of the forgone benefits of the Waste Prevention Rule, is a violation of the agency's obligation to "examine the relevant data" of the Stay, *State Farm*, 463 U.S. at 43, and to provide an explanation "for disregarding facts and circumstances that underlay" the Waste Prevention Rule, *Fox*, 556 U.S. at 516.

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B. BLM Failed to Provide a Reasoned Justification for Imposing the Costs of the Indefinite Stay

1. BLM Failed to Explain How the Costs of the Stay, in the Form of the Waste Prevention Rule's Forgone Benefits, Were Justified in Light of the Stay's Benefits

In addition to failing to calculate and acknowledge the costs of the Stay, BLM failed to "articulate a satisfactory explanation" for imposing those costs. *State Farm*, 463 U.S. at 43. In promulgating the Waste Prevention Rule, BLM found that when compared to the compliance costs of the rule, the benefits outweighed the compliance costs by $50 to $204 million per year. 81 Fed. Reg. at 83,013. In order to explain the Stay, BLM should have similarly determined whether the amount of compliance costs at issue was so high as to justify suspending the full benefits of the Waste Prevention Rule. *See, e.g.*, *Competitive Enter. Inst.*, 956 F.2d at 326-27; *New York*, 969 F.2d at 1153.

Alternatively, had BLM limited the duration of the Stay by setting new compliance deadlines, BLM could have calculated the forgone benefits of the Waste Prevention Rule for that period of time and compared them to the avoided compliance costs during the same period. *See Davis*, 108 F.3d at 1458 (discussing "substantial" emissions that would be caused by an eighteen-month delay). Given that the Waste Prevention Rule promised substantial net benefits, *see* RIA at 6, it may be unlikely that BLM could justify saving compliance costs in exchange for cancelling much greater cost savings and health and environmental benefits. But the point is that BLM failed to take even this minimal (but important) step. *See Home Builders*, 682 F.3d at 1040 (holding that "serious flaw" underlying an agency's economic analysis will render it arbitrary and capricious).

In opposition to plaintiffs' motion for summary judgment, BLM claims that it was justified in ignoring the Waste Prevention Rule's benefits, because BLM "determined" that the harms of the rule are occurring now, while the benefits would not accrue until later. *See* BLM Opp. at 17. But BLM did not rely on these explanations in the Stay and thus they cannot save BLM's action. *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (holding that courts are required to "judge the propriety of [agency] action solely by the grounds invoked by the agency"); *accord Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017); *Alaska Eskimo Whaling Comm'n v. EPA*, 791 F.3d 1088, 1093 (9th Cir. 2015).

In any event, the argument is meritless. In the RIA, BLM determined that each year the Waste Prevention Rule's key provisions were in effect, the benefits of those provisions, now stayed, would exceed costs incurred by industry or states. *See* RIA at 112 (listing positive total net benefits, ranging from $46 to $199 million per year, anticipated for every year between 2017 and 2026). In its opposition, BLM cites compliance costs for 2017, but ignores the more substantial benefits that would be delivered that year by the Waste Prevention Rule's key provisions, if the rule were still in effect. *Compare* BLM Opp. at 16-17 *with* RIA at 106, 109 & 112 (finding $209 million in total benefits, as compared to only $114 million in total costs in 2017). Industry compliance costs for 2017 are only one side of the equation and cannot be properly understood without an equal treatment of the benefits.

BLM also belatedly claimed in its opposition brief that it "need not consider future benefits of the Rule" because the benefits "might or might not be affected depending on the status of litigation and agency reconsideration of the Rule." BLM Opp. at 17. But BLM's actions in indefinitely suspending the Waste Prevention Rule's 2018 deadlines have already materially affected the Waste Prevention Rule's benefits, by removing any requirement that companies and states bring themselves into compliance—something that the Waste Prevention Rule requires them to be doing right now. *See* RIA at 4 (explaining that companies need to begin coming into compliance immediately). Regardless of what happens in the litigation or BLM's reconsideration, BLM has imposed the costs of forgoing the benefits that the Waste Prevention Rule promises for the period of the Stay. BLM should have analyzed and explained the justification for imposing the cost of those forgone benefits in the Stay.

2. BLM's Description of the Status Quo Is Inaccurate

In the Stay, BLM claimed that the Stay "will help preserve the regulatory status quo," 82 Fed. Reg. at 27,431, but that argument rests on an inaccurate premise and thus cannot relieve BLM of the responsibility of addressing the forgone benefits. "The status quo is the last, uncontested status preceding the commencement of the controversy." *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969). Though industry petitioners and a few states challenged the Waste Prevention Rule, the status quo is the position that BLM or the industry petitioners occupied

"'before the dispute developed,'" not after. *Cobra N. Am., LLC v. Cold Cut Sys. Svenska AB*, 639 F. Supp. 2d 1217, 1229 (D. Colo. 2008).

Here, the status quo is the world with the Waste Prevention Rule, which was finalized in November 2016 and was in legal effect starting in January 2017, 81 Fed. Reg. at 83,008. As of the January effective date, industry and affected states have been required to comply with the Waste Prevention Rule.[14] A few states filed a motion for a preliminary injunction to freeze the Waste Prevention Rule, but the U.S. District Court of Wyoming denied that motion, *see Wyoming v. U.S. Dep't of the Interior*, No. 16-cv-0285, 2017 WL 161428, at *12 (D. Wyo. Jan. 16, 2017), and companies had to begin coming into compliance with the Waste Prevention Rule's 2017 and 2018 deadlines.[15] The fact that some of the Waste Prevention Rule's compliance deadlines are in the future does not change the fact that those deadlines are the law of the land. *See Becerra v. Interior*, slip op. at 15 (holding that the stay "prematurely restored a prior regulatory regime").

In any event, standard agency cost-benefit principles would not allow BLM to exclude the benefits of the Waste Prevention Rule from the "status quo" simply because those benefits have yet to accrue. When assessing the economic impact of a new rule, including a suspension, agencies must first establish a baseline, which is the agency's "best assessment of the way the world would look absent the proposed action"—in this case, without the Stay. *See* Circular A-4 at 15. In calculating that baseline, agencies typically include all anticipated effects of promulgated rules in their assumptions, even if those other rules have not been fully implemented. *See* EPA, *Guidelines for Preparing*

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[14] *See* RIA at 4 ("requirements to replace existing equipment would necessitate immediate expenditures"); Mem. in Supp. Of Wyoming and Montana's Mot. for Prelim. Inj. at 24, *Wyoming v. U.S. Dep't of Interior*, No. 16-cv-0285 (D. Wy. Nov. 28, 2016) (stating that states were required to "immediately expend resources" to comply with the rule), ECF No. 22; Reply in Supp. of Pet's Mot. for Prelim. Injunction at 24-26, *Wyoming v. U.S. Dep't of Interior*, No. 16-cv-0285 (D. Wy. Dec. 23, 2016), ECF No. 84 (summarizing numerous industry declarations stating the need to make immediate expenditures).

[15] Ellen M. Gilmer, *CRA effort looms large in legal battle over BLM methane rule*, Energywire (May 9, 2017) (explaining that according to an industry representative, in May, companies were "already complying with the rule's initial restrictions" and would begin preparing for compliance with the 2018 compliance deadlines).

Economic Analyses ("*Guidelines*") at 5-3, 5-13 (2010); Memorandum re Current Guidance on Economic Analysis in SEC Rulemakings at 7 (Mar. 16, 2012) (the baseline should include "the existing regulatory structure").

Once the baseline has been determined, the agency can calculate the expected costs of the new action by measuring its effects against the baseline. For example, when the Department of Labor proposed to postpone the Fiduciary Rule for two months, it calculated the costs of the two-month delay by analyzing how much the benefits from two months of the original rule were worth. *See* 82 Fed. Reg. at 12,320. Here, the baseline for the Stay would include the benefits from the Waste Prevention Rule and, when calculating the costs of the Stay, a loss of those benefits would need to be considered.

Generally speaking, including the full impacts of existing rules in the baseline is helpful to the regulated industry because it allows the agency to "focus on the incremental economic effects of the new rule or policy without double counting benefits" when measuring the new rule's effects. *Guidelines* at 5-3. In other words, once the benefits of other rules are included in the baseline, even if those benefits will not accrue until far into the future, an agency cannot impose a new rule justified by the same benefits. Future benefits would be converted to present values, but they are never disregarded. *See* Circular A-4, at 31-32. Indeed, parties often rely on this principle to challenge new regulations. *See, e.g.*, Mem. in Supp. of Wyoming and Montana's Mot. for Prelim. Inj. at 18-19, *Wyoming v. U.S. Dep't of Interior* No. 16-cv-0285 (D. Wy.), ECF No. 22 (relying on the point in the challenge to the Waste Prevention Rule); Pet'r Nat'l Mining Ass'n Br. at 41, n.19, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (relying on a similar argument in a challenge to EPA's rule restricting mercury emissions).

It is only rational to calculate the baseline in the same manner when repealing or suspending deadlines.[16] If agencies are going to take the unrealized future benefits of rules into account when deciding whether to issue a new regulation, then those unrealized future benefits should be taken into account when agencies repeal or suspend a regulation. BLM's inaccurate description of the status quo

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[16] *See* Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. Chi. L. Rev. 1763, 1793 (2002) (costs and benefits should receive equal treatment).

1 renders the decision here arbitrary and capricious. *Nat. Resources Defense Council, Inc. v. U.S. Forest*
2 *Serv.*, 421 F.3d 797, 811 (9th Cir. 2005) (faulting the Forest Service's reliance on "[i]naccurate
3 economic information").

4 **CONCLUSION**

5 This Court should grant plaintiffs' motion for summary judgment, vacate the Stay, and reinstate
6 the original compliance dates in the Waste Prevention Rule.

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9 Sept. 6, 2017

Respectfully submitted,

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