NULLIFY, POSTPONE, SUSPEND, STAY, AND REPLACE: THE TRUMP ADMINISTRATION AND THE METHANE WASTE PREVENTION RULE

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INTRODUCTION

When a different political party occupies the presidency, there is often a shift in environmental policy. Consequently, when I teach courses in administrative law and environmental law, I provide students with the dates of the presidential terms since 1969.[1] Political context is critical to understanding the transitional landscape of environmental regulation.[2] For example, when Ronald Reagan defeated Jimmy Carter and became president in 1981, his administration suspended two hundred pending regulations and created a "hit list" of 119 existing regulations, over half of which were focused on the environment.[3] Likewise, when George W. Bush succeeded Bill Clinton in 2001, his administration "immediately undertook a series of widely publicized changes . . . that drew the condemnation of

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[1] Richard Nixon (Jan. 1969–Aug. 1974); Gerald Ford (Aug. 1974–Jan. 1977); Jimmy Carter (Jan. 1977–Jan. 1981); Ronald Reagan (Jan. 1981–Jan. 1989); George H.W. Bush (Jan. 1989–Jan. 1993); Bill Clinton (Jan. 1993–Jan. 2001); George W. Bush (Jan. 2001–Jan. 2009); Barack Obama (Jan. 2009–Jan. 2017); and Donald Trump (Jan. 2017).

[2] A prime example is the Clean Water Act. The Act makes it unlawful to discharge dredge or fill material into "navigable waters" without a permit, and defines "navigable waters" as "the waters of the United States, including the territorial seas." *See* 33 U.S.C. §§ 1311(a), 1342(a), 1362(7) (2018). The jurisdictional question of what constitutes a regulated "water of the United States" has been addressed three times by the Supreme Court. *E.g.*, Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123, 139 (1985). Because these Supreme Court decisions have not provided sufficient guidance, the Obama Administration promulgated a final rule in 2015 clarifying the scope of "waters of the United States." Clean Water Rule, 80 Fed. Reg. 30,753 (June 29, 2015). This regulation, known as the "Clean Water Rule," has been enjoined pending ongoing judicial challenges. Shortly after President Trump took office, the Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Army Corps") announced their intent to "Review and Rescind or Revise the Clean Water Rule." *See* Intention To Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532 (Mar. 6, 2017); Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899 (July 27, 2017) (proposed rule). On February 6, 2018, the agencies published a final rule delaying the applicability date of the Clean Water Rule until February 2020. Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018). A year later, in a supplemental notice of proposed rulemaking, the EPA and Army Corps clarified their intention "to permanently repeal the 2015 Rule in its entirety" and "to recodify the pre-2015 regulations." Supplemental notice of proposed rulemaking, 83 Fed. Reg. 32,227 (July 12, 2018). On December 11, 2018, the two agencies signed a proposed rule revising the definition of "waters of the United States." *See* Notice of Public Hearing, 83 Fed. Reg. 67,174 (Dec. 28, 2018) (notice of public hearing regarding the proposed rule). There are currently-pending lawsuits challenging both the Obama Clean Water Rule and the Trump two-year delay rule. *See generally* Environmental & Energy Law Program Staff, *Defining Waters of the United States/Clean Water Rule*, HARV. L. SCH., https://eelp.law.harvard.edu/2017/09/defining-waters-of-the-united-states-clean-water-rule/ (last visited Mar. 8, 2019).

[3] RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 100 (2004). President Reagan appointed James Watt as Secretary of the Interior and Anne Gorsuch as Administrator of the Environmental Protection Agency. In 2004, when asked to reflect on Reagan's environmental policies, Greg Wetstone of the Natural Resources Defense Council stated that "'[n]ever has America seen two more intensely controversial and blatantly anti-environmental political appointees than Watt and Gorsuch.'" See Amanda Little, *A look back at Reagan's environmental record*, GRIST (June 11, 2004), https://grist.org/article/griscom-reagan/. See *also* Madeline J. Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. REV. 697, 707, 710 (2019) (characterizing Gorsuch as a "loyalist environmental agency saboteur" and stating that Zinke undermined "EPA's capacity to carry out its environmental protection obligations."). Thirteen years later, in 2017, President Trump appointed Ryan Zinke as Secretary of the Interior and Scott Pruitt as Administrator of the Environmental Protection Agency. Like their Reagan counterparts, both individuals aggressively promoted a pro-development agenda and both resigned amidst controversy after less than two years in office. See *infra* at 55–58 and accompanying text.

environmentalists, the protest of leaders in the opposing political party, and the critical attention of the national news media."[4]

As the Republican Party's 2016 presidential candidate, Donald Trump's views on environmental regulation and energy development were well-known. He claimed that global warming was a "hoax," endorsed the Keystone XL Pipeline project, criticized the Paris Climate Agreement, and promised to rescind recently promulgated Clean Air Act and Clean Water Act regulations.[5] On November 8, 2016, despite receiving nearly 2.9 million fewer votes, Donald Trump was elected the 45th President of the United States.[6] For the first two years of his presidency, the Republican Party also controlled both the United States Senate and the United States House of Representatives.[7] Consequently, Trump was in a position to deliver on his campaign promises by either seeking legislation or taking executive action.

Nullify, postpone, suspend, stay, and replace. These words encapsulate the actions taken during the first two years of the current administration to reverse existing environment and energy policies. Although Trump's policy initiatives have touched on a variety of issues, such as coal, wetlands, air quality, and public lands,[8] this Article will focus on one particular rule promulgated during the Obama Administration: the 2016 methane waste prevention rule ("MWPR").[9] This rule, issued by the Department of the Interior's Bureau of Land Management ("BLM"), is also known as the "venting and flaring" rule because its primary purpose is "to

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[4] LAZARUS, *supra* note 3, at 239 ("The George W. Bush administration makes quite plain the depth and extent of the chasm growing between the two political parties on environmental protection policy."). *See also* Amanda Little, *Keeping tabs on the Bush administration's environmental record*, GRIST (Sept. 4, 2003), https://grist.org/article/rollback/ ("On Bush's first day in office, January 20, 2001, White House Chief of Staff Andrew Card sent a memo to all cabinet members directing them to ice more than 50 regulations (many of them several years in the making) that had been approved toward the end of the Clinton administration."). President Obama's Chief of Staff, Rahm Emanuel, issued a similar directive in January 2009, calling on federal agencies to put on hold any rules from the Bush Administration that were not yet effective. Suzanne Goldenberg, *New team moves to undo last-minute rule changes*, THE GUARDIAN (Jan. 21, 2009), https://www.theguardian.com/world/2009/jan/22/obama-bush-regulations.

[5] *See 2016 presidential candidates on energy and environmental policy,* BALLOTPEDIA, https://ballotpedia.org/2016_presidential_candidates_on_energy_and_environmental_policy#cite_note-40 (last visited Mar. 23, 2019). On the campaign trail, Donald Trump also vowed to dismantle the Environmental Protection Agency "in almost every form." Brady Dennis et al., *With a shrinking EPA, Trump delivers on his promise to cut government* WASH. POST (Sep. 8, 2018), https://www.washingtonpost.com/national/health-science/with-a-shrinking-epa-trump-delivers-on-his-promise-to-cut-government/2018/09/08/6b058f9e-b143-11e8-a20b-5f4f84429666_story.html?utm_term=.48e2436427fa.

[6] Alana Abramson, *Hillary Clinton Officially Wins Popular Vote by Nearly 2.9 Million*, ABC NEWS (Dec. 22, 2016), https://abcnews.go.com/Politics/hillary-clinton-officially-wins-popular-vote-29-million/story?id=44354341.

[7] *See Party Divisions of the House of Representatives, 1789 to Present*, HISTORY, ART & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/. *See also Party Division*, UNITED STATES SENATE, https://www.senate.gov/history/partydiv.htm.

[8] *See generally* Environmental Law Institute, *Environmental Protection In The Trump Era*, 2018 A.B.A. SEC. C. R. & SOC. JUST. 1 (Spring 2018). *See also* Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "The Public" in Public Land Law*, 48 ENVTL. L. 311 (2018).

[9] Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016).

reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities."[10] The effective date of the MWPR was January 17, 2017, just three days before the conclusion of the Obama presidency.[11] Soon thereafter, President Trump ordered the Department of Interior ("DOI") to review certain rules–including the MWPR–and "if appropriate . . . publish for notice and comment proposed rules suspending, revising, or rescinding those rules."[12] After Congress failed to nullify the waste prevention rule, Interior Secretary Ryan Zinke–prior to leaving office in January 2019–moved quickly and aggressively to comply with the President's directive. His replacement, David Bernhardt, will most likely pursue a similar course of action.[13]

Part I of this article will briefly review how the executive branch can act to change existing laws, regulations, and policies. Parts II and III will describe the 2016 methane waste prevention rule and efforts of the Trump Administration to nullify, postpone, suspend, stay, and replace the rule. There is nothing wrong, of course, with a newly elected president seeking to fulfill campaign promises that require the rejection of a prior president's policies. As noted by Chief Justice Rehnquist, "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."[14] However, "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation."[15] While efforts to suspend or delay recently promulgated "Obama rules" have achieved mixed results, in most instances the courts have not yet determined whether Trump's replacement regulations will be upheld

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[10] *Id.* The rule applies to onshore Federal and Indian (other than Osage Tribe) leases. *Id.* In addition to regulating production methods, the rule also clarifies the circumstances "when produced gas lost through venting, flaring, or leaks is subject to royalties, and when oil and gas production may be used royalty-free on-site." *Id.*

[11] *Id*.

[12] Exec. Order No. 13,783, § 7(b) (Mar. 28, 2017).

[13] David Bernhardt, Deputy Secretary of the Interior, became Acting Secretary of the Interior on January 2, 2019. As Deputy Secretary, Bernhardt erased a chapter on climate change from the Department's handbook, advocated for rolling back the Endangered Species Act protections, and supported the relaxation of methane rules for oil and gas companies. Nate Hegyi, *The New Acting Interior Secretary Is An Agency Insider And Ex-Oil Lobbyist*, NPR (Jan. 2, 2019, 12:44 PM) https://www.npr.org/2019/01/02/677390503/the-new-acting-interior-secretary-is-an-agency-insider-and-ex-oil-lobbyist. *See also infra* note 60 and accompanying text.

[14] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part). *See also* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (Scalia, J.) ("Agencies . . . may reconsider past decisions and, with a reasoned explanation, to revise, replace or repeal a decision that is within their discretion.").

[15] Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 968 (9th Cir. 2015). *See also* Encino Motorcars LLC v. Navarro, 136 S.Ct. 2117, 2125–26 (2016); William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1358, 1441 (2018) ("Agencies cannot run from underlying facts, contested issues, or past statutory interpretations and associated reasoning explaining past policy choices."); Jody Freeman, The 2017 Roscoe Pound Lecture, *The Limits of Executive Power: The Obama-Trump Transition*, 96 NEB. L. REV. 545, 567 (2018) ("[A]gencies can and do change policy but that there are certain limits. For one thing, it's hard to do an about-face when you must overcome an elaborate record that supports the initial decision.").

under the "arbitrary and capricious" standard of review set forth in the Administrative Procedure Act.[16] However, as discussed in Part IV of this article, a federal district court in November 2018 held that the State Department engaged in unlawful agency action when it disregarded prior factual findings and reversed course regarding the Keystone XL pipeline project.[17] This decision, *Indigenous Environmental Network v. United States Department of State*, could be a harbinger of future court decisions that will likewise strike down attempts by the Trump Administration to reverse and replace existing environmental and energy policies.

I. ACTIONS BY THE EXECUTIVE BRANCH TO REVERSE EXISTING REGULATIONS, LAWS, AND POLICIES

The removal of environmental "obstacles" to energy production was a high priority for candidate Trump, and remains a point of emphasis for President Trump. The Chief Executive can take action–both directly and indirectly–to reverse existing regulations, laws, and policies. Six types of presidential conduct are summarized below.

1. The President can ask Congress to pass legislation.

Although his enumerated powers include the authority to recommend to Congress "such Measures as he shall judge necessary and expedient,"[18] President Trump did not ask Congress in his first two years in office to repeal existing statutes or enact any major new laws concerning energy or the environment.[19] Nor was Congress requested to abolish the Environmental Protection Agency ("EPA"). The incoming administration, however, did ask the 115th Congress to nullify sixteen regulations that were finalized at the end of the Obama presidency.[20] With just one exception, Congress enacted the

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[16] 5 U.S.C. § 706(2) (2018).

[17] Indigenous Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 584 (D. Mont. 2018) (holding that the Trump State Department's 2017 Record of Decision contained a "conclusory statement" regarding climate change that "falls short of a factually based determination, let alone a reasoned explanation, for the course reversal" from the 2015 Record of Decision of the Obama State Department).

[18] U.S. CONST. art. II, § 3.

[19] On December 22, 2017, Congress passed the Tax Cuts and Jobs Act, considered by Trump to be the most important legislative achievement in the first two years of his presidency. Tax Cuts and Jobs Act, Pub. L. No 115–97, 131 Stat. 2054 (2017). Although it does not focus on energy and the environment, Title II of the Act authorizes certain withdrawals from the Strategic Petroleum Reserve and promotes oil and gas production on the coastal plain of the Arctic National Wildlife Refuge in northern Alaska. *Id.* In October 2018, Congress passed the non-controversial Save Our Seas Act to promote international action to reduce marine debris. Save Our Seas Act of 2018, Pub. L. No. 115-265, 132 Stat. 3742 (2018).

[20] *See Federal agency rules repealed under the Congressional Review Act,* BALLOTPEDIA, https://ballotpedia.org/Federal_agency_rules_repealed_under_the_Congressional_Review_Act (last visited Mar. 23, 2019) (listing all rules repealed under the Congressional Review Act as of May 21, 2018). Three of the nullified regulations had been promulgated by the Department of the Interior in the final months of the Obama presidency. The Stream Protection Rule sought "to improve the balance between environmental protection and the Nation's need for coal as a source of energy" by "better protect[ing] water supplies, surface water and groundwater quality, streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations." Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016). The Resource Management Planning Rule enhanced "opportunities for public

necessary joint resolutions pursuant to the Congressional Review Act of 1996.[21] As discussed in Part III below, the only instance in which the Republican-controlled Congress did not enact the requested nullification legislation was with respect to the 2016 methane waste prevention rule.

2. The President can use the budget process and spending authority to further policy objectives.

The Trump Administration also sought to influence environmental and energy policies through the appropriations process. In 2017, Congress rejected a proposal to reduce the EPA's budget by nearly one-third, from $8.1 billion to $5.7 billion.[22] The President's most recent proposal would have reduced the EPA's budget by approximately one-fourth.[23] Due in large part to retirements and resignations, the EPA experienced a net loss of 1,200 workers in the first year and a half after Trump took office.[24]

On the other hand, the Trump Administration has advocated for increased appropriations for energy production. In May 2017, the White House proposed to cut the DOI's overall budget by about twelve percent, but increase funding for the development of oil, gas, and coal on public lands.[25]

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involvement and transparency during the preparation of resource management plans" by the Bureau of Land Management. Resource Management Planning Rule, 81 Fed. Reg. 89,580 (Dec. 12, 2016). The third rule, entitled "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska," prohibited "certain kinds of wildlife hunting methods, such as aerial hunting of bears and wolves and bear-baiting, in Alaska." Jennifer Hansler, *These are the bills Trump signed into law in his first year as President*, CNN POLITICS (Jan. 20, 2018, 2:16 PM), https://www.cnn.com/2017/06/29/politics/president-trump-legislation/index.html. *See also* Energy Conservation Standards for Uninterruptible Power Supplies Notice of Proposed Rulemaking, 81 Fed. Reg. 52,247 (Aug. 5, 2016) (nullified rule).

[21] *See* Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J.L. & PUB. POL'Y 505, 515 (2018) ("The Administration submitted 16 rules for Congress to nullify under the CRA, and Congress agreed with the President on 15 of them."). The Congressional Review Act was enacted as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996. Pub. L. No. 104-121, 110 Stat. 871 (1996) (codified at 5 U.S.C. §§ 801–08 (2012)). As discussed *infra* in Part III, the Act provides "a fast-track procedure that enables Congress to set aside any new rule it finds unwise before the rule can go into effect." Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 191 (2018).

[22] Timothy Cama, *Spending bill rejects Trump's proposed EPA cut*, THE HILL (Mar. 21, 2018), https://thehill.com/policy/energy-environment/379679-spending-bill-rejects-trumps-proposed-epa-cut.

[23] Ledyard King, *EPA Budget Would be Slashed by a Fourth in President Trump's Budget and Democrats are Upset*, USA TODAY (Feb. 13, 2018), https://www.usatoday.com/story/news/politics/2018/02/13/epa-budget-would-epa-would-slashedsuffers-big-hit-president-trumps-budget-and-democrats-predictably/333523002/ ("the agency still would get slashed by 26% – more than any other major federal department – under President Trump's 2019 budget proposal."). *But see* Mara Dias, *Congress Saves Funding for Clean Water & Healthy Coasts, But Environmental Rollbacks Loom*, SURFRIDER FOUND. (Feb. 15, 2019), https://www.surfrider.org/coastal-blog/entry/new-spending-bill-favors-clean-water-healthy-coasts-but-environmental-rollb (Congress rejected proposed cuts and provided funding allocations above 2018 enacted levels for the EPA and the National Oceanic and Atmospheric Administration).

[24] Dennis et al., *supra* note 5 ("During the first 18 months of the Trump administration, records show, nearly 1,600 workers left the EPA, while fewer than 400 were hired.").

[25] Brady Dennis, *Trump proposes sharp cuts at Interior Department while pushing for more drilling on public lands*, WASH. POST (May 23, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/05/23/trump-proposes-sharp-cuts-at-interior-department-while-pushing-for-more-drilling-on-public-lands/?utm_term=.5001a96f8a18. *See also* Nicole Ogrysko, *Trump signs 2019 spending bill, federal pay raise into law*, THE FED. NEWS NETWORK (Feb. 14, 2019),

In January 2019, during the federal government shutdown, the DOI's Bureau of Offshore Energy Management brought back dozens of federal employees to carry out the administration's plan to expand oil and natural gas drilling on the Outer Continental Shelf.[26] Opponents argued that the action violated the Anti-Deficiency Act,[27] which prohibits the executive branch from authorizing future spending before Congress has appropriated funds to particular agencies and programs.[28]

3. The President can direct agencies to revise or replace existing regulations.

While it is too early to assess whether such efforts will prove successful, there is no question that the primary focus of the Trump Administration has been to effect policy changes through rulemaking. The Harvard Law School Environmental and Energy Law Program is tracking the deregulatory activities of the Trump Administration, and its website lists over fifty rules proposed in 2017 and 2018 that concern environmental regulation and energy development.[29] The DOI has acted to further the Trump energy policy by promoting production[30] and reducing regulatory requirements.[31]

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https://federalnewsnetwork.com/pay-benefits/2019/02/trump-to-sign-2019-spending-bill-federal-pay-raise-into-law/ ("The Interior Department will receive $14 million in new funding to begin reorganization of the Bureau of Land Management, Fish and Wildlife Service, National Park Service, U.S. Geological Survey and the Bureau of Indian Affairs.").

[26] Timothy Cama, *Trump administration to bring back offshore drilling staff during shutdown*, THE HILL (Jan. 15, 2019), https://thehill.com/policy/energy-environment/425501-trump-administration-to-bring-back-offshore-drilling-staff-during.

[27] Title 31 Revision and Codification of Law of 1982, Pub. L. No. 97–258, 96 Stat. 877 (1982).

[28] *See generally* Timothy Cama, *Trump administration to bring back offshore drilling staff during shutdown*, THE HILL (Jan. 15, 2019), https://thehill.com/policy/energy-environment/425501-trump-administration-to-bring-back-offshore-drilling-staff-during; Todd Dickey, *How can the government expect people to work without pay indefinitely?*, WASH. POST (Jan. 11, 2019), https://www.washingtonpost.com/outlook/2019/01/11/how-can-government-force-people-work-without-pay-indefinitely/?utm_term=.2c3115560ea7. *See also* Complaint for Declaratory and Injunctive Relief, State of California v. Zinke, No. 3:18-cv-05712 (Jan. 24, 2019) (noting, in opposition to a motion by the BLM to stay judicial review of its 2018 rule replacing its 2016 methane waste prevention rule, that the BLM's "claim[] that its employees cannot work on compiling the administrative record" for the 2018 rule is contradicted by the fact that "BLM and Department of the Interior staff have continued to work to authorize other energy-related activities during the shutdown.") [hereinafter *State of California v. Zinke*].

[29] *See Regulatory Rollback Tracker*, HARVARD LAW, https://eelp.law.harvard.edu/regulatory-rollback-tracker/ (last visited Mar. 23, 2019).

[30] *See, e.g.*, Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments, 82 Fed. Reg. 47,248 (Oct. 11, 2017). Environmental organizations and conservation groups claim that BLM, in order to facilitate oil and gas development, is ignoring and dismantling "the 2015 policies, built into [ninety-eight] federal resource-management plans," that protected nearly two million acres of habitat for the imperiled greater sage grouse. Press Release, Center for Biological Diversity, Lawsuit Targets Trump Oil, Gas Leases Threatening Sage Grouse in Five States (Apr. 30, 2018), *available at* https://www.biologicaldiversity.org/news/press_releases/2018/greater-sage-grouse-04-30-2018.php. *See also* Secretarial Order No. 3348, "Concerning the Federal Coal Moratorium" (Mar. 29, 2017) (revoking a 2016 secretarial order that had placed a partial moratorium on the federal coal leasing program).

[31] *See, e.g.*, Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, U.S. Dep't of the Interior, to Sec'y, U.S. Dep't of the Interior (Dec. 22, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf (interpreting the Migratory Bird Treaty Act to not prohibit the accidental or

The EPA has also sought to promote energy development by eliminating or relaxing pollution control rules.[32] In addition to the methane waste prevention rule, the three Trump initiatives most closely tied to the oil and gas industry are the BLM's 2017 rule rescinding its 2015 rule regulating hydraulic fracturing on federal and Indian lands,[33] the BLM's 2017 rule rescinding its 2016 rule that reformed the valuation process for oil, gas, and coal on public lands,[34] and the EPA's ongoing proposals to revise and relax the 2016 Obama rule that established methane emission standards for oil and gas facilities.[35]

4. The President can issue Executive Orders and Proclamations.

The president's authority to issue executive orders to federal agencies is based on the Take Care Clause of the United States Constitution, which states that the president "shall take Care that the laws be faithfully

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"incidental" taking or killing of migratory birds, including the estimated 750,000 birds that die each year in oil pits).

[32] *See, e.g.*, Affordable Clean Energy Rule, 83 Fed. Reg. 44,746 (Aug. 31, 2018). This rule replaces President Obama's "Clean Power Plan" rule. *See* Final Rule, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015). Opponents argue that the Affordable Clean Energy Rule, which is being challenged in court, is "not designed to reduce emissions" but is instead "designed to boost generation from coal plants." *See* Julie McNamara, *Trump Administration's "Affordable Clean Energy" Rule Is Anything But*, UNION OF CONCERNED SCIENTISTS (Aug. 31, 2018), https://blog.ucsusa.org/julie-mcnamara/ace-dangerous-clean-power-plan-replacement.

[33] Final Rule, Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017). The State of California and several environmental groups are challenging the BLM's "rescission rule" in the United States District Court for the Northern District of California. *See, e.g.*, Complaint for Declaratory and Injunctive Relief, State of California v. U.S. Bureau of Land Mgmt., No. 3:18-cv-00521 (N.D. Cal. Jan. 24, 2018) [hereinafter *State of California v. U.S. Bureau of Land Mgmt.*]; Complaint for Declaratory and Injunctive Relief, Sierra Club v. Zinke, No. 3:18-cv-00524 (N.D. Cal. Jan. 24, 2018) [hereinafter *Sierra Club v. Zinke*].

[34] Final Rule, Office of Natural Resources Revenue, Interior Department, Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017). California, New Mexico, and intervening environmental groups have challenged the Office of Natural Resources Revenue's ("ONRR") "repeal rule" in the United States District Court for the Northern District of California. *See* Complaint for Declaratory and Injunctive Relief, State of California v. U.S. Dep't of Interior, 3:17-cv-05948-SBA (N.D. Cal. Oct. 17, 2017). In *Becerra v. U.S. Dep't of Interior*, the district court invalidated the effort by the Interior Department to postpone the compliance dates in the Obama rule pending the issuance of the repeal rule. Becerra v. U.S. Dep't of Interior, 276 F. Supp. 3d 953, 966 (N.D. Cal. 2017). *See also infra* note 130 and accompanying text.

On March 29, 2019, the United States District Court for the Northern District of California held that the repeal of the 2016 "valuation" rule was arbitrary and capricious because the BLM's "conclusory explanation in the Final Repeal fails to satisfy its obligation to explain the inconsistencies between its prior findings in enacting the Valuation Rule and its decision to repeal such Rule." *State of California v. U.S. Dep't of Interior*, 3:17-cv-05948-SBA, at 17. The court held that there was "no meaningful opportunity for comment" in light of the fact that federal officials "did not solicit or receive substantive comments regarding either the Valuation Rule or pre-Valuation Rule regulations nor did [they] fully consider the comments received in repealing the Valuation Rule." *Id.* at 32.

[35] *See, e.g.*, Proposed Rule, Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, 83 Fed. Reg. 52056 (Oct. 15, 2018) (proposing revisions to a 2016 final rule that set new source performance standards ("NSPS") for the oil and natural gas source category). In *Clean Air Council v. Pruitt*, the United States Court of Appeals for the District of Columbia held that the Trump EPA lacked authority under the Clean Air Act to stay the 2016 rule. The Obama "methane emissions" NSPS rule, 81 Fed. Reg. 35824 (June 3, 2016), and the Trump Administration's failure to regulate emissions from existing oil and gas operations, are the subjects of pending lawsuits. Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017). *See also infra* at Part III.

executed."[36] Executive orders cannot create new laws or rescind existing laws, but they can direct agencies to promulgate new regulations or repeal existing regulations. The president can rescind previous executive orders, guide the exercise of administrative discretion, and prioritize agency action.[37]

In his first twenty-three weeks in office, Trump issued thirty-eight executive orders.[38] He directed that environmental reviews and approvals of high-priority infrastructure projects be expedited;[39] ordered the review and possible revision or repeal of the Obama "Clean Water Rule,"[40] the Obama Clean Power Plan,[41] and existing regulations that could potentially burden the development or use of oil, gas, coal, and nuclear energy resources;[42] and rescinded an Obama executive order banning offshore oil and gas drilling in specified areas.[43] In addition, President Trump has issued proclamations that impact energy development and environmental protection. For example, on December 4, 2017, Trump announced his decision to substantially reduce the size of the Bears Ears and Grand Staircase-Escalante National Monuments in Utah and attempted to rescind an Obama executive order banning offshore oil and gas drilling in specified areas.[44] In one of the lawsuits challenging the president's proclamation, it is asserted that the Trump Administration intends to "reopen lands to uranium mining and oil and gas drilling, with devastating consequences to the wild character and the scientific and cultural resources of the Monument."[45]

As discussed in Part III below, the 2016 methane waste prevention rule was specifically addressed in EO 13873, issued on March 28, 2017.[46] This Executive Order, entitled "Promoting Energy Independence and

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[36] U.S. CONST. art. II, § 3.

[37] Beth Ginsberg et al., *How Executive Orders and Judicial Review Are Shaping Environmental Policy*, 37 No. 26 WESTLAW J. ENVTL 1, 2 (July 19, 2017).

[38] *Id*.

[39] Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 30, 2017).

[40] Exec. Order No. 13,778, 82 Fed. Reg. 12497 (Mar. 3, 2017).

[41] Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

[42] *Id*.

[43] Exec. Order No. 13,795, 82 Fed. Reg. 20815 (May, 3 2017). By this action, President Trump purported to rescind withdrawals by President Obama of approximately 119 million acres of submerged land on the outer continental shelf. *See* Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016); Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016). However, on March 29, 2019, the United States District Court of Alaska held that Congress did not authorize a president to rescind a prior president's withdrawal under the Outer Continental Shelf Lands. League of Conservation Voters v. Trump, No. 3:17-cv-00101-SLG, 2019 U.S. Dist. LEXIS 55026 (D. Alaska Mar. 29, 2019) (order re: motions for summary judgment). *See also* Kevin O. Leske, *"Un-Shelfing" Lands under the Outer Continental Shelf Lands Act (OCSLA): Can a Prior Executive Withdrawal under Section 12(a) Be Trumped by a Subsequent President?*, 26 N.Y.U. ENVTL. L.J. 1 (2017).

[44] *See generally Presidential Proclamation Modifying the Bears Ears National Monument*, THE WHITE HOUSE (Dec. 4, 2017), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/.

[45] *See, e.g.*, Complaint for Injunctive and Declaratory Relief at 41, Nat. Res. Def. Council, Inc. v. Trump, No. 1:17-cv-02606 (D. D.C., Dec. 7, 2017).

[46] Exec. Order No.13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

Economic Growth," directed Interior Secretary Ryan Zinke to review the MWPR to determine whether it unduly burdens "the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law."[47] If deemed burdensome, Section 7 of the order commands the Secretary to "as soon as practicable, suspend, revise, or rescind" the rule.[48] The Executive Order also directs decisionmakers to no longer consider the global social costs of methane when weighing regulatory costs and benefits.[49]

5. The President can nominate and appoint favorable decisionmakers.

The President, with the advice and consent of the Senate, appoints principal "Officers of the United States," such as Administrator of the EPA and the Secretary of the Interior.[50] President Trump initially appointed Scott Pruitt to head the EPA and Ryan Zinke to be the Interior Secretary. The rise and fall of Pruitt is well-known: as Oklahoma's Attorney General, he often joined forces with the oil and gas industry in lawsuits against the Obama EPA; as EPA Administrator, "[h]e began the largest regulatory rollback in the agency's history, undoing, delaying or blocking several Obama-era environmental rules;"[51] and on July 6, 2018, he resigned in the face of numerous ethics and management scandals.[52] Even after his departure, Pruitt's pro-development bias has been the basis for legal challenges to EPA rulemaking. In December 2018, six United States Senators submitted a remarkable document that opposes EPA's proposal to revise the 2016 final rule setting new source performance standards ("NSPS") for the oil and natural gas source category.[53] In support of their position that the rule should be withdrawn, the senators set forth a detailed (twenty-two page) argument

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[47] *Id.* at § 1(c).

[48] *Id.* at § 7.

[49] *See id*. at § 5. This modification of the decision-making process is being challenged by California and New Mexico in their lawsuit to enjoin and invalidate the BLM's 2018 methane waste prevention rule. *State of California v. Zinke*, *supra* note 28, at 18 ("Defendants' reliance on an 'interim domestic social cost of methane' model is arbitrary and capricious for multiple reasons, including that it is outcome-seeking; fails to take into account the best available science; undervalues the benefits of the Rule (including benefits to public health and safety), apparently to justify repeal; fails to adequately address risk and uncertainty; and ignores significant climate impacts."). *See also infra* Part IV.

[50] U.S. CONST. art. II, § 2, cl 2. *See also* Lucia v. SEC, 138 S. Ct. 2044, 2051 n.3 (2018); Freytag v. C.I.R., 501 U.S. 868, 886 (1991).

[51] Coral Davenport et al., *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES, July 5, 2018, https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html.

[52] In November 2018, the EPA Inspector General's Office closed two probes (for improper gifts and abuse of position) because the office was unable to interview Pruitt before he resigned. Timothy Cama, *EPA watchdog closes two Pruitt investigations*, THE HILL (Nov. 29, 2018, 8:44 PM), https://thehill.com/policy/energy-environment/419035-epa-watchdog-closes-two-pruitt-investigations.

[53] Letter from Six United States Senators, to Oil and Natural Gas Sector, EPA, on Comments on the Environmental Protection Agency's proposed weakening of rules governing methane emissions from oil and natural gas facilities, (Dec. 17, 2018), *available at* https://www.whitehouse.senate.gov/imo/media/doc/2018-12-17%20Methane%20Comment%20 Letter.pdf. The senators are Sheldon Whitehouse (D-RI), Chris Van Hollen (D-MD), Jeff Merkley (D-OR), Cory Booker (D-NJ), Kirsten Gillibrand (D-NY), and Edward J. Markey (D-MA).

that "former EPA Administrator Scott Pruitt, under whom the proposal was developed, possessed an inalterably closed-mind about regulations limiting methane emissions and climate change," and that his "involvement in the rulemaking violates federal regulations governing impartiality."[54]

Secretary of the Interior Ryan Zinke likewise resigned amidst "federal investigations into his travel, political activity, and potential conflicts of interest."[55] At his confirmation hearing, Zinke endorsed Trump's position of allowing more oil and natural gas drilling.[56] The Bureau of Land Management, during Secretary Zinke's tenure, aggressively leased federal lands for fossil fuel extraction, rescinded its 2015 rule regulating hydraulic fracturing on federal and Indian lands,[57] and–as discussed in Part III below–revised in part and rescinded in part the 2016 methane waste prevention rule.[58]

Andrew Wheeler, a former coal lobbyist and the new EPA Administrator, is expected to continue implementing the Trump agenda of deregulation and energy development.[59] Trump's successor to Ryan Zinke as Secretary of the Interior, David Bernhardt, is another former energy lobbyist who – in his role as Deputy Secretary – described the 2016 methane waste prevention rule as "flawed" and "'a radical assertion of legal authority that stood in stark contrast to the longstanding understanding of Interior's own lawyers.'"[60]

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[54] *Id*. The six senators also contend that the rule is arbitrary and capricious and is in effect a "delegation of agency rulemaking authority to a regulated industry." *Id*.

[55] Ellen Knickmeyer et al., *Zinke resigns as interior secretary amid numerous probes*, AP NEWS (Dec. 16, 2018), https://www.apnews.com/842c84a03e5f405fae83277a97905841.

[56] Timothy Cama, *Senate confirms Zinke to lead Interior*, THE HILL (Mar. 1, 2017), https://thehill.com/policy/energy-environment/321766-senate-confirms-zinke-to-lead-interior. Zinke also promised to oppose large-scale transfers of federal land to state or private interests. *Id*. According to an organization that promotes open and accessible government data and information, the Interior Department's website for the Bureau of Land Management no longer lists "Clean and Renewable Energy" as a national priority, but instead highlights "Making America Safe Through Energy Independence" and "Getting America Back to Work[.]" Toly Rinberg et al., *Changing the Digital Climate: How Climate Change Web Content is Being Censored Under the Trump Administration* 22, ENVTL. DATA & GOVERNANCE INITIATIVE (Jan. 2018), https://envirodatagov.org/wp-content/uploads/2018/01/Part-3-Changing-the-Digital-Climate.pdf. *See also Department of Interior Scrubs Climate Change from its Strategic Plan*, UNION OF CONCERNED SCIENTISTS, https://www.ucsusa.org/center-science-and-democracy/attacks-on-science/department-interior-scrubs-climate-change-from-strategic-plan#.XEytxVxKhPY (last updated Jan. 5, 2018) ("The 2014-2018 strategic plan for the Department of the Interior . . . mentioned 'climate change' 46 times. In a leaked draft of DOI's latest five-year plan, covering 2018-2022, 'climate change' is not mentioned at all. . . . This draft plan at DOI shows a clear continuation of its pattern for disregarding the reality of climate change including deleting references to climate change on the agency's website and reprimanding officials for speaking out on climate change science.").

[57] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017) (final rule, Bureau of Land Management).

[58] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (Final Rule).

[59] Timothy Cama, *EPA's Wheeler Faces Grilling Over Rule Rollbacks*, THE HILL (Jan. 15, 2019), https://thehill.com/policy/energy-environment/425518-epas-wheeler-faces-grilling-over-rule-rollbacks (describing concerns raised during Wheeler's confirmation hearings).

[60] Jennifer Ludden, *Trump Administration Eases Regulation Of Methane Leaks On Public Lands*, NPR (Sept. 18, 2018), https://www.npr.org/2018/09/18/649326026/trump-administration-eases-regulation-of-methane-leaks-on-public-lands. In December 2018, two environmental advocacy organizations –

In the first two years of the Trump presidency, agency decisionmakers promoted the Administration's policies by altering regulatory and enforcement strategies,[61] granting exemptions,[62] de-emphasizing disfavored statutory and regulatory responsibilities,[63] and prioritizing among delegated responsibilities.[64] They also acted–sometimes unlawfully–to tilt the decision-making process.[65]

Greenpeace USA and the Center for Biological Diversity – requested the Interior Department's Office of the Inspector General to investigate Bernhardt for conflicts of interest in connection with the ongoing "aggressive suite of regulatory rollbacks . . . to benefit the oil and gas sector." Letter to Mary Kendall, U.S. Dep't of Interior, Office of Inspector General, from Janet Redman, Climate Director, Greenpeace USA & Noah Greenwald, M.S. Endangered Species Director, Center for Biological Diversity 5 (Dec. 20, 2018), *available at* https://www.greenpeace.org/usa/wp-content/uploads/2018/12/Greenpeace-CBD-letter-to-Interior-IG-re-Bernhardt.pdf. Among other potential conflicts, the petition notes that, in his former role as a lobbyist, Bernhardt worked for a firm that represents the Independent Petroleum Association of America, one of the litigants that sued to block implementation of the 2016 methane waste prevention rule. *Id*. at 3–4.

On February 4, 2019, President Trump nominated Bernhardt to become the next Secretary of the Interior. His nomination is considered to be a sign that the Interior Department will continue the policies set forth in the first two years of the Trump Administration. *See* Jimmy Tobias, *The Key Questions the Senate Should Ask Trump's Nominee to Head the Department of the Interior*, PACIFIC STANDARD (Feb. 12, 2019), https://psmag.com/environment/the-key-questions-the-senate-should-ask-david-bernhardt (describing Bernhardt as "a well-paid former lobbyist for oil, gas, and other corporate interests across the American West," and noting that critics "have called him 'the ultimate D.C. swamp creature.'"). Bernhardt was confirmed on April 11, 2019. Miranda Green and Rebecca Beitsch, *David Bernhardt confirmed as new Interior chief*, THE HILL (Apr. 11, 2019), https://thehill.com/policy/energy-environment/438460-david-bernhardt-confirmed-as-new-interior-chief.

[61] *See generally* Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "The Public" in Public Land Law*, 48 ENVTL. L. 311 (2018). *See also* Marianne Sullivan et al., *The EPA has backed off enforcement under Trump – here are the numbers*, THE CONVERSATION (Jan. 3, 2019), https://theconversation.com/the-epa-has-backed-off-enforcement-under-trump-here-are-the-numbers-108640 (concluding that civil enforcement actions in fiscal year 2018 were the lowest in the last ten years; EPA imposed fewer fines; compliance costs for regulated entities were down; and inspections decreased).

[62] In 2017, the Department of Homeland Security waived numerous environmental laws to facilitate the construction of fencing along portions of the United States-Mexico border. In February 2018, a federal district court upheld the waivers as within the discretionary authority granted by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. *See In re* Border Infrastructure Environmental Litigation, 284 F. Supp. 3d 1092, 1102–03 (S.D. Cal. 2018), *aff'd*, Nos. 18-55474, 18-55475, 18-55476, 2019 U.S. App. LEXIS 4053 (9th Cir. Feb. 11, 2019).

[63] *See, e.g*., Timothy Cama, *Zinke looks to ease some wildlife rules*, THE HILL (Sept. 11, 2018), https://thehill.com/policy/energy-environment/406044-zinke-looks-to-ease-some-wildlife-rules (noting that, among other actions, the Interior Department in July 2018, proposed to make "it easier to remove species' protections and harder to protect habitat" under the Endangered Species Act, and in December 2017, "published a legal finding that the Migratory Bird Treaty Act does not prohibit 'incidental' harms or killing of the birds under its jurisdiction."). Executive agencies must comply with the Freedom of Information Act, which requires disclosure of certain information and documents controlled by the government. *See* 5 U.S.C. § 522. On December 28, 2018, the Department of the Interior published a proposed rule to make its "FOIA processing . . . more efficient." Proposed Rule, Freedom of Information Act Regulations, 83 Fed. Reg. 67,175 (Dec. 28, 2018). The revisions impose new burdens on individuals and organizations seeking public information. *See* Juan Carlos Rodriguez, *Public Heaps Scorn on DOI Plan to Curb Info Access*, LAW 360 (Jan. 30, 2019), https://www.law360.com/articles/1123535/public-heaps-scorn-on-doi-plan-to-curb-info-access.

[64] E.A. Crunden, *Accidentally-released documents show Interior agency prioritized industry over public lands*, THINK PROGRESS (July 23, 2018, 3:59 PM), https://thinkprogress.org/interior-zinke-public-lands-oil-drilling-d8a4cc51c5d2/ ("documents . . . reveal that agency officials dismissed evidence that public lands provide numerous benefits in favor of prioritizing fossil fuel interests, along with ranching and logging.").

[65] On January 31, 2018, the Bureau of Land Management issued an Instruction Memorandum ("IM") designed to simplify and streamline the decision-making process for leasing oil and gas rights on federal lands. In *Western Watersheds Project v. Zinke*, the plaintiffs contended that the federal defendants acted

6. The President can nominate favorable judges.

As of January 18, 2019, eighty-eight of President Trump's judicial nominees have been confirmed, including forty-seven District Court judges, thirty-four Circuit Court judges, and two Justices of the United States Supreme Court.[66] It is too early to assess whether Trump's judicial appointments will prove to be a boon to his energy and environmental policies. When assessing agency action, courts chiefly employ two standards of review: the "arbitrary and capricious" test set forth in the Administrative Procedure Act,[67] and the Supreme Court's "*Chevron*" doctrine.[68] Both standards are deferential, which should work in favor of the federal government, although the issue of deferring to an agency position that conflicts with a previous agency position is more nuanced.[69] However, the notion of "*Chevron* deference" is under increasing attack,[70] and the arbitrary

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unlawfully by adopting the memorandum at issue, IM 2018-034, without notice-and-comment rulemaking, and by applying it "to exclude or sharply limit public participation in BLM oil and gas leasing decisions." W. Watersheds Project v. Zinke, 336 F. Supp. 3d 1204, 1231 (D. Idaho 2018), The district court granted the motion for a preliminary injunction in part, finding that "the record contains significant evidence indicating that BLM made an intentional decision to limit the opportunity for (and even in some circumstances to preclude entirely) any contemporaneous public involvement in decisions concerning whether to grant oil and gas leases on federal lands." *Id*. at 1238.

The Interior Department was recently criticized for the pro-business composition of its Royalty Policy Committee, formed in 2017, to advise Zinke on the "fair market value, and the collection of revenues derived from, the development of energy and mineral resources on Federal and Indian lands." Royalty Policy Committee Establishment Notice, 82 Fed. Reg. 16,222 (Apr. 3, 2017). The Western Organization of Resource Councils filed a lawsuit claiming that the Committee operated in violation of the Federal Advisory Committee Act ("FACA"). Opinion and Order, W. Org. of Res. Councils v. Zinke, No. 9:18-cv-00139-DWM (D. Mont. Jan. 24, 2019). The district court in January 2019 dismissed the lawsuit on the grounds that FACA does not provide a standard to evaluate whether a committee is "fairly balanced." *Id*. at 16–19. The court also held that the Royalty Policy Committee was structured in a manner that "avoid[s] the more stringent BLM advisory committee regulations." *Id*. at 19. Although it found in favor of the Department of the Interior, the court expressed concern that the agency's narrow view of the Federal Advisory Committee Act "highlights a troubling trend within the current administration's view of governing and the rule of law." *Id*. at 7.

[66] *See Federal judges nominated by Donald Trump,* BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Donald_Trump#Confirmed_to_their_positions (visited Mar. 10, 2019).

[67] 5 U.S.C. § 706(2) (2018). Review under the standard is narrow: the reviewing court may not substitute its judgment for that of the agency, which must simply articulate a rational connection between the facts found and the conclusions made. *See* Motor Vehicle Mrfs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

[68] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[69] *See, e.g*., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–982 (2005) (stating that the *Chevron* doctrine applies to an agency interpretation that was a recent reversal of agency policy, but "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

[70] *See* Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (describing the *Chevron* test as "an important, frequently invoked, once celebrated, and now increasingly maligned precedent.").

and capricious test has always required a reasoned explanation whenever an agency reverses course.[71]

Trump's first two Supreme Court nominees are conservative jurists. Neil Gorsuch (the son of Anne Gorsuch Burford, the EPA Administrator under President Reagan), has been described as a textualist and an originalist whose "devotion to the balance of powers outlined in the Constitution ... will make him a force on the court for cutting back on the power of what conservatives call the 'administrative state.'"[72] Brett Kavanaugh, according to one observer, "has exhibited a very clear track record of relative solicitousness to regulated industry and skepticism to environmental interests."[73] Both jurists have challenged the notion of judicial deference to agency interpretations of statutes and regulations.[74]

With respect to President Trump's efforts to reverse rules and policies set forth during the Obama Administration, it is interesting to note that Justice Gorsuch, as a judge on the United States Court of Appeals for the Tenth Circuit, wrote opinions that "saw agency policy change as an extreme and constitutionally problematic power, especially if that agency shift followed some earlier judicial policy exegesis."[75] As for Justice Kavanaugh, it is significant that he replaces Justice Anthony Kennedy, whose views were of critical importance in *Rapanos v. United States*[76] (interpreting the scope of

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[71] A court will reverse agency decision-making under the arbitrary and capricious standard "if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *See State Farm Mut.*, 463 U.S. at 42–44.

[72] Richard Wolf, *Justice Gorsuch confirms conservatives' hopes, liberals' fears in first year on Supreme Court*, USA TODAY (Apr. 8, 2018), https://www.usatoday.com/story/news/politics/2018/04/08/justice-gorsuch-confirms-conservatives-hopes-liberals-fears-first-year-supreme-court/486630002/. *But see* Associated Press, *Gorsuch Willing to Limit Environmental Groups in Land Cases*, FORTUNE (Mar. 5, 2017), http://fortune.com/2017/03/05/gorsuch-public-lands-conservation/ (scholars describing his court of appeals' decisions relating to public lands and the environment as a "mixed bag" with an equal number of decisions that are environmentally favorable and environmentally unfavorable).

[73] Michael Livermore, *Judge Kavanaugh and the environment*, SCOTUS BLOG (Jul. 18, 2018, 1:27 PM) https://www.scotusblog.com/2018/07/kavanaugh-and-the-environment/ ("what is striking is Kavanaugh's inclination — even more so than his fellow conservatives — to read the language at issue in ways that were adverse to more stringent environmental protection. By contrast, it appears as though in his time on the D.C. Circuit, Kavanaugh has never issued a dissent in a case in which the majority ruled against an environmental interest.").

[74] *See* Benjamin Warden, *Neil Gorsuch: On Energy and Environmental Law*, 3 OIL & GAS, NAT. RES. & ENERGY J. 1493, 1518 (2018) (Gorsuch's "general disdain for the *Chevron* doctrine poses somewhat of a threat to agencies that want autonomy and reliance afforded to them."); Christopher Walker, *Judge Kavanaugh on administrative law and separation of powers*, SCOTUS BLOG (Jul. 26, 2018, 2:55 PM), https://www.scotusblog.com/2018/07/kavanaugh-on-administrative-law-and-separation-of-powers/ ("Kavanaugh has advanced in his academic writings a more-systemic narrowing of *Chevron* deference based on concerns about uniformity of federal law and partisanship in judicial decision-making.").

[75] Buzbee, *supra* note 15, at 1369. *See also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (contrasting "an independent [judicial] decisionmaker seeking to declare the law's meaning as fairly as possible" with "an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day.").

[76] 547 U.S. 715, 759 (2006).

Clean Water Act jurisdiction) and *Massachusetts v. EPA*[77] (upholding EPA's authority to regulate greenhouse gases under the Clean Air Act). It is likely that challenges to regulatory efforts of the Trump Administration to limit the scope of both decisions will come before the Supreme Court.

II. THE 2016 METHANE WASTE PREVENTION RULE

The 2016 methane waste prevention rule applies to BLM leases and "aims to reduce the waste of natural gas . . . lost during oil and gas production activities through venting or flaring of the gas, and through equipment leaks."[78] Soon after taking office, President Trump requested Congress to nullify the MWPR and simultaneously directed the DOI to modify or rescind the rule.[79] As discussed in Part III below, the nullification legislation failed, and agency efforts to postpone and suspend the rule were successfully challenged in court. BLM and representatives of the oil and gas industry, however, were able to obtain a judicial stay of the MWPR pending completion of rulemaking efforts to substantially revise the rule.[80] The BLM's 2018 final rule revises portions of the 2016 MWPR and rescinds other portions of the rule.[81] The 2018 replacement rule, as well as the judicial order staying the implementation of the 2016 rule, are both subject to judicial challenge. Consequently, while the 2016 methane waste prevention rule has been replaced, its ultimate fate remains to be determined.

1. The methane emissions problem and the proposed waste prevention rule.

In his 2015 State of the Union Address, President Obama stated that "no challenge–no challenge–poses a greater threat to future generations than climate change."[82] At about the same time, the President announced a goal to reduce methane emissions from the oil and gas sector by forty to forty-five

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[77] 549 U.S. 497, 497 (2007).

[78] 81 Fed. Reg. 83,009 (Nov. 18, 2016) (final rule).

[79] *See infra* at 108-116 and accompanying text.

[80] *See infra* Part III.

[81] 83 Fed. Reg. 49,184 (Sept. 28, 2018) (final rule).

[82] Michelle A. Vu, *Obama State of the Union 2015 Text Transcript and Full Video*, CP POLITICS (Jan. 20, 2015), https://www.christianpost.com/news/obama-state-of-the-union-2015-text-transcript-and-full-video-132859/?page ("The best scientists in the world are all telling us that our activities are changing the climate, and if we do not act forcefully, we'll continue to see rising oceans, longer, hotter heat waves, dangerous droughts and floods, and massive disruptions that can trigger greater migration, conflict, and hunger around the globe. The Pentagon says that climate change poses immediate risks to our national security. We should act like it. That's why, over the past six years, we've done more than ever before to combat climate change, from the way we produce energy, to the way we use it."). In contrast, President Trump, in the 2018 and 2019 State of the Union addresses, did not mention climate change. *See* Robinson Meyer, *Trump Doesn't Mention Climate Change in His State of the Union*, THE ATLANTIC (Jan. 31, 2018), https://www.theatlantic.com/science/archive/2018/01/trump-doesnt-mention-climate-change-in-his-state-of-the-union/551930/; Randy Showstack, *Trump's State of the Union Address Ignores Climate Change*, EARTH & SPACE SCIENCE NEWS (Feb. 6, 2019), https://eos.org/articles/trumps-state-of-the-union-address-ignores-climate-change.

percent from 2012 levels by 2025.[83] On March 26, 2015, the BLM published a final rule that regulated hydraulic fracturing on federal and Indian lands.[84] On September 18, 2015, the EPA proposed amendments to the Clean Air Act NSPS for the oil and natural gas source category.[85] Five months later, on February 8, 2016, the BLM proposed its methane waste prevention rule.[86]

The proposed rule notes that, "[w]hile oil and gas production technology has advanced dramatically in recent years, the BLM's requirements to minimize waste of gas have not been updated in over 30 years."[87] The primary purpose of the MWPR is "to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian leases."[88] The rule also clarifies the circumstances "when produced gas lost through venting, flaring, or leaks is subject to royalties."[89] The two parts of the rule are connected because

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[83] *See* Kristin Hines Gladd, *New Methane Regulations for the Oil and Gas Sector*, 30 WTR NAT. RES. & ENV'T 51 (2016) ("Driving this goal is the fact that methane emissions accounted for approximately 10 percent of the United States' greenhouse gas emissions in 2012, and 30 percent of these emissions are attributable to the production, transmission, and distribution of oil and natural gas."). *See* Arnold W. Reitze, Jr., *The Control of Methane and VOC Emissions from Oil and Gas Operations in the Western United States*, 54 IDAHO L. REV. 213, 214–15 (2018) ("Worldwide, methane is responsible for about 20% of the global warming.").

[84] Hydraulic Fracturing on Federal and Indian Lands Final Rule, 80 Fed. Reg. 16,128 (Mar. 26, 2015). The United States District Court for the District of Wyoming, on September 30, 2015, enjoined BLM from applying the new rule pending resolution of the litigation. Wyoming v. U.S. Dept. of the Interior, 136 F. Supp. 3d 1317, 1327 (D. Wyo. 2015). The court held, among other things, that BLM did not have authority to regulate hydraulic fracturing on federal or Indian lands; and that BLM's regulation of hydraulic fracturing was not supported by substantial evidence and lacked rational justification. *Id.* at 1329–40. However, in light of the fact that BLM proposed a replacement rule, 82 Fed. Reg. 34,464 (July 25, 2017), the United States Court of Appeals for the Tenth Circuit vacated the district court's decision. Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017). The BLM's replacement rule is currently being challenged in the United States District Court for the Northern District of California. *State of California v. U.S. Bureau of Land Mgmt.*, *supra* note 33; *Sierra Club v. Zinke*, *supra* note 33. *See also* 82 Fed. Reg. 61,924 (Dec. 29, 2017).

[85] Emission Standards for New Modified Sources Proposed Rule, 80 Fed. Reg. 56,593 (Sept. 18, 2015). The final NSPS rule was published in June 2016 and immediately challenged in the United States Court of Appeals for the District of Columbia Circuit. *See* 81 Fed. Reg. 35,824 (June 3, 2016). After Trump became president, the EPA sought to suspend and reconsider the rule; however, in *Clean Air Council v. Pruitt*, the court held that the agency's decision to stay its rule was arbitrary, capricious, and in excess of its statutory authority under the Clean Air Act. *See generally* Clean Air Council v. Pruitt, 862 F.3d 1 (2017) (per curiam). The EPA, in March 2018, published a final rule that amended parts of the 2016 NSPS rule, and in October 2018, proposed additional revisions. Compare Emission Standards for New, Reconstructed, and Modified Sources Amendments, 83 Fed. Reg. 10,628 (Mar. 12, 2018) with Emission Standards for New, Reconstructed, and Modified Sources Reconsideration Proposed Rule, 83 Fed. Reg. 52,056 (Oct. 15, 2018). The challenges to the 2016 NSPS rule have been held in abeyance. *See* Consent Motion of Petitioners to Hold Petitions in Abeyance and to Govern Further Proceedings, American Petroleum Institute v. EPA, No. 13-1108 (D.C. Cir. 2013) (and consolidated cases). Meanwhile, fifteen states and the City of Chicago are suing the EPA for unreasonably delaying the fulfillment of its mandatory obligation to issue guidelines for controlling methane emissions from existing oil and gas sources. *See generally* Complaint, New York v. Pruitt, No. 1:18-cv-773 (D. D.C. May 30, 2018).

[86] Waste Prevention, Production Subject to Royalties, and Resource Conservation Proposed rule, 81 Fed. Reg. 6,616 (Feb. 8, 2016).

[87] *Id*. *See also* Reitze, *supra* note 83, at 233 ("Flaring . . . has increased rapidly in recent years because oil and gas development frequently occurs in remote locations where transport is not available for the natural gas that is also produced as part of an oil operation.").

[88] 81 Fed. Reg. 6,616 (Feb. 8, 2016).

[89] *Id*.

flaring, venting, and leaks not only adversely impact the environment, but also "waste a valuable resource that could be put to productive use, and deprive American taxpayers, tribes, and States of royalty revenues."[90] The MWPR, according to the Obama Administration, is a "win-win" proposition: it sets forth "economical, cost-effective, and reasonable measures that operators should take to minimize waste, which will enhance our nation's natural gas supplies, boost royalty receipts for American taxpayers, tribes, and States, and reduce environmental damage from venting and flaring."[91]

The royalty payment and waste prevention requirements are summarized in the proposed rule as follows:

> Under [existing regulations], operators must apply to the BLM on a case-by-case basis for approval to flare royalty-free, based on economic criteria. We propose to reduce the need for case-by-case applications by clarifying when flared or vented natural gas is subject to royalties. Further, with respect to venting and flaring of natural gas, we propose to: Prohibit venting, except in certain limited circumstances; limit the rate of routine flaring at development oil wells; require operators to detect and repair leaks; and mandate reductions in venting from: Pneumatic controllers and pneumatic pumps that operate by releasing natural gas; storage vessels; activities to unload liquids from a well; and well drilling, completion, and testing activities. Finally, the

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[90] With respect to the environmental impacts, the proposed rule states that "wasted gas may harm local communities and surrounding areas through visual and noise impacts from flaring, and regional and global air pollution problems of smog, particulate matter, toxic air pollution (such as benzene, a carcinogen) and climate change." *Id*. at 6,616–17. Methane, the primary constituent of natural gas, is "an especially powerful greenhouse gas (GHG), with climate impacts roughly 25 times those of CO2, if measured over a 100-year period, or 86 times those of CO2, if measured over a 20-year period." *Id*. at 6,617.

[91] *Id*. at 6,616 ("Overall, the BLM estimates that the benefits of this rule outweigh its costs by a significant margin."). In comparing costs to benefits, the BLM included "the social cost of methane." *See, e.g.*, *id*. at 6,624–25 ("the BLM estimates that this rule would result in monetized benefits of $255–329 million per year (using a 7% discount rate to calculate the present value of future annual cost savings, and using model averages of the social cost of methane with a 3% discount rate) or $255–357 million per year (using a 3% discount rate to calculate the present value of future annual cost savings, and using model averages of the social cost of methane with a % discount rate). We estimate that the proposed rule would reduce methane emissions by 164,000–169,000 tpy, which we estimate to be worth $180–253 million per year (this social benefit is included in the monetized benefit above)."). The social costs of methane have been defined as "the social costs avoided by implementing methane regulations." Shani Harmon, *The Economics of Methane Regulation: The Cost-Effectiveness of Regulating Existing Oil and Gas Operations*, 30 FALL NAT. RES. & ENV'T 22, 23 (2015). Senator James Inhofe (R-Okla.) has described the social cost of methane as a "deeply flawed methodology" and criticized the EPA's use of the concept as "yet another attempt by the Obama Administration to advance an unpopular climate agenda–by inventing a dollar amount for the price of a ton of methane to justify onerous regulations." Letter from Sen. James Inhofe to Gina McCarthy, EPA Adm'r (Dec. 4, 2015), *available at* https://www.epw.senate.gov/public/_cache/files/c3bbcbd9-89ea-4a19-a870-5fd426603e41/12.04.15-administrator-mccarthy-re-socialcost-of-methane.pdf.

> proposed rule would require operators to submit gas capture plans with their Applications for Permits to Drill new wells.[92]

The proposed venting and flaring limits include phase-in periods and exemptions for existing leases located in remote areas.[93] To minimize the loss of natural gas through leaks and fugitive emissions, the proposal requires the use of detection instruments, semi-annual inspections, and a phased-in replacement of high-bleed pneumatic controllers.[94] Natural gas released from storage tanks is to be controlled by vapor recovery units or by routing to flares or combustors, and the operators are required to route emissions of volatile organic compounds ("VOCs") from regulated storage vessels to combustion devices, continuous flares, or sales lines.[95] Lessees engaging in well maintenance, liquid unloading,[96] and "workover" operations[97] are to use available waste prevention technologies and employ best management practices.[98]

2. The final 2016 methane waste prevention rule.

After receiving approximately 330,000 public comments on the proposed methane waste prevention rule, the BLM published its final rule on November 18, 2016.[99] In the final rule, the BLM notes that the Office of the

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[92] 81 Fed. Reg. 6,616–17 (Feb. 8, 2016). An oil and gas lease will not be issued unless (1) the BLM has determined in a resource management plan (RMP) that drilling is appropriate for the area; and (2) the application for a permit to drill ("APD") satisfies regulatory and statutory requirements. *See* Reitze, *supra* note 83, at 231 ("As part of the APD approval process, the BLM reviews the planned drilling activity and prepares an environmental assessment of the environmental impacts of the proposed drilling, after which the agency may approve the APD as submitted, approve it with appropriate modifications or conditions, or deny it.").

[93] 81 Fed. Reg. 6,616, 6,620 (Feb. 8, 2016). Venting and flaring of gas occurs when waste prevention and capture are not considered to be cost-effective. The BLM's proposed rule, however, concludes that the benefits of the venting and flaring requirements will exceed compliance costs. *Id*. at 6,620 ("The capture and sale of associated gas is viable where there is sufficient gas production to offset the costs of connecting to or expanding existing pipeline infrastructure. In addition, technologies for capturing and using gas without a pipeline are becoming increasingly available. This capture infrastructure may include: Separating out NGLs or liquefying the natural gas (LNG), allowing the resulting liquids to be trucked off location; converting the gas into compressed natural gas (CNG) for use on-site or to be trucked off location; and using the gas to run microturbines to generate power for use onsite or for sale back to the grid.").

[94] *Id*. at 6,621. Pneumatic controllers subject to EPA regulations are exempted, and other controllers are also exempted if replacement "would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease." *Id*.

[95] *Id*. at 6,222. Again, the requirements are subject to phase-in periods and exceptions. *Id*.

[96] *Id*. at 6,623 ("Over time, as pressure in a natural gas well drops, liquids often start accumulating at the bottom of the well, impeding gas production. Operators often remove or 'unload' the liquids, but depending on the method, this process can release substantial quantities of natural gas into the environment.").

[97] *Id*. ("Substantial quantities of gas can be lost during drilling, completion, and refracturing (sometimes referred to by the broader term 'workover') operations.").

[98] *Id*. The applicability of the requirements depends on whether the well was drilled before or after the effective date of the rule, and whether the lessee is in compliance with EPA requirements for control of gas. *Id*.

[99] Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016). *See also id*. at 83,021 ("Of the approximately 330,000 comment submissions, approximately 1,000 were unique comments, with the remaining comments coming from mass-mailing campaigns from several organizations.").

Inspector General of the DOI and the Government Accountability Office both "recommended that the BLM update its regulations to require operators to augment their waste prevention efforts, afford the BLM greater flexibility in rate setting, and clarify BLM policies regarding royalty-free, on-site use of oil and gas."[100] The final rule identifies studies issued after the rule was proposed that "further demonstrate significant gas loss, the potential to reduce such waste through various technologies and practices, and the need for widespread leak detection and repair."[101]

The BLM agreed with some, but not all, of the submitted comments. For example, in response to industry suggestions, the final rule clarifies that an operator is not required to flare gas that is lost due to leaks, provided the operator is in full compliance with the leak detection and repair requirements.[102] Additionally, the rule includes an exemption from the venting prohibition for venting associated with non-routine maintenance activities, extends the phase-in period for its flaring requirements, and uses specified capture targets rather than monthly flaring limits.[103] The final rule, however, rejects the assertion by industry commenters that BLM lacks the authority to require flaring instead of venting of federal and tribal gas.[104] The BLM disagreed that requiring flaring rather than venting is not a waste prevention and/or safety measure, and concluded in the final rule that the flaring rules are authorized by the Mineral Leasing Act,[105] which grants the BLM the authority to promulgate rules for the prevention of undue waste or for safety purposes.[106] The BLM also stated that the rule's provisions requiring flaring rather than venting are authorized by the Federal Land Policy and Management Act of 1976, which requires a balancing of "the need for domestic sources of minerals against the need to protect the quality of air and

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[100] *Id*. at 83,010.

[101] *Id*. at 83,015. In particular, the BLM noted that the EPA's 2016 Greenhouse Gas ("GHG") Inventory, released in April 2016, "provides estimates of methane loss from the oil and gas sector that are significantly greater than previous estimates." *Id*. at 83,016.

[102] *Id*.

[103] *Id*. at 83,023–25. The final rule eliminated the proposed requirements for chemical injection pumps and diaphragm injection pumps that operate relatively infrequently and does not adopt the provision from the proposed rule that would have prohibited manual well purging from new wells. *Id.* at 8,3012. The final rule adjusts the frequency of leak detection inspections, and removes the prohibition on liquids unloading through manual well purging at new wells. *Id*. at 83,027, 83,034.

[104] *Id*. at 83,037 ("These commenters argued that the BLM's sole authority is to prevent waste, and a provision that requires flaring rather than venting does not aim at waste prevention because shifting from venting to flaring does not conserve the gas.").

[105] 30 U.S.C. §188 *et seq*. (2018).

[106] 81 Fed. Reg. 83,008, 83,037 (Nov. 18, 2016) (citing 43 C.F.R. § 3162.5–3 (2018)). In addition to the Mineral Leasing Act, the BLM oversees Federal and Indian oil and gas activities pursuant to other federal laws. *See, e.g.*, Act of March 3, 1909, 25 U.S.C. § 396; Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g (2018); Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 *et seq*.; Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351–360 *et seq*.; Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1701 *et seq*.; and Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq*. (2018). *Id*. at 83,009.

atmospheric resources,"[107] and are consistent with "the BLM's trust responsibilities with respect to Indian oil and gas development."[108]

III. EFFORTS TO NULLIFY, POSTPONE, SUSPEND, STAY, AND REPLACE THE 2016 METHANE WASTE PREVENTION RULE

Shortly after Donald Trump took office on January 20, 2017, efforts were underway to abrogate the methane waste prevention rule, which became effective just three days earlier. The first attempt, which involved the passage of nullification legislation, failed when the necessary resolution was defeated in the United States Senate.[109] The BLM thereafter postponed the compliance dates set forth in the MWPR; however, this action was held to be unlawful agency action.[110] Undeterred, the BLM suspended the compliance dates; however, this action was enjoined.[111] Despite these legislative and regulatory setbacks, the Trump Administration and the oil and gas industry obtained a judicial stay of the 2016 waste prevention rule for most of 2017 and 2018, and the BLM, in September 2018, promulgated a replacement rule.[112] The ultimate fate of the rescinded 2016 rule now depends on the outcome of pending lawsuits challenging the 2018 rule.

1. Efforts to nullify the 2016 methane waste prevention rule.

As discussed in Part I, the Congressional Review Act enables a newly elected president to request Congress to nullify rules enacted in the prior administration by passing a "joint resolution of disapproval that is presented to the President for his [or her] signature or veto."[113] If the legislation is enacted, "the rule is nullified and the agency cannot re-adopt it or a 'substantially similar' one unless Congress passes new authorizing legislation."[114]

The 115th Congress was asked to nullify two rules promulgated during the Obama Administration that regulated oil and gas development on public lands. On March 28, 2017, President Trump signed a joint resolution of Congress disapproving the BLM's "Planning 2.0 Rule," which was intended to enhance "opportunities for public involvement and transparency

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[107] *Id.* at 83,008, 83,037 (citing 43 U.S.C. § 1701(a)(8), (a)(12)).

[108] *Id.* at 83,038. *See, e.g.*, Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."); Fletcher v. United States, 730 F.3d 1206, 1209 (10th Cir. 2013) (holding that a 1906 Act, severing the mineral estate underlying Osage lands and directing the Secretary of Interior to collect and distribute royalties, created a trust relationship between the federal government and individual Osages owning royalty interests). The *Fletcher* opinion was authored by then-Circuit Judge Neil Gorsuch.

[109] *See infra* at 113-115 and accompanying text.

[110] *See infra* at 117-129 and accompanying text.

[111] *See infra* at 130-141 and accompanying text.

[112] *See infra* at 142-149 and accompanying text.

[113] Larkin, *supra* note 21, at 509.

[114] *Id*.

during the preparation of resource management plans" and emphasize "the importance of evaluating the resource, environmental, ecological, social, and economic conditions at the onset of planning."[115] According to a website for House Republicans, the rule would have diluted local and state input into land management decisions, centralized power in Washington, D.C., and allowed "radical environmental groups to insert their agenda into Resource Management Plans."[116]

On February 3, 2017, the House of Representatives passed Joint Resolution 36 to disapprove the methane waste prevention rule.[117] The Senate's corresponding resolution, however, was rejected 51 to 49 on May 10, 2017, when three Republican senators (Susan Collins of Maine, Lindsay Graham of South Carolina, and John McCain of Arizona), joined with forty-eight Democrat senators.[118] One commentator has suggested that the MWPR survived because it "embodies a nexus between traditional notions of anti-waste sentiments and progressive environmental values."[119] In his statement explaining his swing vote, however, Senator McCain instead expressed concern that, under the Congressional Review Act, "'passage of the resolution would have prevented the federal government, under any administration, from issuing a rule that is "similar," according to the plain reading of the Congressional Review Act.'"[120] Both McCain and John Barrasso of Wyoming, the chairman of the Senate Committee on Environment and Public Works, immediately called on Interior Secretary Ryan Zinke to revoke the rule.[121]

2. Efforts to postpone the 2016 methane waste prevention rule.

The Obama Administration's final methane waste prevention rule was published on November 18, 2016, ten days after Donald Trump was elected President.[122] Two states and two industry groups immediately filed suit in the

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[115] Resource Management Planning Final Rule, 81 Fed. Reg. 89,580 (Dec. 12, 2016). The BLM rule became effective on January 11, 2017. *Id*. The nullification legislation was passed on March 27, 2017, and signed by the President on the following day. *See* Joint Resolution on Resource Management Planning Rule, Pub. L. No. 115-12, 131 Stat. 76 (2017).

[116] *Signed into Law: Congressional Review Act (CRA) Resolutions,* HOUSE REPUBLICANS, https://www.gop.gov/cra/ (June 1, 2018).

[117] H.R.J. Res. 36, 115th Cong. (2017).

[118] Valerie Volcovici, *Bid to revoke Obama methane rule fails in surprise U.S. Senate vote,* REUTTERS (May 10, 2017), https://www.reuters.com/article/us-usa-congress-idUSKBN18620F.

[119] Lily Ricci, Note, *Two Ideas, Many Outcomes: How Anti-Waste Sentiments and the Public Trust Doctrine Support Varied Interests in Fracking-Related Litigation*, 30 GEO. ENVTL. L. REV. 499, 509 (2018).

[120] It had been expected that McCain would vote for the resolution, causing a tie that would have been broken in favor of nullification by Vice President Mike Pence. *See* Jeremy Dillon et al., *Maverick McCain Re-Emerges on Methane Vote*, CQ ROLL CALL (May 10, 2017), https://www.rollcall.com/news/politics/maverick-mccain-re-emerges-methane-vote. Senators Heidi Heitkamp of North Dakota and Joe Manchin of West Virginia–who tend to favor pro-energy legislation–voted with their fellow Democrats.

[121] *Id*. *See also* Reitze, *supra* note 83, at 239. ("The [] vote was influenced by the expectation that the Department of the Interior will issue a new revised methane rule.").

[122] *See supra* note 9.

United States District Court for the District of Wyoming to enjoin and overturn the rule.[123] On January 16, 2017, the day before the MWPR became effective and four days before the end of the Obama presidency, the district court declined to enjoin the rule.[124]

On March 28, 2017, President Trump issued Executive Order 13783, entitled "Promoting Energy Independence and Economic Growth."[125] Section 7(b) of the Executive Order directs the Secretary of the Interior to review the MWPR and other regulations related to oil and gas development and "if appropriate" take action to "publish for notice and comment proposed rules suspending, revising, or rescinding those rules."[126] In response to the Executive Order (and in light of the failure of Congress to nullify the MWPR), the DOI announced "that justice requires it to postpone the compliance dates for certain sections of the Rule pursuant to the Administrative Procedure Act, pending judicial review."[127] The BLM did not engage in notice and comment rulemaking, but instead based its authority to immediately postpone the MWPR on Section 705 of the Administrative Procedure Act, which provides in part that, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it."[128]

California, New Mexico, and a coalition of conservation and tribal citizens groups successfully challenged the postponement action in the United States District Court for the District of Northern California.[129] The court rejected, as contrary to plain language and prior precedent, the government's

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[123] North Dakota intervened in the suit filed by Wyoming and Montana. The other suit was filed by the Western Energy Alliance and the Independent Petroleum Association of America. Several environmental groups, as well as California and New Mexico, intervened to defend the 2016 MWPR.

[124] *See* Order on Motions for Preliminary Injunction, Wyoming v. U.S. Dep't of the Interior, No. 2:16-cv-00280-SWS at 29 (Jan. 16, 2017) (lead case). The court held that the BLM had "rulemaking authority to prevent the waste of federal and Indian mineral resources and to ensure the proper payment of royalties to federal, state, and tribal governments." *Id*. at 14. The court expressed concern, however, whether the MWPR "was promulgated *for the prevention of waste* or instead for the *protection of air quality*, which is expressly within the 'substantive field' of the EPA and states pursuant to the Clean Air Act." *Id*. at 15. The court also expressed doubts about the BLM's cost/benefit calculation, questioning "whether the 'social cost of methane' is an appropriate factor for BLM to consider in promulgating a resource conservation rule," and noting that "the asserted cost benefits of the Rule are predominately based upon the emission reductions, which is outside of BLM's expertise, and not attributable to the purported waste prevention purpose of the Rule." *Id*. at 21. The court, however, agreed with the BLM that the petitioners did "not clearly and unequivocally established a likelihood of success on the merits and irreparable harm" and "failed to establish that irreparable injury is likely in the absence of an injunction." *Id*. at 27.

[125] The Executive Order was published in the Federal Register three days later. Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

[126] *Id*. at 16,096.

[127] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27,430 (June 15, 2017).

[128] *Id.* at 27,431 (quoting 5 U.S.C. § 705 (2018)). The BLM noted that the MWPR includes requirements that begin on January 17, 2018 and contended that "[t]his compliance date has not yet passed and is within the meaning of the term 'effective date' as that term is used in Section 705 of the APA." *Id*. The BLM stated that it "believes the Waste Prevention Rule was properly promulgated," but determined that "[p]ostponing these compliance dates will help preserve the regulatory status quo while the litigation is pending and the Department reviews and reconsiders the Rule." *Id*.

[129] California v. U.S. Bureau of Land Mgmt., 277 F. Supp. 3d 1106. 1110–11 (N.D. Cal. 2017).

argument that the term "effective date" in Section 705 encompasses compliance dates set forth in a final rule.[130] The postponement of the final rule was "effectively a repeal," and consequently violated the APA's requirement of notice-and-comment rulemaking, which "is equally applicable to the repeal of regulations as to their adoption."[131]

The court also noted that–even if Section 705 applied–the government failed to establish that "justice so requires" immediate postponement of the 2018 compliance dates.[132] The Trump BLM cited compliance costs but it did not discuss the benefits that would result from compliance and did not argue that the MWPR was based on inaccurate facts or faulty studies.[133] While acknowledging that "[n]ew presidential administrations are entitled to change policy positions," the court also noted that "they must give reasoned explanations for those changes and 'address [the] prior factual findings' underpinning a prior regulatory regime."[134]

3. Efforts to suspend the 2016 methane waste prevention rule.

The day after the BLM's postponement action was vacated, the Bureau proposed, for notice and comment, a rule that would "temporarily suspend or delay certain requirements contained in the 2016 final rule until January 17, 2019."[135] In support of the proposed suspension rule, the BLM stated that it "is currently reviewing the 2016 final rule and wants to avoid imposing temporary or permanent compliance costs on operators for

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[130] *Id*. at 118 ("The plain language of the statute authorizes postponement of the 'effective date,' not 'compliance dates,'" and "[e]ffective and compliance dates have distinct meanings."). In *Becerra v. U.S. Dep't of Interior*, involving the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Rule, 81 Fed. Reg. 43,337 (July 1, 2016), the court had likewise rejected the government's position that the term "effective date" in § 705 encompasses effective dates and compliance dates. Becerra v. U.S. Dep't of Interior, 276 F. Supp. 3d 953, 964 (N.D. Cal. 2017). *See also* Safety-Kleen Corp. v. EPA, Nos. 92-1629, 92-1639, 1996 U.S. App. LEXIS 2324, at *2–3 (D.C. Cir. Jan. 19, 1996) (Section 705 "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review. It does not permit the agency to suspend without notice and comment a promulgated rule, as respondent has attempted to do here."); Silverman v. Eastrich Multiple Inv'r Fund, L.P., 51 F.3d 28, 31 (3d Cir. 1995) ("The mandatory compliance date should not be misconstrued as the effective date of the revisions.").

[131] *California*, 277 F. Supp. 3d at 1121. *See also* Nat. Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 762 (3d Cir. 1982) (The APA does not permit an agency to "guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date. The APA specifically provides that the repeal of a rule is rulemaking subject to rulemaking procedures."); Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n, 673 F.2d 425, 446 (D.C. Cir. 1982) ("The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal.").

[132] *California*, 277 F. Supp. 3d at 1122.

[133] *Id*. at 1122–23.

[134] *Id*. at 1123 (quoting Organized Vill. of Kake v. U.S. Dep't of Agriculture, 795 F.3d 956, 966–67 (9th Cir. 2015) (en banc)). The BLM filed a notice of appeal, but subsequently moved to dismiss its appeal. *See* State of California v. U.S. Bureau of Land Management, No. 17-17456 (9th Cir., Mar. 15, 2018) (order granting motion). *See also* Buzbee, *supra* note 15, at 1378 (describing the "agency stay and delay two-step" and noting that "reviewing courts during 2017 and 2018 overwhelmingly rejected such a strategy.").

[135] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 46,458, 46,460 (Oct. 5, 2017) (proposed rule).

requirements that may be rescinded or significantly revised in the near future."[136] Despite finding in November 2016 that "the benefits of this rule would outweigh its costs by a significant margin,"[137] the BLM in October 2017 concluded that it "may have underestimated costs and overestimated benefits."[138] The proposed suspension rule contains a detailed discussion of why the 2016 MWPR should be rescinded in part and revised in part.[139]

The final suspension rule was published on December 8, 2017, and was to take effect on January 8, 2018.[140] Once again, California, New Mexico, and a coalition of conservation and tribal citizen groups challenged the BLM's decision to delay the compliance dates in the 2016 MWPR, and once again the challenge succeeded.[141] In granting the plaintiffs' motion to enjoin BLM from enforcing the Suspension Rule, the United States District Court for the Northern District of California concluded that "[t]he BLM's reasoning behind the Suspension Rule is untethered to evidence contradicting the reasons for implementing the Waste Prevention Rule."[142] The district court took care to stress that the "BLM does not have to provide the same reasoned analysis in support of a temporary suspension that it would for a future substantive revision, but it must nonetheless provide good reasons for the Suspension Rule."[143] The court examined the BLM's rationales for

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[136] *Id*. The BLM tailored the suspension rule "so as to target the requirements of the 2016 final rule for which immediate regulatory relief appears to be particularly justified." *Id*. at 46,460.

[137] Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008, 83,013 (Nov. 18, 2016) (final rule).

[138] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 46,458, 46,459 (Oct. 5, 2017). The BLM also concluded that "some provisions of the rule appear to add regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." *Id*.

[139] *Id*. at 46,460–66. On November 1, 2017, the Department of the Interior published its report prepared in response to Executive Order 13,783. Review of the Department of the Interior Actions That Potentially Burden Domestic Energy, 82 Fed. Reg. 50,532 (Nov. 1, 2017). The report concludes that the 2016 MWPR "poses a substantial burden on industry, particularly those requirements that are set to become effective on January 17, 2018." *Id*. at 50,535. The report further states that the "BLM is currently drafting a proposed rule that would eliminate overlap with the Environmental Protection Agency's (EPA) Clean Air Act authorities while also clarifying regulatory provisions related to the beneficial use of gas on Federal and Indian lands." *Id.*

[140] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050 (Dec. 8, 2017). The rule delays for one year the effective date of the provisions of 2016 MWPR that had not yet become operative, and suspends for one year the effectiveness of certain provisions already in effect.

[141] *Id*.

[142] California v. BLM 286 F. Supp. 3d 1054, 1058 (N.D. Cal. 2018).

[143] *Id*. at 1064. The court relied on Supreme Court and Circuit Court precedents concerning agency actions that represent a policy change. *See* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (when an agency's new policy "rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank state."); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Unexplained inconsistency" between agency actions is "a reason for holding an interpretation to be an arbitrary and capricious change."); Action for Children's Television v. F.C.C., 821 F.2d 741, 745 (D.C. Cir. 1987) ("It is axiomatic that an agency choosing to alter its regulatory course must supply a reasoned analysis indicating its prior policies and standards are being deliberately changed, not casually ignored.").

suspending the 2016 MWPR,[144] and concluded that the Bureau failed to provide the necessary reasoned analysis:

> BLM ... must provide at least some basis—indeed, a "detailed justification" — to explain why it is changing course after its three years of study and deliberation resulting in the Waste Prevention Rule. New facts or evidence coming to light, considerations that BLM left out in its previous analysis, or some other concrete basis supported in the record—these are the types of "good reasons" that the law seeks. Instead, it appears that BLM is simply "casually ignoring" all of its previous findings and arbitrarily changing course.[145]

The decision, while limited to holding that the Suspension Rule is arbitrary and capricious, serves as a warning to the BLM that substantive revisions of the 2016 MWPR must be based on "good reasons" instead of politics.[146]

4. Efforts to stay the 2016 methane waste prevention rule.

In anticipation of the Suspension Rule becoming effective on January 8, 2018, the United States District Court for the District of Wyoming stayed the judicial challenges to the 2016 MWPR.[147] On February 22, 2018, the same day that the United States District Court for the Northern District of California

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[144] *California*, 286 F. Supp. 3d at 1065–66. BLM's primary rationale in the Suspension Rule is that it "has concerns regarding the statutory authority, cost, complexity, feasibility, and other implications of the rule." *See* 82 Fed. Reg. at 58,050. Because these concerns contradict the BLM's previous determination that the MWPR imposes "economical, cost-effective, and reasonable measures . . . to minimize gas waste," 81 Fed. Reg. at 83,009, the BLM had to "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox Television*, 556 U.S. at 515. The BLM did state in the Suspension Rule that it had a "newfound concern" that the MWPR would jeopardize the ability of operators of marginal or low-producing wells "to maintain or economically operate these wells." 82 Fed. Reg. at 58,050. The district court, however, held that BLM provided "no analysis or factual data to support this concern'" *California*, 286 F. Supp. 3d at 1065. The BLM also stated that the 2016 rule's leak detection and repair requirements could cause operators to shut-in marginal wells, yet provided "no citation or factual basis for that claim," and did not "offer any more detail about what the additional compliance costs are, at what point they would cause shut-in of marginal wells, or the value of the supposed lost benefits." *Id*. With respect to royalty payments, the BLM expressed doubt that its 2016 Regulatory Impact Analysis ("RIA") correctly concluded that royalty payments would increase under the waste prevention rule, but failed to provide a "detailed justification" for rejecting the RIA's determination that there would be a significant increase in total royalties. *Id*. at 1067. The court considered the best justification for the Suspension Rule to be the BLM's concern that the 2016 MWPR will be held invalid, either in its entirety or in part, in the ongoing litigation before the United States District Court for the District of Wyoming. In its order denying injunctive relief, the Wyoming district court expressed concern that the MWPR may impermissibly intrude on the EPA's authority to regulate air pollution, and also questioned the BLM's cost/benefit calculations. *See supra* notes 142-144. However, the United States District Court for the Northern District of California held that the Suspension Rule was not appropriately tailored to address concerns regarding invalidation of the MWPR. *California*, 286 F. Supp. 3d at 1067–68.

[145] *Id*. at 1068.

[146] The BLM appealed the invalidation of the Suspension Rule, but was subsequently allowed to dismiss its appeal. *See* Order Granting Motion to Dismiss Appeal, State of California v. U.S. Bureau of Land Mgmt., No. 18-15711 (9th Cir. Mar. 15, 2018).

[147] *See* Order Granting Joint Motion to Stay at 5, Wyoming v. U.S. Dept. of the Interior, No. 2:16-cv-002800-SWS (D. Wyo. Dec. 29, 2017) (lead case).

invalidated the Suspension Rule, the BLM published a proposal "to revise the 2016 final rule in a manner that reduces unnecessary compliance burdens, is consistent with the BLM's existing statutory authorities, and re-establishes long-standing requirements that the 2016 final rule replaced."[148]

As previously discussed, in January 2017, the United States District Court for the District of Wyoming initially declined to enjoin the methane waste prevention rule pending judicial review.[149] However, in light of the February 2018 proposed "Revision Rule," in April 2018, the Wyoming district court stayed implementation of the Waste Prevention Rule's phase-in provisions.[150] The court relied on Section 705 of the Administrative Procedure Act, which "to the extent necessary to prevent irreparable injury," empowers a reviewing court to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."[151] The court also described the MWPR litigation as "symbolic of the dysfunction in the current state of administrative law," and declared that the "waste, inefficiency, and futility associated with a ping-ponging regulatory regime is self-evident and in no party's interest."[152]

Both sides appealed, and the United States Court of Appeals for the Tenth Circuit dismissed the appeals as moot on April 9, 2019.[153] Consequently, although the BLM was not able to use its rulemaking authority to stop the implementation of the 2016 methane waste prevention rule, the industry petitioners seeking to overturn the 2016 MWPR were able to prevent the implementation of the rule, at least pending judicial review of the 2018 replacement rule.

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[148] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements83 Fed. Reg. 7,924 (Feb. 22, 2018).

[149] *See supra* note 123.

[150] Wyoming v. United States Dept. of the Interior, 366 F.Supp.3d 1284 (D. Wyo. Apr. 4, 2018) (order staying implementation of rule provisions and staying action pending finalization of revision rule). The court also stayed the litigation "until the BLM finalizes the Revision Rule, so that this Court can meaningfully and finally engage in a merits analysis of the issues raised by the parties." *Id.* at 1292.

[151] 5 U.S.C. § 705 (1966). The court found that the petitioners "will be irreparably harmed by full and immediate implementation of the 2016 Waste Prevention Rule, magnified by temporary implementation of significant provisions meant to be phased-in over time that will be eliminated in as few as four months." *Wyoming*, 366 F.Supp.3d 1284 at 1291.

[152] *Id*. at *1, 5. The district court thereafter denied a motion to stay, pending appeal, its decision to stay the implementation of the MWPR's phase-in provisions. The court rejected the argument that it must utilize the four-factor preliminary injunction test in determining whether to grant relief under Section 705 of the APA. Order Denying Motion for Stay Pending Appeal, Wyoming v. United States Dept. of the Interior, No. 2:16-cv-002800-SWS (lead case) (Apr. 30, 2018).

[153] Order and Judgement, State of Wyoming v. U.S. Dep't of the Interior, Nos. 18-8027 and 18-8029 (10th Cir. Apr. 9, 2019). *See id.* at 6 ("Any decisions we might issue in these interlocutory appeals would have no real-world effect because the rules the district court enjoined have been replaced.").

5. Efforts to replace the 2016 methane waste prevention rule.

Although the Trump Administration was not able to secure the nullification of the MWPR, or issue a valid rule delaying its phase-in provisions, it has completed the notice-and-comment rulemaking process to replace the Obama rule. On September 18, 2018, the BLM published its final rule ("Replacement Rule"), which rescinds part of the 2016 MWPR, revises certain requirements, and adds new provisions. The Replacement Rule became effective on November 27, 2018, just over two years after Donald Trump was elected president.[154]

The 2018 Replacement Rule rescinds "novel requirements" in the MWPR, including the requirements for "waste-minimization plans, gas-capture percentages, well drilling, well completion [], pneumatic controllers, pneumatic diaphragm pumps, storage vessels, and leak detection and repair."[155] The Rule revises provisions related to venting and flaring, and adds new "provisions regarding deference to appropriate State or tribal regulation in determining when flaring of associated gas from oil wells will be royalty-free."[156] Another significant change is the addition of a definition of "waste of oil or gas"[157] that "codifies the BLM's policy determination that it is not appropriate for 'waste prevention' regulations to impose compliance costs greater than the value of the resources they are expected to conserve."[158]

The justifications for replacing the 2016 MWPR fall into two categories: (1) the Replacement Rule is needed because the existing rule is legally problematic; and (2) the Replacement Rule is preferable because it reduces unnecessary regulatory burdens and is cost-effective. With regard to whether the MWPR is ultra vires agency action, the 2018 rule states "that many provisions of the 2016 rule exceeded the BLM's statutory authority to regulate for the prevention of 'waste' under the Mineral Leasing Act (MLA)."[159] The 2016 BLM rule, according to the 2018 BLM, does not take

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[154] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184 (Sept. 28, 2018).

[155] *Id*.

[156] *Id*. *See also id*. at 49,190 (describing changes to downhole well maintenance and liquids unloading requirements, and requirements for measuring and reporting volumes of gas vented and flared, and stating that the 2018 rule does not merely return the regulatory regime in place prior to the MWPR, but makes "[n]otable improvements" such as "[c]odifying a general requirement that operators flare, rather than vent, gas that is not captured (§ 3179.6); requiring persons conducting manual well purging to remain onsite in order to end the venting event as soon as practical (§ 3179.104); and, providing clarity about what does and does not constitute an 'emergency' for the purposes of royalty assessment (§ 3179.103).").

[157] *Id*. at 49,212 (43 C.F.R. § 3179.3).

[158] *Id*. at 49,197 (noting that the proposed definition, which was adopted in the final rule, "incorporated the definition of 'waste of oil or gas' from the BLM's operating regulations at 43 CFR 3160.0–5, but added an economic limitation: Waste does not occur where the cost of conserving the oil or gas exceeds the monetary value of that oil or gas.").

[159] *Id*. at 49,185. The MLA requires oil and gas lessees to "use all reasonable precautions to prevent waste of oil or gas developed" on public lands and to observe "'such rules . . . for the prevention of undue waste as may be prescribed.'" *Id*. at 49,185–86 (citing 30 U.S.C. §§ 187, 225). In support of its new position, the [Trump] BLM notes that, when the United States District Court for the District of Wyoming agreed with the [Obama] BLM in January 2017 that the MWPR should not be enjoined, it nonetheless

"lease-specific circumstances faced by an operator -- including the economic viability of capturing and marketing the gas -- into account," and is based on the erroneous premise "that essentially any losses of gas at the production site [can] be regulated as 'waste,' without regard to the economics of conserving that lost gas."[160] The Replacement Rule also concurs with the commenters that assert that the 2016 rule went beyond BLM's authority by regulating "air quality under the guise of waste prevention."[161] In order to "not usurp the Clean Air Act authority of the EPA, the States, and tribes," the Replacement Rule rescinds provisions of the MWPR "that imposed costs in excess of their resource conservation benefits or created the potential for impermissible conflict with the regulation of air quality by the EPA or the States under the Clean Air Act."[162]

Even if the MWPR is a lawful exercise of delegated rulemaking authority, the BLM believes the Replacement Rule is preferable because the 2016 rule: (1) "added regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation";[163] (2) imposed compliance costs that are "well in excess of the value of the resource (natural gas) that would have been conserved,"[164] and (3) overlapped with EPA and state requirements for oil and gas operations.[165] The Replacement Rule states that "many of the 2016 rule's requirements placed a particular

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expressed "grave concerns that the BLM had usurped the authority of the EPA and the States under the Clean Air Act, and questioned whether it was appropriate for the 2016 rule to be justified based on its environmental and societal benefits, rather than on its resource conservation benefits alone." *Id.* at 49,186. The BLM in the Replacement Rule states that it "has considered the court's concerns with the 2016 rule and finds them to be valid." *Id*.

[160] *Id*. at 49,186 ("in adopting an interpretation of 'waste' that is not informed by the economics of capturing and marketing the gas, the BLM ignored the longstanding concept of 'waste' in oil and gas law, which Congress adopted in enacting the MLA."); *id*. at 49,184 ("the 2016 rule's approach to reduction of fugitive emissions and flaring departed from the historic approach of considering 'waste' in the context of a reasonable and prudent operator standard."). This proposed definition of waste, which excludes avoidable releases of natural gas, is described as "deeply flawed" in comments submitted by law professors with expertise in natural resources law. *See* Memorandum from David. E. Adelman et al. on Comments on Proposed Rule on Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, and Related Regulatory Impact Analysis 7 (Apr. 23, 2018), *available at* https://perma.cc/BK97-9KA8. *See also id*. at 8 ("The common law addresses the competing incentives in this situation by prohibiting the present user from exploiting the resource in a way that maximizes the present value of the user's earnings stream at the expense of the overall value of the resource. Yet BLM instead proposes to sanction a calculus that would encourage the present user (the operator) to think only about its own earnings stream, and to control gas losses only when the user could make a profit by so doing. Under this approach, the public would lose out on royalty payments that would have been made had gas not been wasted. BLM's proposed definition is therefore contrary to the central premise of the common law of waste.").

[161] Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49,184, 49,189 (Sept. 28, 2018).

[162] *Id*. at 49,186. *See also id*. at 49,190 ("Many of the rescinded provisions of the 2016 rule focused on controlling emissions from sources and operations, which are regulated by EPA under its Clean Air Act authority, and for which there are analogous EPA regulations.").

[163] *Id*. at 49,184.

[164] *Id*.

[165] *See id*. at 49,188–89. *See also id*. at 49,189 ("[E]ven if the 2016 rule did not exceed the BLM's statutory authority, it is nonetheless within the BLM's authority to revise its 'waste prevention' regulations in a manner that balances compliance costs against the value of the resources to be conserved.").

compliance burden on operators of marginal or low-producing wells, and there is a substantial risk that many of these wells would not be economical to operate with the additional compliance costs."[166] In support of this position, the BLM states that nearly three-fourths of the regulated wells are marginal wells, and estimates "that the annual compliance costs associated with the 2016 rule would have constituted 24 percent of the annual revenues of even the highest-producing marginal oil wells and 86 percent of the annual revenues of the highest-producing marginal gas wells."167 In order to reduce this burden, the 2018 rule rescinds requirements for pneumatic equipment, storage tanks, and leak detection and repair.[168]

The Replacement Rule also concludes that the 2016 rule is not cost-effective.[169] While recognizing that the 2016 Regulatory Impact Analysis (RIA) found otherwise, the BLM states in the Replacement Rule that its prior determination "was dependent upon the use of a 'global' social cost of methane metric based on Technical Support Documents that have since been rescinded."[170] The determination to no longer consider the global social costs of methane was made by President Trump in Executive Order 13873, entitled "Promoting Energy Independence and Economic Growth."[171] In addition to changing the decision-making process, Executive Order 13783 disbanded the Interagency Working Group on Social Cost of Greenhouse Gases and directed the DOI to review the MWPR and, if appropriate, "suspend, revise, or rescind" the rule.[172]

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[166] *Id*. at 49,187.

[167] *Id*. at 49,185 ("The BLM also finds that marginal oil and gas production on Federal lands supported an estimated $2.9 billion in economic output in the national economy in FY 2015.").

[168] *Id*. at 49,184 (noting that, by rescinding the requirements, "this final rule allows operators to continue implementing waste reduction strategies and programs that they find successful and to tailor or modify their programs in a manner that makes sense for their operations.").

[169] *Id*. at 49,186 ("[T]he BLM reviewed the 2016 rule's requirements and determined that the rule's compliance costs for industry and implementation costs for the BLM exceed the rule's benefits.").

[170] *Id*. at 49,187. *See also id*. at 49,190 ("[T]he Technical Support Documents that provided the basis for the use of the global social cost of methane in the 2016 RIA were rescinded by E.O. 13783."). The BLM also noted that, in the decision that invalided its Suspension Rule as arbitrary and capricious agency action, the United States District Court for the Northern District of California addressed the social cost of methane issue and stated that "'[BLM] has provided a factual basis for its change in position (the OMB circular and Executive Order 13793) as well as demonstrated that the change is within its discretion, at least with respect to this aspect of the RIA.'" *Id*. at 49190–91 (quoting California v. BLM, 286 F. Supp. 3d 1054, 1070 (N.D. Cal. 2018)).

[171] Exec. Order No. 13, 783, 82 Fed. Red. 16,093, 16,095-96 (Mar. 28, 2017).

[172] *Id*. Section 5 of Executive Order 13,783 is set forth below:

> **Sec. 5.** *Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis*. (a) In order to ensure sound regulatory decision-making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.
>
> (b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

IV. IS THE 2018 METHANE WASTE PREVENTION RULE A LAWFUL AGENCY ACTION?

On September 18, 2018, the day the Replacement Rule was issued, the states of California and New Mexico filed a lawsuit to enjoin and vacate the rule, and on September 28, 2018, the date of the rule's publication in the Federal Register, a similar lawsuit was filed by a coalition of environmental organizations, conservation organizations, and tribal citizen groups.[173] The two lawsuits, which have been consolidated, are pending before Judge Yvonne Gonzalez Rogers of the United States District Court for the Northern District of California.[174] The lawsuits contend that the BLM has "failed to offer a reasoned explanation for repealing requirements that, just two years ago, the agency determined were necessary to fulfill its statutory mandates."[175] Both lawsuits also claim that the BLM's determination that the Replacement Rule has no significant environmental impacts violates the

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> (i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);
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> (ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);
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> (iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);
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> (iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);
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> (v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide (August 2016); and
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> (vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).
>
> (c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A–4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.

Id.

[173] *See generally State of California v. Zinke*, *supra* note 28; *Sierra Club v. Zinke*, *supra* note 33.

[174] In February 2018, a different judge, U.S. District Court Judge William H. Orrick, granted California and New Mexico's motion to enjoin the BLM's Suspension Rule, which had sought to delay compliance deadlines in the MWPR pending rulemaking efforts to replace the rule. *See* California v. BLM, 286 F. Supp. 3d 1054, 1076 (N.D. Cal. 2018) ("Plaintiffs have provided several reasons that the Suspension Rule is arbitrary and capricious, both for substantive reasons, as a result of the lack of a reasoned analysis, and procedural ones, due to the lack of meaningful notice and comment.").

[175] *State of California v. Zinke*, *supra* note 28, at 3. *See also Sierra Club v. Zinke*, *supra* note 33, at 24 ("BLM fails to reconcile its new argument that the Waste Prevention Rule exceeds BLM's statutory authority with the arguments that it made in adopting the Waste Prevention Rule and defending it in court.").

Administrative Procedure Act[176] and the National Environmental Policy Act.[177]

As previously noted,[178] "[w]hen an agency takes an action that represents a policy change, it 'must show that that there are good reasons for the new policy,' '[b]ut it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute [and] that there are good reasons for it.'"[179] The agency, however, must "provide a more detailed justification than what would suffice for a new policy created on a blank state,"[180] and "must supply a reasoned analysis indicating [] its prior policies and standards are being deliberately changed, not casually ignored."[181] This may prove difficult for the Trump Administration. When the BLM offered similar justifications for the issuance of the Suspension Rule, the district court noted that the Bureau "need not provide a level of analysis equivalent to . . . any future revision rule."[182] Nevertheless, after examining the reasons offered for delaying the compliance dates in the MWPR, the court held that "it appears that BLM is simply 'casually ignoring' all of its previous findings and arbitrarily changing course."[183]

1. The arguments for and against the 2018 Replacement Rule.

In defense of the Replacement Rule, the 2018 BLM agrees with previously rejected arguments that some provisions of the 2016 rule are ultra vires and impermissibly intrude on the authority of the EPA or the States to regulate air quality.[184] In December 2016, however, the BLM argued in the United States District Court for the District of Wyoming that the MWPR "is a lawful exercise of BLM's longstanding and unambiguous authority under the MLA, FOGRMA, and IMLA to prevent the waste of federal and Indian

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[176] 5 U.S.C. § 706 (2018).

[177] 42 U.S.C. § 4332(2)(C) (2018). *See State of California v. Zinke*, *supra* note 28, at 21 ("Defendants' failure to take a 'hard look' at the direct, indirect, and cumulative impacts of the Waste Rule Repeal, including impacts related to air pollution, public health, and climate change harms, is also arbitrary and capricious, an abuse of discretion, and contrary to the requirements of the APA and NEPA."); *Sierra Club v. Zinke*, *supra* note 33, at 3 ("BLM relies on a cursory 26-page Environmental Assessment (EA) rather than a more comprehensive Environmental Impact Statement (EIS) despite the Rescission Rule's significant environmental impacts.").

[178] See *supra* at notes 14–15 and accompanying text.

[179] California v. BLM, 286 F. Supp. 3d 1054, 1064 (2018) (quoting F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)). *See also* Buzbee, *supra* note 15, at 1407 ("Policy change is [] possible, but an agency that proposes a policy change while also trying to sidestep science, studies, data, and the agency's own past explanations will, due to these linked facets of reasoned decision-making's requirements, be vulnerable to judicial rejection.").

[180] *Fox Television.*, 556 U.S. at 515. *See also id*. at 515–16 ("In such cases it is not that further justification is demanded by the mere fact of the policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

[181] Action for Children's Television v. F.C.C., 821 F.2d 741, 745 (D.C. Cir. 1987).

[182] *California*, 286 F. Supp. 3d at 1068.

[183] *Id*.

[184] *See supra* notes 154-157 and accompanying text.

mineral resources and to ensure that federal, state and tribal governments receive royalties on salable minerals."[185] The memorandum in opposition to the petitioners' motion to enjoin the 2016 rule sets forth a detailed defense of the BLM's rulemaking authority[186] and concludes that the aforementioned statutes, as well as trust responsibilities to Indian mineral owners, "*unambiguously* provide congressional authorization to BLM to regulate oil and gas development to prevent the waste of federal and Indian mineral resources, protect the safety of workers, and ensure receipt of royalties on salable gas."[187] What was considered to be unambiguously within the BLM's delegated authority is now considered by the BLM to be ultra vires agency action. In order to prevail on the issue of delegated authority, the BLM must not only refute the arguments of the plaintiffs; it must also refute its own prior arguments.[188]

Other issues that will be litigated include the BLM's new definition of waste, the regulatory impact of the 2016 rule on marginal wells, and the BLM's decision to exclude the global social costs of methane in weighing costs and benefits. The opponents of the 2018 rule argue that the new definition of "waste of oil or gas" is arbitrary and capricious and violates the plain language and intent of the Mineral Leasing Act.[189] With regard to the regulatory impact on low-producing wells, the states of California and New Mexico point out that the BLM "previously found that marginal or low-producing wells would *not* be overburdened by the Rule."[190] The most

[185] Federal Respondents' Consolidated Opposition to Petitioners' and Petitioner-Intervenor's Motions for Preliminary Injunction at 31, Wyoming v. U.S. Dep't of the Interior, No. 2:16-cv-0280-SWS (Dec. 15, 2016) (lead case). The referenced statutes are the Mineral Leasing Act, 30 U.S.C. §§ 188–287, the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785, and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–2108. *See also id.* at 1–2 ("Because the Rule is aimed at waste prevention, it falls squarely within BLM's authority under the Mineral Leasing Act ('MLA'), which requires oil and gas lessees to 'use all reasonable precautions to prevent waste of oil and gas developed' on public lands and to observe 'such rules . . . for the prevention of undue waste as may be prescribed' by the Secretary of the Interior. 30 U.S.C. §§ 187, 225.").

[186] *Id.* at 12–13.

[187] *Id*. at 18 (emphasis added). The federal defendants, in the prior litigation, also argued that "the Waste Prevention Rule is not a pollution control rule and does not improperly infringe on the Environmental Protection Agency's ('EPA') authority under the Clean Air Act." *Id*. at 2.

[188] *Sierra Club v. Zinke*, *supra* note 33, at 24 ("BLM fails to reconcile its new argument that the Waste Prevention Rule exceeds BLM's statutory authority with the arguments that it made in adopting the Waste Prevention Rule and defending it in court.").

[189] *State of California v. Zinke*, *supra* note 28, at 19 ("This definition completely ignores BLM's statutory mandates to ensure that the American public receives a fair return on publicly-owned resources, as well as BLM's duty to protect public health and the environment. This new definition is also contrary to the existing definition of 'waste' found elsewhere in BLM's regulations, is incoherent given the variability in the size of operators and oil and gas price fluctuations, and constitutes an unexplained and unsupported change in position."); *Sierra Club v. Zinke*, *supra* note 33, at 2 ("This definition violates the plain language and intent of the Mineral Leasing Act, which requires BLM to consider not just private oil and gas interests, but also the 'interests of the United States' and the 'public welfare' when regulating waste of publicly owned oil and gas resources leased, in the public interest, to oil and gas companies.") (citing 30 U.S.C. § 187 (2018)).

[190] *State of California v. Zinke*, *supra* note 28, at 18 (emphasis added). *See also id*. (noting that the 2016 MWPR "contains a provision allowing operators to propose a less costly alternative where compliance with the Rule would be 'so costly as to cause the operator to cease production and abandon significant recoverable oil or gas reserves under a lease.'") (citing 81 Fed. Reg. at 83,030 (Nov. 18, 2016)).

contentious issue may be the BLM's reversal of position with respect to whether the 2016 methane waste prevention rule is cost-effective. The BLM believes that its prior view–that the MWPR is a "win-win" proposition–is no longer correct in light of President Trump's executive order withdrawing the decision-making documents that required consideration of the global social costs of methane. In marked contrast, the BLM in 2016 argued that the global social cost of methane metric:

> represents the best available estimates of the monetary value of impacts arising from marginal changes in methane emissions, taking into account a "range of anticipated climate impacts, such as net changes in agricultural productivity and human health, property damage from increased flood risk, and changes in energy system costs, such as reduced costs for heating and increased costs for air conditioning."[191]

The states of California and New Mexico, in their challenge to the Replacement Rule, assert that the limited focus on domestic social costs of methane "is outcome-seeking; fails to take into account the best available science; undervalues . . . benefits to public health and safety . . .; fails to adequately address risk and uncertainty; and ignores significant climate impacts."[192] The environmental, conservation, and tribal citizen organizations point out that the BLM "does not acknowledge that the National Academies and the Interagency Working Group have concluded that no good methodologies exist for excluding non-domestic harms."[193] A nonprofit research institution, Resources for the Future, has independently concluded that "the Trump administration's domestic estimate is likely to underestimate impacts to the US from greenhouse gas emissions."[194]

2. The Keystone XL Pipeline litigation.

The 2018 Replacement Rule will be reviewed pursuant to the deferential *Chevron* doctrine and the deferential arbitrary and capricious

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[191] Federal Respondents' Consolidated Opposition to Petitioners' and Petitioner-Intervenor's Motions for Preliminary Injunction at 59, Wyoming v. U.S. Dep't of the Interior, No. 2:16-cv-002800-SWS (Dec. 15, 2016) (lead case) (quoting the 2016 Regulatory Impact Analysis).

[192] *State of California v. Zinke*, *supra* note 28, at 18. *Cf.* Ariel San Miguel, *Recent Developments in Environmental Law: Agency Rulemaking: Methane Emissions*, 32 TUL. ENVTL. L.J. 143, 148 (2018) (arguing that the usage of the social cost of methane is "an inappropriate gauge of 'net benefit' if gauged in terms of preventing the 'waste of natural gas' rather than preventing losses from air pollution and climate change.").

[193] *Sierra Club v. Zinke*, *supra* note 33, at 28. *See also id*. ("BLM also fails to acknowledge that because of the global economy's highly integrated nature, the international impacts of climate change will inevitably spill over into the United States, creating *domestic* harms. BLM has no answer to comments pointing out these domestic harms in its final rule; instead, it simply ignores this important aspect of the problem.").

[194] Alan J. Krupnick & Isabel Echarte, *The 2016 BLM Methane Waste Prevention Rule: Should It Stay or Should It Go?*, RES. FOR THE FUTURE 30 (Apr. 18, 2018). The report noted that "some impacts occurring abroad can affect the US through the global economy," and also suggested that the employment by the Trump Administration of an unduly high discount rate produced underestimated global and domestic social costs. *Id*. at 29–30.

standard. It may be upheld as rational decision-making and "permissible under the statute[s]."[195] However, in another challenge to a Trump Administration decision favoring the oil and gas industry, a federal district court in November 2018 held that the State Department engaged in unlawful agency action when it disregarded prior factual findings and reversed course regarding the Keystone XL pipeline project.[196] This decision, *Indigenous Environmental Network v. United States Department of State*,[197] could be a harbinger of future court decisions that will likewise strike down similar attempts to reverse and replace existing environmental and energy policies.

The Keystone XL pipeline, owned by TransCanada, is an extension of the Keystone Pipeline System, which transports oil extracted from tar sands.[198] In 2015, the Obama Administration concluded that the project would undermine efforts to combat climate change and was not in the country's national security interest.[199] President Trump, in his first week in office, issued an executive order expediting environmental reviews and approvals for "High Priority Infrastructure Projects,"[200] and in March 2017, signed a presidential permit that effectuated the decision of the State Department to allow TransCanada to construct the cross-border pipeline.[201] Environmental advocacy organizations filed suit to enjoin the project, claiming that the State Department violated federal laws, including the National Environmental Policy Act ("NEPA") and Endangered Species Act, when it issued its Record of Decision ("ROD") and national interest determination in favor of the pipeline.[202] The lawsuit also alleged that the State Department's change in course regarding climate change violated the APA.[203]

The United States District Court for the District of Montana held that the Trump State Department "failed to comply with NEPA and the APA when it disregarded prior factual findings related to climate change and reversed course."[204] In particular, the court held that "the Department's 2017 conclusory

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[195] F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[196] Indigenous Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561 (D. Mont. 2018).

[197] *Id*.

[198] This description of the Keystone XL pipeline, and related regulatory developments and litigation, is based in part on the summary in the Harvard Law School Environmental and Energy Law Program's "Regulatory Rollback Tracker." *See Keystone XL Pipeline*, HARVARD, https://eelp.law.harvard.edu/2018/02/keystone-xl-pipeline/ (last visited Mar. 23, 2019).

[199] Elise Labott & Dan Berman, *Obama rejects Keystone XL pipeline*, CNN (Nov. 6, 2015), https://www.cnn.com/2015/11/06/politics/keystone-xl-pipeline-decision-rejection-kerry/index.html (Nov. 6, 2015).

[200] Exec. Order No. 13,766, 82 Fed. Reg. 8,657 (Jan. 24, 2017).

[201] Amber Jamieson & Adam Vaughan, *Keystone XL: Trump issues permit to begin construction of pipeline*, THE GUARDIAN (Mar. 24, 2017), https://www.theguardian.com/environment/2017/mar/24/keystone-xl-pipeline-permit-trump-administration.

[202] *See generally Indigenous Envtl. Network*, 347 F. Supp. 3d 561.

[203] *Id*. at 573.

[204] *Id.* at 576. The Endangered Species Act was also violated by an inadequate consideration of oil spill impacts on protected species. *Id*. at 575. The federal defendants prevailed on most of the remaining NEPA claims.

analysis that climate-related impacts from Keystone subsequently would prove inconsequential and its corresponding reliance on this conclusion as a centerpiece of its policy change required the Department to provide a 'reasoned explanation.'"[205] Because the State Department failed to provide a detailed justification for adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy,"[206] the court vacated the 2017 ROD and remanded with instructions that the Trump Administration "provide a reasoned explanation for the 2017 ROD's change in course."[207]

The district court in *Indigenous Environmental Network v. United States Department of State* held that the State Department's "2017 ROD ignores the 2015 ROD's conclusion that 2015 represented a critical time for action on climate change."[208] In similar fashion, the district court in *State v. Bureau of Land Management* held that the BLM, in issuing its methane waste Suspension Rule, did not rely on "considerations that [it] left out in its previous analysis, or some other concrete basis supported in the record," but instead "'casually ignor[ed]' all of its previous findings and arbitrarily chang[ed] course."[209] The states and organizations seeking to enjoin and vacate the 2018 Replacement Rule likewise argue that the BLM has ignored its prior findings and conclusions.[210]

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[205] *Id*. (quoting Organized Vill. of Kake v. U.S. Dep't of Agriculture, 795 F.3d 956, 968 (9th Cir. 2015) ("The Department instead simply discarded prior factual findings related to climate change to support its course reversal.").

[206] F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[207] *Indigenous Envtl. Network*, 347 F. Supp. 3d at 591. TransCanada has appealed (9th Cir. No. 18-36068) and the Indigenous Environmental Network and North Coast Rivers Alliance have cross-appealed (9th Cir. No. 19-35036). The United States has also cross-appealed (9th Cir. No. 19-35099).

[208] *Id*. at 584 ("The Department did not merely make a policy shift in its stance on the United States' role on climate change. It simultaneously ignored the 2015 ROD's Section 6.3 titled 'Climate Change-Related Foreign Policy Considerations.'").

[209] California v. BLM, 286 F. Supp. 3d 1054, 1068 (N.D. Cal., 2018).

[210] *See, e.g.*, *State of California v. Zinke*, *supra* note 28, at 19 ("BLM's new definition of 'waste of oil or gas' . . . ignores BLM's statutory mandates to ensure that the American public receives a fair return on publicly-owned resources, as well as BLM's duty to protect public health and the environment . . . is also contrary to the existing definition of 'waste' found elsewhere in BLM's regulations."); *Sierra Club v. Zinke*, *supra* note 33, at 27 (The BLM's decision to revert, in some situations, to the venting and flaring requirements that it applied prior to the 2016 MWPR "ignores [] problems with [the requirements] that it identified in 2016, and were identified in the [Government Accountability Office] reports."). On November 23, 2018, the U.S. Global Change Research Program released Volume 2 of the Fourth National Climate Assessment report, entitled "Impacts, Risks, and Adaptation in the United States." The report acknowledges that, "[c]ommunities, governments, and businesses are working to reduce risks from and costs associated with climate change by taking action to lower greenhouse gas emissions and implement adaptation strategies," but warns that "mitigation and adaptation efforts . . . do not yet approach the scale considered necessary to avoid substantial damages to the economy, environment, and human health over the coming decades." U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT VOLUME II IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 26 (2018), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf. The report was immediately dismissed by President Trump. Chris Cillizza, *Donald Trump buried a climate change report because 'I don't believe it'*, CNN (Nov. 27, 2018, 10:57 PM), https://www.cnn.com/2018/11/26/politics/donald-trump-climate-change/index.html. California Attorney General Xavier Becerra, on the other hand, has stated that "'we will use every bit of that report'" in pending environmental lawsuits against the Trump Administration, including litigation challenging rollbacks on fuel efficiency standards for automobiles, hydraulic fracking, and methane emissions. Stuart Leavenworth, *As Trump dismisses climate change*

After unsuccessfully moving for a stay of the district court's injunction pending appeal, President Trump issued a "presidential permit" to revoke the State Department permit and authorize the border crossing of the Keystone XL pipeline.[211] According to the Trump Administration, the permit "reinforces, as should have been clear all along, that the presidential permit is indeed an exercise of presidential authority — that is not subject to judicial review under the Administrative Procedure Act."[212] According to a Sierra Club spokesman, the presidential permit is an attempt to circumvent the courts and "bypass 'bedrock' environmental laws for the benefit of a foreign pipeline company."[213]

CONCLUSION

The methane waste prevention rule was promulgated in 2016 and became effective on January 17, 2017, at the very end of the Obama Administration.[214] President Trump urged Congress to nullify the rule, but the legislative effort fell short by one vote in the Senate.[215] The BLM then issued a "postponement" rule without notice-and-comment that violated the APA.[216] A subsequent "suspension" rule, which was issued after notice was provided and comments were received, was enjoined as arbitrary and capricious agency action because the BLM failed to sufficiently explain why it was reversing course.[217] In short, efforts to nullify, postpone, and suspend the MWPR did not succeed.

Undaunted, the BLM proposed a "rescission" rule and obtained a judicial stay of the phase-in provisions of the 2016 rule. On November 27, 2018, the Obama methane waste prevention rule was replaced with the Trump methane waste prevention rule.[218] However, it remains to be seen whether this "stay and replace" strategy will survive judicial scrutiny. Moreover, if the current litigation is prolonged until 2020, it is possible that a new president will be elected who may seek to nullify, suspend, stay, and replace the Trump methane waste prevention rule.

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report, California plans to use it against him, MCCLATCHY DC BUREAU (Nov. 28, 2018, 4:50 PM), https://www.mcclatchydc.com/news/policy/environment/climate/article222309155.html.

[211] *See* Presidential Memorandum from Donald J. Trump on Presidential Permit to TransCanada Keystone Pipeline (Mar. 29, 2019), *available at* https://www.whitehouse.gov/presidential-actions/presidential-permit/.

[212] Mary Papenfuss, *Trump Sidesteps Court Order, Issues Edict To Build Controversial Keystone XL Pipeline*, HUFF. POST (Mar. 30, 2019, 2:54 AM), https://www.huffpost.com/entry/keystone-xl-pipeline-trump-presidential-permit_n_5c9ee89ae4b00ba6327d620a.

[213] *Id.*

[214] *See Supra* Part II.

[215] *Id.*

[216] *See Supra* Part III.

[217] *Id*.

[218] *Id*.