EXHIBIT 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY and SIERRA CLUB,

Plaintiffs,

v.

THE BUREAU OF LAND MANAGEMENT and Sally Jewel, Secretary of the Department of the Interior,

Defendants.

Case No. 5:11-cv-06174-PSG

BRIEF OF *AMICUS CURIAE* WESTERN ENERGY ALLIANCE

Date: August 6, 2013
Time: 10:00 a.m.
Courtroom: 10, 19th Floor

The Honorable Paul S. Grewal

Complaint Filed: December 8, 2011

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I. INTRODUCTION & BACKGROUND

Western Energy Alliance (Alliance) submits this *amicus curie* brief to argue that under well-established legal precedent, the proper remedy where the Court finds procedural violations under the National Environmental Policy Act (NEPA) is not lease cancellation. In addition, under NEPA, and the valid existing property rights established by the issuance of federal oil and gas leases, the proper remedy in this case is lease suspension, pending further NEPA analysis. Plaintiffs Center for Biological Diversity and Sierra Club (collectively CBD) erroneously apply a vacatur analysis to this case. Rather, this Court should look to the extensive legal precedent where courts have found that lease suspension is the proper remedy for procedural violations of NEPA in the federal oil and gas leasing context pending additional NEPA review and analysis.

As the Court is aware, CBD challenged Sally Jewel, Secretary of the U.S. Department of the Interior, and the Bureau of Land Management's (BLM) (collectively, the Federal Defendants) decision to issue federal oil and gas leases under the Administrative Procedures Act, 5 U.S.C. § 706 (APA) for alleged violations of NEPA, 42 U.S.C. § 4321, *et seq.*, and the Mineral Leasing Act, 30 U.S.C. § 181, *et seq.* (MLA). The Court held that BLM violated NEPA, but not the MLA. Order at 1-2 (ECF No. 30). On May 15, 2013, the Court ordered the parties to brief the appropriate remedy. ECF No. 52.

The Court found discrete violations of NEPA in that BLM failed to specifically take a "hard look" at the impacts of hydraulic fracturing—a practice that the Court acknowledges has been occurring for over 50 years. Order at 22-23. In doing so, the Court properly stated that Plaintiffs "provide no authority establishing the court's authority to [cancel leases] while the lessees stand absent from this suit." *Id*. at 28. The Court acknowledged that there is no authority mandating lease cancellation for procedural violations of NEPA. *Id.*

Despite the Court's acknowledgement on lease cancellation and binding Ninth Circuit precedent, in its Remedy Brief, ECF No. 55, CBD continues to advocate for lease cancellation. The Court should be guided by the Ninth Circuit's seminal case of *Conner v. Burford* and order the suspension of the leases pending compliance with NEPA. 848 F.2d 1441, 1461 (9th Cir. 1988. Under this and other precedent, a NEPA violation is procedural. It is well settled that

procedural violations of NEPA result in procedural remedies. Contrary to CBD, additional NEPA analysis—and not lease cancellation—is the proper remedy, preserving the leaseholders' property rights while BLM conducts additional NEPA analysis.

II. FEDERAL DEFENDANTS' RESPONSE

The Alliance supplements the brief of the Federal Defendants, who in accordance with controlling Ninth Circuit precedent, propose a remedy that allows the lease holders to maintain their property rights while the BLM prepares additional NEPA analysis to address the issues identified by the Court. As the Federal Defendants explain, during that time, the leases without no surface occupancy (NSO) restrictions would be held in suspension until the NEPA deficiencies are cured. These suspensions do not prejudice or harm the interest of CBD in any way as BLM will not permit any activity on the leases during the suspension.

The Federal Defendants Remedy Brief demonstrates the procedural and financial burden vacatur would place on BLM and the lessees if it were required to completely start over the lease sale process. Federal Response at 13-14. According to the BLM, and setting aside the work related to environmental evaluations that it would still have to conduct if the leases were only held in suspension, the government would be forced to begin the entire leasing process from the beginning, potentially causing years of delay. *Id*. at 14. Additionally, as explained by the Federal Defendants, vacatur would cancel valid existing lease rights and would set dangerous precedent for remedy of purely procedural violations of NEPA. *Id*. at 14-15. Vacatur would also diminish the market value of the challenged leases and eliminate the competitive advantages of the current lessees at any future lease sale for these parcels. *Id*.

III. INTEREST OF AMICUS CURIAE

The Alliance respectfully submits this brief in support of the Federal Defendants regarding the appropriate remedy resulting from the Court's Order. The Alliance is a non-profit, regional trade association representing more than 400 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Of its 400 members, including several members that currently have interests in oil and gas leases and oil

and gas development in California, including on lands owned by the United States and managed by BLM.

Alliance members are adversely affected by the Court's Order regarding the applicable level of NEPA required at the oil and gas leasing stage. The Order and potential cancellation of valid existing property rights would deprive Alliance members of valuable due process rights, and interfere with its members' and the oil and gas industry's ability to make reasoned decisions on investments. The Alliance has a substantial stake in ensuring that its members' valid existing property rights—existing federal oil and gas leases—are not cancelled when a court finds a procedural violation of NEPA.

In an industry as risk-laden and capital intensive as oil and gas development, certainty of investment requires transparency in governmental decision-making and the reasonable interpretation and application of regulations. The decision below undermines regulatory certainty, strands significant investment, and impedes oil and gas development and the benefits that the development of domestic, low-cost energy resources provides our nation. These issues are of critical importance to the Alliance and its members.

The federally-owned minerals in California and the entire American West provide the nation with reliable sources of oil and gas and increase tax revenues to state and local governments from associated oil and gas production. In order to protect such a vital piece of America's energy supply, companies operating on federal lands must have regulatory certainty and transparency in agency functions. If this Court mandates cancellation of the lessees' valid existing property rights, state and local economic activity, including oil and gas leasing and development, and the vast revenues each yields will diminish.

The oil and gas industry provides significant revenue to the United States treasury from oil and gas development and must be able to rely on a consistently applied set of regulations and contractual principles in the federal oil and gas leasing process. For example, in terms of revenue that Alliance members provide to the federal government, every dollar appropriated for BLM's Onshore Oil and Gas Management Program generates $88.76 in royalty, rent, and bonus revenue for the federal treasury. *See* Dept. of the Interior, Mineral Management Service, *Fiscal Year*

2012, The Interior Budget in Brief, Department of Interior, February 2011; *Reported Revenues: Federal Onshore in All States for FY in 2012*, U.S. Office of Natural Resources Revenue Statistical Information.[1] California receives just under one-half of the federal royalty and leasing revenue under the MLA. 30 U.S.C. § 191(a).

In 2012, the State of California received over $111 million in royalty payments for its share of federal oil and gas revenues, and across the American West, oil and natural gas development provided over $6.6 billion in direct government revenue for impacted communities, schools, conservation funds, and other public benefits.[2] These benefits to California and the federal treasury are threatened by a decision that would cancel already issued federal oil and gas leases and create dangerous precedent for NEPA violations in the context of the entire federal oil and gas leasing context.

IV. ARGUMENT: PROPER REMEDY ON REMAND

A. Standard for NEPA Violations

NEPA is a procedural statute promulgated to ensure that an agency makes an informed decision. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978). NEPA requires an agency to take a "hard look" at the environmental consequences of a proposed action and prescribes public dissemination of relevant environmental information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA "does not mandate particular results, but simply prescribes the necessary process." *Id*. The Tenth Circuit has also maintained that NEPA "prescribes the necessary process [and] does not mandate particular results." *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1240 (10th Cir. 2000) (citations omitted).

In *Northern Alaska Environmental Center v. Kempthorne (NAEC)*, the Ninth Circuit articulated the level of NEPA analysis required at each step of the federal oil and gas leasing,

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[1] *See* http://www.doi.gov/budget/appropriations/2012/highlights/upload/2012_Highlights_Book.pdf and http://statistics.onrr.gov/ReportTool.aspx.

[2] *See* Office of Natural Resources Statistical Information, found at http://statistics.onrr.gov/ and additional information compiled from the Department of Interior website.

exploration and development stages associated with oil and gas leasing on federal acreage in Alaska. 457 F.3d 969, 977 (9th Cir. 2006). This case is very instructive on the parameters of NEPA compliance and the detailed required in the federal oil and gas leasing context. The Ninth Circuit explained that "[a]t the earliest stage, the leasing stage we have before us, there is no way of knowing what plans for development, if any, may eventually materialize." *Id*. Thus, BLM was not required to conduct site-specific analysis at the leasing stage. *Id*. ("government was not required at [leasing] stage to do a parcel by parcel examination of potential environmental effects."). NEPA would still apply to subsequent proposals for exploration and development when more site-specific effects are identifiable. *Id*.

Several courts have specifically addressed the appropriate remedy for NEPA violations in the federal oil and gas leasing contexts. Most importantly, the Ninth Circuit's decision in *Conner v. Burford* specifically rejected the proposal of lease cancellation and merely "enjoin[ed] the federal defendants from permitting any surface-disturbing activity to occur on any of the leases until they have fully complied with NEPA and the ESA." 848 F.2d at 1466. Other courts have also held that for a NEPA violation in the oil and gas leasing context, the remedy is continued suspension of the leases, not lease cancellation. *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006); *Wilderness Society v. Wisely*, 524 F. Supp. 2d 1285, 1312 n.12 (D. Colo. 2007); *see also Willow Creek Ecology v. U.S. Forest Service*, 225 F. Supp. 2d 1312, 1316 (D. Utah 2002) (for procedural violations of a procedural statue such as NEPA, the remedies "are limited to procedural remedies.").

Consistent with these cases, the proper remedy for a procedural violation of NEPA is lease suspension and further NEPA analysis, not lease cancellation.

B. Consistent with Ninth Circuit Authority, the Court Should Not Cancel the Leases But Rather Suspend Them Pending Additional NEPA Analysis

Here, the proper remedy is to suspend the leases under 43 C.F.R. § 3103.4-4 until BLM addresses the Court's NEPA inadequacies. This remedy provides an opportunity for BLM to conduct additional NEPA review and analysis, and also provides the leaseholders with the security of their property interests pending compliance with NEPA. As this case involves a

procedural violation, the remedy must also be procedural, and it is well settled, by courts in the Ninth Circuit and others, that it is appropriate to suspend, and not cancel, leases pending additional NEPA analysis.

The Ninth Circuit's decision in *Conner v. Burford* is directly on point and must guide this Court's determination of a proper remedy on remand for procedural violations of NEPA. When BLM's leasing decisions have not complied with NEPA, BLM should suspend the affected leases pending additional analysis rather than cancelling or voiding the leases. *See Conner v. Burford*, 848 F.2d at 1461 (declining to require lease cancellation). The *Conner v. Burford* court "enjoin[ed] the federal defendants from permitting any surface-disturbing activity to occur on any of the leases until they have fully complied with NEPA and the ESA." 848 F.2d at 1466. By not vacating the leases, the court "avoid[ed] the unnecessarily harsh result of completely divesting the lessees of their property rights." *Id*. at 1461 n.50. Further, the Alliance maintains that even if the lessees were included in this case, the proper remedy for NEPA violations in further NEPA analysis. This Court should apply the same analysis and reject the inapposite vacatur analysis proffered by CBD.

Other courts have made similar rulings on the appropriate remedy for similar NEPA violations consistent with *Conner v. Burford*. Where, as here, a court finds narrow procedural violation of procedural statutes such as NEPA, the remedies "are limited to procedural remedies." *Willow Creek Ecology*, 225 F. Supp. 2d at 1316. The federal district court in Colorado was faced with a very similar issue in *The Wilderness Society, v. Wisely* which is instructive. In that case, plaintiffs brought similar legal challenges under the APA and NEPA. 524 F. Supp. 2d at 1285. The court recognized its very limited role was to review the procedures BLM undertook prior to offering specific lands for oil and gas development, and not to review the substantive policy decisions implicit in that decision. Although the court eventually determined that BLM's NEPA analyses were not sufficient to support leasing, the court did not cancel the oil and gas leases on remand. *Id.* at 1312 n.12 ("The Court will not simply void the September 2005 decision to resume leasing . . . as doing so might adversely affect property interests obtained by lessees . . .

.”). Rather, the Court simply prohibited further surface disturbing actions on the leases until BLM complied with its procedural obligations under NEPA.

The court’s holding in *Wisely* is consistent with similar decisions in which courts have found procedural NEPA violations associated with BLM and Forest Service leasing decisions, including decisions of the Ninth Circuit. In such situations, the normal procedure is to place the disputed leases in suspense, thus prohibiting any surface-disturbing operations, until the BLM has completed additional NEPA analysis. *See, e.g., Mont. Wilderness Ass’n*, 408 F. Supp. 2d at 1038 (determining the appropriate relief for NEPA violation is continued suspension of activity on the leases pending additional analysis).

Moreover, the federal district court in Utah held that suspension of the leases rather than cancellation of leases was sufficient to comply with the court’s order regarding NEPA violations. *S. Utah Wilderness Alliance v. U.S. Dep’t of the Interior*, No. 06-CV-342-DAK, 2007 WL 2220525, at *1 n.3, *2 (D. Utah July 30, 2007) (rejecting argument that cancellation is necessary to “wipe the slate clean”). Specifically, the court held that, “Plaintiffs are not entitled to any relief under NEPA beyond that which BLM’s suspension decision has already afforded.” *Id*. at *2. Court opinions such as *Southern Utah Wilderness Alliance*, have expressed that cancellation is not necessary because BLM will honor its NEPA obligations on remand even if leases are only suspended. *Id*. at *1-*2; *see also Wilderness Society*, 524 F. Supp. 2d at 1312 n.12.

As the Ninth Circuit also explained in *Northern Cheyenne Tribe v. Hodel*, “We see no reason to suppose that the Secretary will feel greater commitment to the original project if the leases are not voided but held in abeyance until a new evaluation is made.” 851 F.2d 1152, 1157 (9th Cir. 1988. These courts’ willingness to permit BLM to suspend leases while it completes additional analysis, rather than ordering vacatur, signals that NEPA does not require BLM to void leases prior to undertaking additional analysis.

This extensive precedent is not inconsistent with *Bob Marshall Alliance v. Hodel*, 804 F. Supp. 1292, 1297-98 (D. Mont. 1992 where the court found that BLM’s failure to consider a “no action” alternative under NEPA prior to issuing oil and gas leases required cancellation of the leases. In that case, the court found that cancellation was appropriate because BLM had not

considered whether to lease in the first place. In other words, because BLM had not even considered the alternative of whether to lease, it had violated a specific provision of NEPA requiring analysis of the "no action" (no lease in this context) alternative. *Id*. at 1297 (relying on 42 U.S.C. § 4332(2)(E). Unlike *Hodel*, here, CBD did not argue, and this Court did not find, that BLM violated NEPA for failing to analyze a "no lease" alternative. Rather, the Court merely found that BLM failed to conduct additional analysis regarding the potential impacts of hydraulic fracturing prior to leasing. Order at 27-28.

Therefore, in this case where the Court required additional NEPA documentation, the remedy is simply performance of additional NEPA analysis, not lease cancellation. This additional analysis would inform BLM's decisions on remand regarding what, if any, additional lease stipulations should be applied to the leases to address hydraulic fracturing and protection of other resources of concern.

C. NEPA Violations Do Not Result in Improperly Issued Leases

CBD suggests that the lessees should have anticipated that BLM could cancel the leases as "improperly issued" under 43 C.F.R. § 3108.3(d) based on procedural violations of NEPA. CBD Opening Remedy Brief at 8-9 and Reply at 13-14. However, lease cancellation under 43 C.F.R. § 3108.3(d) is only appropriate for leases that are "improperly issued" in terms of being invalid at inception because the lands are not open for leasing or the legal requirements for lease sale procedures were not followed.

The Supreme Court noted in *Boesche v. Udall*, 373 U.S. 472, 476 (1963) that the Secretary of the Interior has the "authority to cancel [a] lease administratively for invalidity at its inception." Improper issuance, for example, occurs in instances in which the lands were not available for leasing at all or the lands were already under lease. *See, e.g., Inexco Oil Co*., 93 IBLA 124, 126 (1986). In this case, BLM cancelled leases because "the lands were not available for over-the-counter leasing . . . ." *Id*. Again, in *Celeste C. Grynberg*, BLM canceled leases because "the subject lands were simply not available for leasing." 169 IBLA 178 (2006), *aff'd* in Civ. No. 06-CV-1878 (D. Colo. 2008). Additionally, in cases involving the "non-availability of

the land for oil and gas filings[,] . . . the lease must be canceled." *Id*. (quoting *Claude C. Kenney*, 12 IBLA 183, 184 (1973).

A lease issued without following the proper procedure in NEPA is simply not an "improperly issued" lease. Contrary to CBD and regardless of whether the applicable Lease Sale Notice included a provision on lease cancellation, this provision simply does not apply to procedural violation of NEPA. *See* CBD Reply Brief at 13. CBD provides no authority that a lease issued without following all of the procedural parameters of NEPA is a lease "improperly issued." CBD Reply at 13-14. As discussed above, no court has established that procedural violations of NEPA result in improperly issued leases.

In sum, this case does not involve improperly issued leases, but rather properly issued leases in which the Court found procedural inadequacies in BLM's NEPA compliance. Accordingly, the proper remedy is lease suspension, not cancellation.

D. The Court Should Issue a Temporary Injunction Pending NEPA Compliance as Proposed by Federal Defendants

The Alliance maintains that the proper and sufficient remedy is lease suspension which could be implemented through a temporary injunction prohibiting surface-disturbing activity until BLM conducts additional NEPA analysis. Hydraulic fracturing—if it occurs at all—does not take place until after all surface-disturbing activity has taken place. Further, whether and what type of well stimulation or hydraulic fracturing will occur is not usually determined until the well has been drilled and the subsurface characteristics of the target formation are defined. It is never a foregone conclusion that hydraulic fracturing will actually occur.

The Federal Defendants' proposed remedy of ordering BLM to suspend the leases and remand to the agency is consistent with controlling case law, *see* Section IV.2. supra, and BLM's authority. *See* Federal Defendants Response at 4-5. The Federal Defendants are in the process of conducting additional NEPA analysis on remand and BLM may suspend operations and production on the non-NSO leases in the interest of conservation. *Id.* at 3, 5; *see also* 30 U.S.C. § 209 and 43 C.F.R. § 3103.4-4. This will allow BLM to conduct further analysis before a determination is made as to whether the leases remain in effect or whether the terms be modified.

Federal Defendants Response at 5.

Federal Defendants argue, moreover, this would be the least invasive remedy both fiscally and procedurally. Vacatur would require a complete restart of the lease sale process and require tens of thousands of dollars separate and apart from curing the NEPA defects. Federal Defendants Response at 14. In addition, there exists the possibility that the value of the leases may decrease in the next sale. *Id.*

V. CENTER FOR BIOLOGICAL DIVERSITY'S VACATUR REQUEST IGNORES CONTROLLING PRECEDENT AND CITES INAPPOSITE CASE LAW

CBD ignores the controlling precedent of *Conner v. Burford* and instead relies on various inapposite cases in support of its request that the Court order vacatur of the oil and gas leases. CBD Brief at 2-9. In doing so, CBD cherry picks from its cited cases to encourage the Court to "presume" that vacatur is the appropriate remedy in this action. As set forth above and in the Federal Defendants' brief, courts do not require vacatur when NEPA is violated.[3] The facts and context of the cases relied upon by CBD do not parallel the facts before this Court.

CBD relies heavily on cases that have no relation to the sale and purchase of oil and gas leases. These include cases concerning the national deregulation of a genetically engineered plant, *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) and *Center for Food Safety v. Vilsack*, 734 F. Supp. 2d 948 (N.D. Cal. 2010); cases involving the listing of an animal on the endangered species list, *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (court did *not* vacate agency ruling) and *In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d 214 (D.D.C. 2011); a case concerning the construction and operation of a power plant, *California Communities Against Toxics v. EPA*, 688 F.3d 989 (9th Cir. 2012) (court did not vacate agency ruling); and, a case concerning whether to permit an Indian tribe to resume whaling in the Pacific Ocean, *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).

The sole case that CBD cites relating to the sale and purchase of oil and gas leases actually supports the position that the Court should not vacate the leases at issue here. In *Pit*

[3] CBD's Reply Brief on Remedy further neglects to make any persuasive arguments that *Conner v. Burford* is inapplicable and that vacatur is the proper remedy.

River Tribe v. U.S. Forest Service, 615 F.3d 1069 (9th Cir. 2010), the court denied the request to vacate the original lease transaction but instead focused on a lease extension. Moreover, the court discussed the proper remedy for a NEPA violation in connection with a lease sale:

> Our courts have long held that relief for a NEPA violation is subject to equity principles. For example, in *Conner v. Burford*, we held that certain gas leases need not be invalidated, even though those leases had been sold in violation of NEPA. 848 F.2d 1441, 1461 (9th Cir. 1988). Rather, we held that it was sufficient to enjoin "any surface-disturbing activity to occur on any of the leases until they have fully complied with NEPA" and to instruct that "future environmental analysis by the federal agencies shall *not* take into consideration the commitments embodied in the . . . leases already sold." *Id.*
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> 615 F.3d at 1080-81 (emphasis in original).

CBD ignores the controlling precedent in *Conner v. Burford* and attempts to argue that vacatur is appropriate based on extraneous and irrelevant cases. Accordingly, the leases at issue should not vacated. Instead, consistent with *Conner v. Burford* and other principles of equity and property rights of the lessees, the Court should acknowledge BLM's suspension of the leases until BLM completes its further NEPA documentation.

VI. CONCLUSION

Oil and gas producers, including the members of the Alliance create high-paying jobs, spur economic growth, and provide substantial revenue to local, state and federal governments when they can obtain access to and develop federal oil and gas leases. This requires, however, consistent application of government regulations and contractual obligations. Ultimately, the financial impacts of outright lease cancellation that have been paid for and contractually agreed upon with the United States will seriously undermine the federal oil and gas leasing process, and negatively impact the federal, Californian and local economic activities that benefit each through taxes and other revenues collected. Such a drastic remedy is not based on equity or controlling precedents.

Accordingly, consistent with Ninth Circuit case law, the Court should order that the BLM suspend the leases pending compliance with NEPA.

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DATED: July 22, 2013

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