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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,	Case No. 6:15-CV-01517-TC
Plaintiffs,	**DEFENDANTS' MOTION FOR PROTECTIVE ORDER**
v.	
UNITED STATES OF AMERICA, *et al.*,	
Defendants.	

Defendants hereby move the Court for a protective order. As set forth fully in the accompanying memorandum of law, the Court should grant a protective order precluding the 30(b)(6) depositions and requests for admission noticed on the United States Department of the Interior, United States Department of Agriculture and the United States Department of Transportation. The parties have conferred and Plaintiffs oppose this motion. *See* LR 7-1(a).

Dated: June, 2018

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

As explained in Defendants' previous request for a protective order, discovery is improper in this case. Although Defendants acknowledge that Magistrate Judge Coffin denied the government's previous motion, we respectfully submit that he erred in so doing. Accordingly, we have objected to Magistrate Judge Coffin's rulings with the district judge. In addition, the government's motions for judgment on the pleadings and for summary judgment remain pending before the district court. Because a favorable ruling on any of these filings would eliminate the need for any further discovery, including the specific requests at issue here, we submit that the Court should grant Defendants a protective order from the requests for admission ("RFAs") and the noticed Rule 30(b)(6) depositions pending final resolution of the government's objections and these dispositive motions.

Plaintiffs served Rule 30(b)(6) notices each identifying four (compound) topics on the Departments of Agriculture, Transportation, and Interior. The topics seek information on (1) all bases for denial of specific allegations in Plaintiffs' operative complaint, (2) all bases for denial of any requests for admission that are not "fully admitted," (3) each agency's "role" in implementing a 2017 Executive Order, and (4) all agency plans that would eliminate the effects of climate change. The parties have met and conferred on topics (1) and (4) and, although Defendants continue to contend that any Rule 30(b)(6) depositions are improper for the reasons explained in the previous motion for a protective order, it appears that a mutually-acceptable resolution of Defendants' objections with respect to those two topics is in the offing. Topic (2) is improper for two primary reasons in addition to those explained in the previous motion for protective order. First, it is actually a contention interrogatory, which is not a proper topic for a Rule 30(b)(6) witness. Second, given the large number of requests for admission, topic (2) could amount to more than 400 discrete topics. Such a number is unduly burdensome for any witness,

much less an organizational witness. Defendants have explained to Plaintiffs that the information responsive to topic (3) is either in the public domain, rendering Rule 30(b)(6) testimony cumulative, or protected by deliberative process and, potentially, executive privilege. Plaintiffs have not been able to articulate a line of inquiry on topic (3) that would not fall to either of these defects. Hence, Defendants seek a protective order on topics (2) and (3) of Plaintiffs' Rule 30(b)(6) notice.

Plaintiffs have also served Defendants with over 400 requests for admission that impermissibly seek expert opinions, policy positions, factual assessments, and legal opinions. The requests are also unduly burdensome in that they seek information in a manner that maximizes the burden on Defendants even though the information sought is more readily and efficiently acquired through other procedural devices. These requests are improper and, given their sheer number and breadth, place an undue burden on the agencies. Hence, Defendants also seek a protective order excusing them from responding to these RFAs.

RELEVANT BACKGROUND

Plaintiffs predicate this lawsuit on an unenumerated and never-before-recognized constitutional right to a "climate system capable of sustaining human life." ECF No. 83, at 52. They asked this Court to order President Obama (and now President Trump), the Executive Office of the President, and eight federal agencies to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2." Am. Compl., Prayer for Relief ¶ 7, ECF No. 7. Plaintiffs base their demands on the Due Process Clause of the Fifth Amendment, equal protection principles in the Fifth Amendment, unenumerated rights reserved by the Ninth Amendment, and an asserted "public trust" obligation under an infrequently used doctrine that applies only to property rights in state-owned lands submerged beneath tidal and navigable waterways.

In November 2015, Defendants moved to dismiss Plaintiffs' claims on several grounds, including lack of standing, failure to state a cognizable constitutional claim, and failure to state a claim on a public trust theory. ECF No. 27. This Court denied that motion, and declined to certify its order for interlocutory appeal. *See* ECF Nos. 68, 83, 172. Defendants then petitioned the Ninth Circuit for a writ of mandamus in June 2017, arguing that mandamus was the only means of obtaining timely and effective relief to avoid serious intrusion into the separation of powers, and that the Court had erred in rejecting the contention that Plaintiffs' claims are nonjusticiable and in finding that Plaintiffs stated cognizable claims. ECF No. 177-1.

The Ninth Circuit stayed the district court litigation for seven-and-a-half months—from July 25, 2017, to March 7, 2018—pending its resolution of the mandamus petition, but ultimately denied the petition without prejudice on March 7, 2018. *United States v. U.S. Dist. Court for Dist. of Or.*, 884 F.3d 830, 838 (9th Cir. 2018). The court "underscore[d] that this case is at a very early stage," that "[c]laims and remedies often are vastly narrowed as litigation proceeds," and that the court had "no reason to assume this case will be any different." *Id.* at 838. The court "decline[d] to exercise [its] discretion to grant mandamus relief at [that] stage of the litigation," in part because no discovery requests had yet been filed. *Id.* at 835, 838. But it reiterated that Defendants could continue to "raise and litigate any legal objections they have," including by challenging future discovery orders, "seeking mandamus in the future," or "asking the district court to certify orders for ifnterlocutory appeal of later rulings." *Id.* at 835-38.

Less than three weeks after the Ninth Circuit's ruling, the district court scheduled expert witness disclosure deadlines and a trial memoranda and less than three weeks thereafter set trial for October 29, 2018. ECF Nos. 181, 189, 192. On May 4, 2018, Plaintiffs served Rule 30(b)(6) notices on two named agency defendants—the United States Department of Agriculture

("USDA") and the Department of the Interior ("DOI")—as well as 248 combined Requests for Admission. On May 11, Plaintiffs served a Rule 30(b)(6) notice on the United States Department of Transportation ("DOT"), coupled with an additional 162 Requests for Admission directed at DOT. Plaintiffs have indicated that they intend to serve a Rule 30(b)(6) notice on each federal agency defendant, totaling eight notices. Among the topics noticed for the 30(b)(6) deposition, Plaintiffs requested the United States to designate a witness to respond to "any analysis or evaluation" related to "atmospheric CO_2 concentrations, climate change targets, or greenhouse gas emissions" that "would avoid endangerment of human health and welfare for current and future generations . . . ." Plaintiffs further noticed a topic concerning the role of DOI, USDA and DOT in implementing the President's energy policy. Finally, Plaintiffs requested a DOT witness to respond to a topic relating to any analysis DOT conducted or funded related to the "technical feasibility" of transitioning to electric or hydrogen-power vehicles.

On May 9, 2018, Defendants moved for a protective order and for a stay of discovery pending resolution of Defendants' motion for a protective order, Defendants' motion for judgment on the pleadings, and Defendants' summary judgment motion. ECF No. 196 at 19. With respect to the protective order, Defendants argued that discovery is barred in this case for three reasons: (1) the Administrative Procedure Act ("APA") provides the exclusive right of action for challenges to actions of the sort Plaintiffs raise, which must therefore be addressed to specifically identified actions or failures to act and be reviewed on an administrative record; (2) requiring agencies to take policy positions and express views on factual issues directly in court through discovery and a trial *de novo* bypasses the APA's provisions governing agency decision-making, including notice-and-comment procedures to ensure an opportunity for broad public input before an agency reaches particular conclusions and adopts measures within its authority;

and (3) the separation of powers bars any discovery seeking policy positions or factual judgments of agency officials outside of the procedures that govern agency decision-making. *Id.* at 8-19. With respect to the stay of discovery, Defendants argued that a stay was appropriate because any of the three separate motions—the motion for a protective order, motion for judgment on the pleadings, and summary judgment motion—had the potential to remove any need for discovery. *Id.* at 19-20.[1]

Magistrate Judge Coffin denied the motion for protective order on May 25, 2018—two days after Plaintiffs filed their response and before Defendants had an opportunity to reply. ECF No. 212. Magistrate Judge Coffin determined that the Complaint does not assert claims arising under the APA as the claims are "based on alleged violations of constitutional rights." *Id.* at 2. In addition, he held that the Court had already rejected Defendants' argument that Plaintiffs' must bring their claims under the APA. *Id.* The Magistrate then refused to grant a protective order based on the separation of powers, finding instead that, "[s]hould a specific discovery request arise during discovery in this case that implicates a claim of privilege the government wishes to assert, the government may file a motion for a protective order directed at any such specific request." *Id.* at 3. Finally, Magistrate Judge Coffin denied—without explanation—Defendants' motion for a stay of all discovery pending resolution of their motion for judgment on the pleadings and motion for summary judgment. *Id.*

On June 1, the United States filed objections to the May 25, 2018 order on the ground that the order fails to address Defendants' arguments, including its threshold contention that the

[1] A hearing on the motion for judgment on the pleadings is scheduled for July 18, 2018. ECF No. 214. And while no hearing has yet been scheduled for the motion for summary judgment, that motion will be fully briefed by June 26 under the default briefing schedule provided by Local Rules.

APA provides the sole right of action for Plaintiffs' claims such as those here and requires Plaintiffs to direct their challenge to specifically identified and discrete agency actions or failures to act. ECF No. 215. The United States' objections remain pending before the District Court.

LEGAL STANDARD

1. Rule 30(b)(6) Depositions

Federal Rule of Civil Procedure 30(b)(6) governs the deposition of organizational entities. A party may depose any entity, such as a corporation or governmental agency, by serving a deposition notice or subpoena that describes "with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). The organization must then designate one or more individuals who will "testify on its behalf . . . about information known or reasonably available to the organization." *Id.*

When complying with such a discovery request would expose the respondent to "annoyance, embarrassment, oppression, or undue burden or expense," Rule 26(c)(1) allows that respondent to seek a protective order "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." The burden is on the movant to show "good cause" for the protective order. Fed. R. Civ. P. 26(c)(1); *see also Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002) ("For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted."). The district court enjoys "considerable latitude . . . to craft protective orders during discovery." *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990). Courts have issued protective orders and precluded 30(b)(6) depositions where plaintiffs seek information protected by deliberative process or other privileges. *See, e.g.,U.S. ex rel. Dye v. ATK Launch Stystems, Inc.*, No. 1:06-CV-00039-CW, 2011 WL 60176, at *4 (D. Utah Jan. 7, 2011) (plaintiffs could not inquire about a federal agency letter in a 30(b)(6) deposition because

"[a]ny inquiry beyond the face of the April 2009 letter is 'undue' because the letter is clear, and the deliberative process privilege prevents further inquiry into the United States' decision making"); *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (prohibiting deposition, finding that "the Court is drawn inexorably to the conclusion that [the defendant's] Notice of Deposition is intended to ascertain how the SEC intends to marshal the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated.").

2. Requests for Admission

Under Federal Rule of Civil Procedure 36(a), a party may seek written admissions concerning the truth of any matters within the scope of Federal Rule of Civil Procedure 26(b)(1) relating to: 1) facts and 2) the genuineness of documents. "The purpose of Rule 36(a) is to expedite trial by establishing certain material facts as true and thus narrowing the range of issues for trial." *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1245 (9th Cir. 1981); *Tillamook Country Smoker, Inc. v. Tillamook Ctv. Creamery Ass'n.*, 333 F. Supp.2d 975, 984 (D. Or. 2004) ("The plain purpose of [Rule 36] is to expedite resolution of litigation by 'narrowing the range of issues left for decision'"), *aff'd sub nom. Tillamook Country Smoker, Inc. v. Tillamook Cty. Creamery Ass'n*, 465 F.3d 1102 (9th Cir. 2006). Requests for admission are also not intended to be used as discovery devices. *Tracchia v. Tilton*, No. CIVS062916GEBKJMP, 2008 WL 5382253, at *2 (E.D. Cal. Dec. 22, 2008); *Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 445 (CD. Cal. 1998) ("A party who desires discovery of what the facts are should resort to other discovery rules rather than Rule 36 and requests for admission 'are not to be treated as substitutes for discovery processes to uncover evidence.'") (citations omitted). Courts sustain the responding party's objections to requests for admission that are essentially interrogatories designed to

uncover facts. *Ochotorena v. Adams*, No. 1:05-CV-01524-JODLBPC, 2009 WL 1953502, at *1, *5 (E.D. Cal. July 7, 2009); *Tuvalu v. Woodford*, No. S04-1724-DLKJMP, 2006 WL 3201096 at *1 (E.D. Cal. Nov. 2, 2006), *report and recommendation adopted*, No. CIV-S041724-JAMKJMP, 2008 WL 2774571 (E.D. Cal. July 15, 2008); *Safeco*, 181 F.R.D. at 446-47. Similarly, although Rule 36 allows a party to request an admission of "the application of law to fact," "[r]equests for purely legal conclusions . . . are generally not permitted." *Benson Tower Condo. Owners Ass'n v. Victaulic Co.*, 105 F.Supp.3d 1184, 1195-96 (D. Or. 2015), *aff'd*, 702 F.App'x 537 (9th Cir. 2017); *see Disability Rights Council v. Wash. Metro. Area*, 234 F.R.D. 1, 3 (D.D.C. 2006) (finding one request sought a purely legal conclusion when nothing in it applied law to fact and did not explore the facts of that case, and another request sought a purely legal opinion as it sought what was required under the subject regulations).

ARGUMENT

At the outset, Defendants reiterate that no discovery in this case is proper for the reasons stated in their motion for a protective order, which is now before the district court on Defendants' objections. In addition, Defendants reiterate that no discovery is proper because the entire suit should be dismissed for the reasons stated in Defendants' motion for judgment on the pleadings and motion for summary judgment, both of which are now pending before the district court. In addition to those categorical objections, which support a protective order from all discovery, a protective order from the requests for admission and the noticed Rule 30(b)(6) depositions currently at issues is warranted for the reasons described in greater detail below. And a protective order concerning the discovery at issue here is especially warranted for the period the Court has under consideration the government's motions for judgment on the pleadings and summary judgment and the motion for a categorical protective order from all discovery.

I. The Court Should Grant a Protective Order Precluding the 30(b)(6) Depositions

Plaintiffs' proposed 30(b)(6) depositions on DOI, USDA, and DOT are improper for two reasons. First, they present separation of powers concerns and inconsistencies with APA procedures that, as Magistrate Judge Coffin directed, Defendants specifically raise now. That is, the noticed topics will necessarily force federal agencies to articulate policy positions and factual assessments through binding deposition testimony without regard for the processes established for such decision-making by an agency or agency officials under the APA.[2] Second, the requests are unduly burdensome and insufficiently particularized.

A. Plaintiffs' Request that a Rule 30(b)(6) Witness Testify on RFAs that the United States Does Not Fully Admit is Unduly Burdensome and Insufficiently Particularized

In addition to serving a notice of a Rule 30(b)(6) deposition on DOI, USDA, and DOT, Plaintiffs simultaneously propounded more than 400 RFAs collectively on those three agencies. In the accompanying Rule 30(b)(6) notices, Plaintiffs include a topic seeking testimony on "each response" in the RFAs that is not a full admission. Ex. 4, Pls.' Fed. R. Civ. P. 30(b)(6) Notice of Dep. – Def. Dep't of Agric. ("USDA 30(b)(6) Notice") at 6; Ex. 5, Pls.' Fed. R. Civ. P. 30(b)(6) Notice of Dep. – Def. Interior ("DOI 30(b)(6) Notice") at 6; Ex. 6 (Pls.' Fed. R. Civ. P. 30(b)(6) Notice of Dep. – Def. Dep't of Transp. ("DOT 30(b)(6) Notice") at 6. These requests exemplify the fundamental defects in this suit, as set forth in Defendants' pending motions. They also are improper because they are unduly burdensome and, insufficiently particularized, and would be more efficiently addressed through other discovery devices if discovery were to be permitted at all.

[2] Plaintiffs have agreed to convert Topic 1 into contention interrogatories and, under certain conditions, to convert Topic 4 into a RFA or interrogatory. The parties' efforts to reach a mutually-acceptable compromise on these two topics is ongoing.

First, this topic is not merely one topic but potentially hundreds, imposing an oppressive burden on the subject agencies. Because Plaintiffs have thus far propounded 413 RFAs, the United States would potentially have to prepare witnesses to address hundreds of topics, to the extent Plaintiffs do not deem the United States' responses a "full admission." Indeed, Plaintiffs largely do not seek admissions on undisputed factual matters—as discussed further below—and thus many of the RFAs are not susceptible to a "full admission." And the burden with preparing witnesses across multiple agencies for hundreds of topics is undue and exacerbated by the short timeframe that remains before trial. *See Harry v. Duncan*, 223 F.R.D. 536, 539 (D. Mon. 2004), *supplemented*, 330 F. Supp. 2d 1133 (D. Mont. 2004) (issuing a protective order against "unreasonably burdensome and oppressive" requests for numerous depositions with a short time remaining for discovery); *Apple, Inc. v. Samsung Elecs. Co., Ltd*., No. C-11-1846-LHK-PSG, 2012 WL 1511901 at *2 (N.D. Cal. Jan. 27, 2012) (Rule 30(b)(6) witness must "fully and unevasively answer questions about the designated subject matter. . . that task becomes less realistic and increasingly impossible as the number and breadth of noticed subject areas expand." (internal quotation marks omitted)).

Second, this topic is potentially boundless. Rule 30(b)(6) requires a party to "describe with reasonable particularity the subject areas that are intended to be questioned, and that are relevant to the issues in dispute." *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). Rule 30(b)(6) is a trade-off. In exchange for relief from the burden of identifying an appropriate witness in an organization, a party serving a Rule 30(b)(6) notice must narrow the inquiry, "describ[ing] with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). "An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task." *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). And that is exactly what Plaintiffs do

here. Plaintiffs' demand that DOI, USDA, and DOT sit a witness to discuss any instance where the United States failed to give a "full admission" does not place the United States on adequate notice of the topics Plaintiffs might explore during the Rule 30(b)(6) deposition. Given the scope and breadth of the RFAs, almost any issue related to this sprawling litigation could arguably be deemed a noticed topic.

Where, as here, "the defendant cannot identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible." *Id.* Courts routinely prohibit Rule 30(b)(6) notices that fail to meet the requirement of "reasonable particularity." *See, e.g., Martin v. Valley Nat'l Bank of Arizona,* 140 F.R.D. 291, 315 (S.D.N. Y. 1991) (inquiry into "the Department's review of all other ESOP-financed buyouts through to the present" termed "plainly overbroad or otherwise beyond the proper scope of discovery"); *Padana Assicurazioni-Societa Aziono v. M/V Caribbean Express I*, No. Civ. A. 97-3855,1999 WL 30966, at *2 (E.D. La. Jan. 21,1999) ("[t]he subject notices refer only to 'the causes of the loss or damage to the cargo as described in the Complaint,' a description that is insufficiently particularized"). Here, too, the topic lacks the requisite particularity.

Third, if Plaintiffs were unsatisfied with a RFA response that was less than a "full admission," the proper course would be to serve targeted contention interrogatories rather than rely on a catchall Rule 30(b)(6) topic. That is, Plaintiffs would have to target the RFA responses they find problematic and focus their discovery appropriately. Where, for example, the United States did not provide a full admission because the RFA sought an admission on a mixed question of law and fact, Rule 33(c) contention interrogatories would be more appropriate and efficient than a 30(b)(6) deposition. *See Exxon Research & Eng'g Co. v. United States,* 44 Fed. Cl. 597, 601-02 (1999) (finding contention interrogatories more appropriate than 30(b)(6)

deposition to discover party's position on mixed factual and legal issue because they "would yield most reliably and in the most cost-effective, least burdensome manner information that is sufficiently complete to meet the needs of the parties and the court"); *United States v. Dist. Council of N.Y. City*, No. 90 CIV. 5722 (CSH), 1992 WL 208284, at *15 (S.D.N.Y. August 18, 1992) (denying a motion to compel a 30(b)(6) deponent to answer "essentially a form of contention interrogatories" because, among other reasons, it would be "highly inefficient and burdensome"); *SmithKline Beecham Corp. v. Apotex Corp.*, No. 99-CV-4304, 2004 WL 739959, at *4 (E.D. Pa. Mar. 23, 2004). And given the short timeframe before trial, Plaintiffs must utilize the most efficient means of discovery rather than propound a sweeping Rule 30(b)(6) topic.

B. Requiring Agencies to Sit Rule 30(b)(6) Witnesses Raises Separation of Powers Concerns and Conflicts with the APA Provisions Regulating Rulemaking and Adjudication

The deposition notices served on DOI, USDA, and DOT require the agencies to sit a witness to opine on the respective agency's role in implementing the President's energy strategy. *See e.g.* Ex. 4, USDA 30(b)(6) Notice, Subject Area 3. This poses two threshold problems, which reflect the underlying defects of this lawsuit that the United States raised in its previous motion for a protective order on all discovery, and which this Court encouraged Defendants to raise in the context of particular requests. ECF No. 212 at 3 ("Should a specific discovery request arise during discovery in this case that implicates a claim of privilege the government wishes to assert, the government may file a motion for a protective order directed at any such specific request.").[3] The particular requests attempt to force representatives from federal

[3] Magistrate Judge Coffin interpreted Defendants' separation of powers argument to "implicate matters of privilege." ECF No. 212 at 3. Although Defendants disagree with this characterization of their argument, *see* ECF No. 215 at 16-17, they reassert their arguments in the context of the three 30(b)(6) notices served thus far on DOI, USDA, and DOT, as specifically suggested by the Court.

agencies to articulate policy positions and factual assessments outside the procedures established by the APA for agency decision-making through deposition testimony that is purportedly binding on the representatives' agencies—all directed at a trial and ultimate relief that would themselves violate the APA and the separation of powers. As explained in Defendants' motion for a protective order from all discovery, that process of discovery would therefore violate the APA's procedures and the separation of powers.

On DOI, USDA and DOT, Plaintiffs have propounded the following topic:

> SUBJECT AREA 3: The [AGENCY'S] role in implementing President Trump's America First Energy Strategy, including President Trump's Executive Order to Create Energy Independence.

Plaintiffs thus seek binding testimony that explores the agencies' role in implementing national energy policy and strategy on matters that are the subject of current and ongoing deliberations. And consistent with Plaintiffs' stated aims of probing the Executive Branch's policies on climate change, this topic requires the agencies to make factual assessments and statements on complex and politically-contested policy issues. Plaintiffs' focus on the President's energy strategy, including the "Executive Order to Create Energy Independence," if permitted, would allow Plaintiffs to probe during the 30(b)(6) deposition not only the interaction between the agency and the President on energy policy but also the substance of the policy debates themselves. This concern is not theoretical. In the context of factual depositions, Plaintiffs have already sought to delve into protected communications between the President and agency officials on current budgetary matters. Exhibit 10, Dep. of James Michael Kuperberg 100:1 – 102-4. The noticed 30(b)(6) depositions would be more of the same.

To the extent that Plaintiffs argue that they merely seek previously-articulated official positions of the agencies, there is no need for this topic at all as such positions can be gleaned in readily available public documents. Federal agencies take official positions pursuant the

procedures set forth in the APA and the statutes governing the agencies. When EPA, for instance, issues a rule, that rule is published in the Federal Register and then the Code of Federal Regulations. The court may take judicial notice[4] of those document or statements. Fed. R. Evid. 201. The proposed 30(b)(6) depositions are therefore either unnecessary or improper; regardless, they should not proceed.[5]

Significantly, the Supreme Court has rejected discovery demands—like the ones at issue here—that "threaten substantial intrusions on the process by which those in closest operational proximity to the President advise the President." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 381 (2004) (internal quotation marks and citation omitted). Likewise, courts have rejected discovery demands that seek privileged information, including 30(b)(6) depositions directed at information protected by the deliberative process privilege. *See e.g.,U.S. ex rel. Dye*, 2011 WL 60176, at *4 (quashing Rule 30(b)(6) deposition topic because of deliberative process concerns); *Methode Elecs. v. Finisar Corp.*, 205 F.R.D. 552, 554-55 (N.D. Cal. 2001) (recognizing that concerns about privilege and work product militate in favor of requiring contention information to be sought through interrogatories, not a 30(b)(6) deposition). Here too, the Court should reject Plaintiffs' request for testimony on these matters.

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[4] To be clear, while judicial notice provides a more efficient and equally effective means of establishing facts of agency action than interrogatories, Rule 30(b)(6) depositions, or requests for admission, it remains Defendants' position that Congress provided the sole means for judicial review of agency action and inaction in the APA. Hence, instead of discovery, judicial-notice procedures, and a trial, this Court should be reviewing agency administrative records to assess compliance with the constitutional provisions that Plaintiffs allege are relevant.

[5] Plaintiffs noticed the following topic on DOT that suffers from the same infirmities: "Any analysis or evaluation conducted by, or funded by, the DEPARTMENT OF TRANSPORTATION of the technical feasibility of the United States transitioning to a transportation system utilizing predominantly electric and/or hydrogen-powered vehicles." Ex. 5, DOT 30(b)(6) Notice. This topic also either seeks testimony on publically-available analyses or privileged matters.

Moreover, to require agencies to comply with this topic would effectively allow Plaintiffs to seek official positions on matters of factual assessment and questions of policy. Such an inquiry would impermissibly conflict with the procedures prescribed by the APA, depriving the public of the ability to provide input as required by the APA's rulemaking provisions or agency procedures. The 30(b)(6) notices demand testimony on emergent national energy policy, requiring the agencies to make factual assessments and statements on numerous complex and controversial policy issues before the decision-makers themselves may have crystallized their policy position in the public domain. The responses of agency officials to this line of questioning on behalf of their agencies, *see* Fed. R. Civ. P. 30(b)(6), would fall within the broad definitions of "rule" and "adjudication" provided by the APA if the issues raised were properly submitted to the channels for agency decision making, *see* 5 U.S.C. § 551(4), (7), which are matters that Congress has committed to the agencies in the first instance through rulemaking procedures involving public comment or adjudicatory procedures with various protections and inputs, not the courts. Yet they would be offered by individual deponents, without public input from other stakeholders or any of the procedures of agency decision-making contemplated by the APA. *See* 5 U.S.C. §§ 553, 554. This is improper. Congress, through the APA and the agencies' respective organic statutes, vested these kinds of determinations in the agencies' administrative processes. Through 30(b)(6) testimony, Plaintiffs thus seek to force the agencies to do something that the APA forbids and is beyond this Court's authority to require. *See, e.g.*, *In re SEC ex rel. Glotzer*, 374 F.3d 184, 188-192 (2d Cir. 2004) (refusing to authorize discovery request directed at federal agency that violated APA requirements); *cf. Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 428 (2011) (noting, in rejecting climate-change-related claim, that courts "may not . . . issue rules under notice-and-comment procedures"). The case would

also violate the separation of powers to the extent it seeks to compel the President and agency heads to develop and recommend policy proposals outside their existing substantive authority and procedures. A protective order precluding the DOI, USDA and DOT Rule 30(b)(6) depositions is therefore appropriate.

II. A Protective Order is Necessary to Prohibit Plaintiffs' Requests for Admission.

A. The Requests for Admission Raise the Same Separation of Powers Concerns and Conflict with the APA Provisions Regulating Rulemaking and Adjudication.

The requests for admissions raise the same concerns. As with the noticed depositions, the requests for admission attempt to force federal agencies to articulate policy positions and factual assessments outside the procedures established by the APA for agency decision making. And, as with the depositions, that process would violate the APA's procedures and the separation of powers.

Plaintiffs seek an admission, for example, that "[y]outh will be most affected by climate change" or that our national forests and grasslands are at risk due to climate change. Ex. 2 (list of opinion-based RFAs). Similarly, Plaintiffs seek an admission that "[r]educing GREENHOUSE GAS emissions to mitigate CLIMATE CHANGE will require a long-term, multifaceted transformation of the TRANSPORTATION SECTOR in the United States." *See id.* Although styled as RFAs, these requests do not seek admissions on discrete historical facts of the sort at issue in a typical civil case within the cognizance of an Article III court. Rather, they seek official agency statements on broad and complex scientific and highly technical matters that involve expert analysis and opinion and cut across many agencies and the Nation as a whole. Relatedly, approximately 20 ask the USDA, 53 ask DOI, and 9 ask DOT to admit conclusions of law. *See* Ex. 3 (list of legal opinion RFAs). For example, Plaintiffs have propounded dozens of RFAs seeking admissions on activities that DOI and USDA "authorize" on public lands. But

"authorize" in this context is a term of legal import and an admission would be an admission of legal authority and associated action. Plaintiffs also seek admissions about the legal roles of the respective agencies and subcomponents.[6] The agencies cannot take official positions on such matters consistent with their obligations under the APA and the separation of powers.

As with the depositions, to the extent that Plaintiffs argue that they merely seek previously-articulated official positions of the agencies, there is no need for this topic at all as such positions can be ascertained from in readily-available public documents. Again, the Court may take judicial notice of those documents or statements. Fed. R. Evid. 201. A protective order precluding the requests for admission is, therefore, appropriate.

B. The Requests for Admission Are Also Inappropriate Because They Seek Opinion Testimony and Are Unduly Burdensome.

Plaintiffs' RFAs are also improper on three additional grounds: (1) they seek expert opinion and policy positions; (2) they seek legal conclusions; and (3) they exceed 400 in number and are unduly burdensome in light of alternative means of establishing admissible evidence that is less burdensome on Defendants. Unlike interrogatories, document production requests, and depositions, requests for admission "are not a discovery device at all, 'since [they] presuppose[ ] that the party proceeding under [Rule 36] knows the facts or has the document and merely wishes its opponent to concede their genuineness.'" *K.C.R. v. Cty. of Los Angeles*, No. CV 13-3806 PSG SSX, 2014 WL 3433925, at *3 (C.D. Cal. July 14, 2014). That is, Rule 36 "should not be used unless the statement of fact sought to be admitted is phrased so that it can be

[6] E.g., "The DEPARTMENT OF AGRICULTURE, through the USFS, exercises "some type of stewardship responsibility over 80 percent of America's forests."; " PHMSA develops and enforces regulations for the safe, reliable, and environmentally sound operation of the U.S.'s 2.6 million mile PIPELINE transportation system for FOSSIL FUELS."; "The DEPARTMENT OF TRANSPORTATION's OFFICE OF PIPELINE SAFETY develops, implements, and enforces the safety standards, procedures, and actual development and expansion of any PIPELINE system in the United States."

admitted or denied without explanation." *United Coal Co. v. Powell Constr. Co*., 839 F.2d 958, 968 (3d Cir. 1988) (citation omitted). The RFAs here run afoul of these basic precepts and should be prohibited.

First, as noted above, quite aside from the broad and complex nature of the asserted "facts" involved, a significant number of RFAs seek vaguely-worded admissions on scientific and highly technical matters that would entail expert analysis and opinion. Such requests are properly a matter for expert reports or for policy makers, but in no event are they subject to a simple admission. The RFAs as propounded are more in the nature of interrogatories, which are not appropriate for Rule 36 requests. Under the Federal Rules of Civil Procedure, RFAs are limited in scope. In contrast, interrogatories may have a wider breadth but are limited to 25 requests. *Compare* Fed. R. Civ. P. 36 *with* Fed. R. Civ. P. 33. While interrogatories can probe opinions, RFAs may not. And, as discussed above, many of these RFAs seek, among other things, admissions on opinions.[7] *See Tuvalu*, 2006 WL 3201096 at *9 ("Many of plaintiff's requests for admission put to defendant Wilson seem to be interrogatories in disguise, which is an improper use of Rule 36 requests"). Plaintiffs' citation to an agency document does not change the nature of their requests. Plaintiffs cannot circumvent these careful limitations on RFAs by issuing contention "interrogatories in disguise." *Id.*; *Safeco*, 181 F.R.D. at 445-46; *Misco, Inc. v. U.S. Steel Corp.*, 784 F.2d 198, 206 (6th Cir. 1986) (noting that utilizing

[7]For example, Plaintiffs seek admissions on matters involving judgment or technical assessments. In any event, such requests seek an opinion, not a factual admission. *See e.g.*, "Reducing transportation emissions will require improving the FUEL EFFICIENCY of cars and trucks, supporting ELECTRIC VEHICLE and low-carbon FUEL research and infrastructure, and shifting demand away from congested roadways to more sustainable modes."
"Aircrafts' generation of NOx in the upper atmosphere leads to the production of ozone, which is estimated to be almost as significant as CO2 emissions in terms of GLOBAL WARMING POTENTIAL from aircraft emissions."

interrogatories disguised as requests for admissions in an attempt to circumvent a local rule limiting the number of interrogatories is an abuse of the discovery process). Even if it may lead to discoverable evidence, a request for admission is not a discovery device to delineate expert and policy disputes. *Tuvalu*, 2006 WL 3201096 at *8 (rejecting argument that further response to request for admission should be compelled in case the compelled response "might lead to further discovery," because "a request for admission is not a discovery device").

Second, the RFAs improperly seek legal conclusions and opinions. "Requests for admissions cannot be used to compel an admission of a conclusion of law." *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999) (finding that a request for admission asking a party to admit that she is a public figure as defined in case law improperly sought a legal conclusion); *see also In re Tobkin*, 578 F. App'x 962, 964 (11th Cir. 2014) ("A party may not request an admission of a legal conclusion under Rule 36"; asking a party to admit that it was not a government entity was an improper request to admit a legal conclusion). Such requests are either irrelevant or circuitously go to Plaintiffs' requested relief of requiring the United States to implement Plaintiffs' proposed carbonless economy. In all events, they are wholly improper under Rule 36. That is, nominally tying a request for admission to the facts of the case does not render it permissible where, as here, "the request remains an abstract legal conclusion . . ." or otherwise seeks irrelevant information. *See Music Grp. Macao Commercial Offshore Ltd. v. Foote*, No. 14-CV-03078-JSC, 2015 WL 579688, at *2 (N.D. Cal. Feb. 11, 2015). *See also Benson Tower Condo. Owners Ass'n*, 2015 WL 2208444, at *3-5 ("Although Plaintiff has nominally tied its RFAs to the facts of the case, the request remains a legal conclusion: whether or not the Victaulic products are defective under Oregon law."); *Disability Rights Council*, 234 F.R.D. at 3 (finding one request sought a purely legal conclusion when nothing in it applied law

to fact, particularly the facts of that case, and another request sought a purely legal opinion concerning what was required under FTA regulations); *Estate of Cederloff v. United States*, No. CIV.A. DKC 08-2863, 2010 WL 157512, at *2 (D. Md. Jan. 13, 2010) (sustaining objection to RFA on relevancy grounds).

Third, the RFAs are objectionable because they pose an extreme and undue burden. Courts "routinely disallow requests for admission that run into the hundreds on the grounds that they are abusive, unreasonable, and oppressive." *Tamas v. Family Video Movie Club, Inc.*, 301 F.R.D. 346, 347 (N.D. Ill. 2014) (citation omitted). Plaintiffs have propounded over 400 RFAs on three agencies. If they were to serve a similar number of RFAs on the remaining five agencies, Plaintiffs would have propounded approximately 1,100 RFAs. This is excessive and unnecessary.

Where, as here, Plaintiffs have unjustifiably propounded hundreds of RFAs that are cumulative of the issues captured in the pleadings and that are subject to judicial notice, courts have ample discretion to protect a litigant from responding. *See, e.g., Byard v. City & Cty. of San Francisco*, No. 16CV00691WHADMR, 2017 WL 988497, at *2 (N.D. Cal. Mar. 15, 2017) (finding that 531 RFAs "is largely abusive, oppressive, and overly burdensome, and demonstrates a profound lack of understanding about the proper use of RFAs as a discovery tool. When considered as a whole, the set reads as an attempt to establish Plaintiffs' entire case through 531 RFAs."); *Hood v. S. Whidbey School Dist.*, No. C-11-2024-RAJ, 2013 WL 1898214, at *2 (W.D. Wash. May 6, 2013) (propounding nearly 500 requests for admission was unwarranted), *aff'd*, 605 F. App'x 665 (9th Cir. 2015); *Wigler v. Elec. Data Sys. Corp.*, 108 F.R.D. 204, 205–06 (D. Md. 1985) (finding propounding 1,664 requests for admission was unjustified); *see also Stokes v. Interline Brands Inc.*, No. C-12-05527 JSW (DMR), 2013 WL

6056886, at *2 (N.D. Cal. Nov. 14, 2013) (same for 1059 requests for admission); *Tamas*, 301 F.R.D. at 347 (same for 460 requests for admission). And the RFAs are unnecessary. In this case, Plaintiffs have propounded nine RFAs on DOI seeking admissions concerning the President's public statements.[8] DOI has no specialized knowledge of the public remarks of the President and this Court can readily take judicial notice of any such statements under Federal Rule of Evidence 201. In such a case, the RFAs are a misguided exercise, requiring Defendants to ferret out facts that Plaintiffs can more readily have this Court judicially notice under Federal Rule of Evidence 201 (assuming those facts are relevant to the triable issues of this case), while Defendants are simultaneously saddled with the formidable task of responding to 18 expert reports in three months. This illustrates the undue burden and, indeed, the waste that Plaintiffs RFAs create. Thus, even beyond Defendants' overarching submission that all discovery is barred as contrary to the APA and the separation of powers, Defendants should be protected from the undue burden of responding to hundreds of requests, and the requests for admission propounded on DOI, USDA, and DOT should be struck in their entirety.

III. At a Minimum, a Protective Order Should Be Granted Until the Defendants' Motion for a Protective Order from All Discovery Is Finally Resolved.

As discussed *supra*, Defendants have separately moved for a protective order as to all discovery, on grounds that (1) the APA provides the exclusive right of action for Plaintiffs' claims, which must therefore be directed at specifically identified agency actions and be reviewed on an administrative record; (2) requiring agencies to take policy positions and express views on factual issues directly in court through discovery and a trial *de novo* bypasses the APA's provisions governing agency decision making, including notice-and-comment procedures

[8] *See* Ex. 9, May 4 Requests for Admission served on DOI, Request Nos. 58-64, 66-67.

to ensure an opportunity for broad public input before an agency reaches particular conclusions and adopts measures within its authority; and (3) the separation of powers bars any discovery seeking policy positions or factual judgments of agency officials outside the procedures that govern agency decision making. ECF No. 196 at 8-19. Magistrate Judge Coffin denied that motion on May 25, 2018. ECF No. 212. Defendants have objected to that order under Rule 72, and that objection remains pending. ECF No. 215. Defendants have also requested that, if the district court declines to reverse Magistrate Judge Coffin's order, it should certify its order for interlocutory appeal, because the government will have little choice but to seek further review in the Ninth Circuit or the Supreme Court, or both. ECF No. 215 at 8. Consistent with these filings, Defendants respectfully urge the grounds asserted in their previous motion for a protective order as independent grounds for granting the relief sought herein.

At a minimum, the Court should grant a protective order from the pending RFAs and noticed 30(b)(6) depositions until the government's objections to Magistrate Judge Coffin's prior order and the government's pending motions for judgment on the pleadings and summary judgment are finally resolved. Were the district court or a higher court to agree with the government's arguments in any of these filings, all of the pending RFAs and the noticed Rule 30(b)(6) depositions would plainly be improper.

CONCLUSION

For the reasons stated above, the Court should grant a protective order precluding the 30(b)(6) depositions and request for admission noticed on DOI, USDA, and DOT.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on June 4, 2018, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

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