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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHRN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, Plaintiff, vs. DAVID BERNHARDT, *et al.*, Defendants. SIERRA CLUB, *et al.*, Plaintiffs, vs. RYAN ZINKE, *et al.*, Defendants.	Civil Case No. 4:18-cv-05712-YGR (Consolidated With Case No. 4:18-cv-05984-YGR) **AMERICAN PETROLEUM INSTITUTE CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: January 14, 2020 Time: 10:00 am Courtroom: 2, 4th Floor Judge: Hon. Yvonne Gonzalez-Rogers

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 14, 2020, at 10:00 a.m. before the Honorable Yvonne Gonzalez-Rogers, Courtroom 2, 4th floor, 1301 Clay Street Oakland, CA 94612, Intervenor-Defendant American Petroleum Institute ("API") will and hereby does move the Court to enter summary judgment on all claims asserted by Plaintiffs in this consolidated action.

API makes this motion pursuant to Federal Rule of Civil Procedure 56 because there is no genuine dispute as to any material fact and API is entitled to judgment as a matter of law. API's motion is based on this Notice and Motion, the accompanying Memorandum of Points and Authorities in support, the administrative record lodged with the Court by Federal Defendants, all pleadings and papers properly filed in this action, and such oral argument and other matters as may be presented to the Court at the time of hearing.

Dated this 26th day of August, 2019.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

In 2018 the Bureau of Land Management ("BLM") revised[1] its 2016 regulation[2] that would have impermissibly required federal and Indian oil and natural gas lessees to capture gas and pay the government a royalty, even if that gas were uneconomic to capture and market. The 2018 "Revision Rule" eliminated that requirement, properly restored the fundamental underpinnings of BLM's authority to prevent "undue waste" under the Mineral Leasing Act of 1920 ("MLA"), and largely cured the impermissible air quality regulation that BLM had issued in 2016 under the guise of "waste prevention." Contrary to Plaintiffs' "rescission" label, the Revision Rule did retain several provisions of the 2016 Rule limiting venting and flaring of gas, and created a regulatory program distinct from both the 2016 Rule and BLM's pre-2016 regulations.

Plaintiffs prefer all the requirements of the 2016 Rule because they would discourage production of oil and gas from federal and Indian leases. Plaintiffs ask this Court to judicially compel their policy preference by voiding the Revision Rule and reinstating the 2016 Rule. The Court should not do so. *See Wyoming v. U.S. Dep't of the Interior*, 366 F. Supp. 3d 1284, 1290 (D. Wyo. 2018) ("Wish as they might, neither the States, industry members, nor environmental groups are granted authority to dictate oil and gas policy on federal public lands.").

Plaintiffs' arguments distort the fundamentals of a lessee's obligation to its lessor, BLM's authority under the MLA, and the Revision Rule itself, and claim that BLM adopted a "new operator profit policy" that for the first time introduced economic considerations for the prevention of "undue waste" under the MLA. But Plaintiffs have it backwards; *the 2016 Rule was the outlier*. Before the 2016 Rule, the concept of waste had *always* been economically driven. Specifically, in the context of venting and flaring, "waste" is an avoidable loss of oil or gas, the value of which exceeds the cost of loss avoidance. This well-established principle has been understood in the oil and gas industry since before the MLA was enacted, by Congress

[1] 83 Fed. Reg. 49,184 (Sep. 28, 2018) ("Revision Rule").
[2] 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("2016 Rule").

when enacting the MLA, and by BLM and its predecessor agencies in administering the MLA for decades.[3]

The economic precepts of waste make perfect sense when viewed in the context of oil and gas leasing, Congress' chosen system in the MLA to promote development of federal minerals. Because the federal government cannot feasibly develop its own minerals, it leases them to private operators that invest in and produce the minerals for the mutual economic benefit of both the lessees and the public lessor. Under this contractual arrangement with the lessor government, the lessee assumes a duty to conduct prudent operations and to produce and market oil and gas to optimize economic benefit, which is shared by both the lessee and lessor. In circumstances where a reasonable and prudent operator could have captured and economically marketed gas, yet that gas is nonetheless avoidably lost, then waste has occurred and the lessee generally owes a royalty on the lost production. But where gas, including gas associated with production of oil from oil wells, is *unavoidably* lost, then the loss is not waste, and no royalty or other compensation is owed to the lessor. Congress recognized that some waste occurs incident to operations, and did not require that lessees avoid all waste; rather, it wrote the MLA to preclude "undue waste" and to require that lessees "use all reasonable precautions to prevent waste of oil or gas developed in the land …." 30 U.S.C. §§ 187, 225.

Plaintiffs' arguments against the Revision Rule all flow from the erroneous premise that nearly all "loss" of gas is "undue waste," and thus any measure that could *potentially* increase gas capture is statutorily *required*, irrespective of whether it would force the lessee to capture and market the gas at a loss, and pay royalties on that uneconomically captured production further compounding the loss. Of course, this approach fulfills Plaintiffs' primary policy objective to keep oil and gas in the ground because no reasonable and prudent lessee would continue to operate its lease under such terms. The 2016 Rule that Plaintiffs prefer thus

[3] Leases for oil and gas on tribal lands are governed by the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. §§ 396 *et seq*., not the MLA. However, BLM has applied the same waste prevention principles and regulations to Indian leases that apply to federal leases.

represented an attempt to impermissibly maximize federal revenue at the expense of lessees in violation of the MLA and leases issued thereunder, and to correspondingly pursue Plaintiffs' desired air quality regulation under the guise of waste prevention. BLM, via its Revision Rule, now recognizes that the 2016 Rule exceeded the agency's waste prevention authority and unduly burdened lessees, and was a BLM overreach to instead regulate air quality.

In trying to resuscitate the 2016 Rule, Plaintiffs cannot demonstrate that BLM is authorized, much less *obligated*, to use its MLA waste prevention authority for purposes other than actual waste prevention. Plaintiffs' arguments fail for multiple reasons. First, Plaintiffs' contention that the Revision Rule impermissibly construes BLM's waste prevention authority to safeguard operator profits is wrong. This is not a matter of policy preference, but of limitations on BLM's statutory authority under the MLA. The MLA incorporates longstanding oil and gas industry concepts, including "waste" prevention, which BLM may not cast aside. The Revision Rule merely reverts to these waste prevention principles that still prevail in the oil and gas industry, and which Congress incorporated into the MLA. These principles had been administered by BLM and its predecessors under the MLA for decades without complaint from Plaintiffs, and for good reason. Nothing in the MLA or the oil and gas leases issued thereunder suggests that to prevent "undue waste" a lessee can be made to capture and market gas at a loss and remit a royalty to the government on the value of that gas. But that is the result of the 2016 Rule, which stretches the concept of waste prevention under the MLA too far.

Second, Plaintiffs' insistence that BLM must limit venting and flaring of gas as it did in the 2016 Rule pursuant to other provisions of the MLA, the Federal Land Policy and Management Act ("FLPMA"), and the Federal Oil and Gas Royalty Management Act ("FOGRMA") is similarly unavailing. No statute other than the MLA authorizes BLM to prevent waste or otherwise regulate venting and flaring. FOGRMA deals with revenue collection and does not speak to the issue of waste prevention. It is well-established that FLPMA is a planning statute that does not authorize or mandate BLM to regulate air quality.

The Clean Air Act completely occupies the field of regulation intended to protect air quality, and it is administered exclusively by the U.S. Environmental Protection Agency ("EPA") and the states, not BLM.

Third, Plaintiffs' argument that BLM's deferral to state and tribal venting and flaring regulations to protect federal and Indian mineral interests constitutes an impermissible "delegation" of BLM's MLA waste prevention authority is a red herring because BLM has delegated nothing. States and tribes have independent authority to regulate venting and flaring within their borders. In fact, they have greater ability to do so under their various air quality and police power authorities than BLM has under its limited MLA waste prevention authority. The record demonstrates that states may, and do, regulate venting and flaring more stringently than BLM.

Unable to prove any legal mandate, or even authority, for BLM to regulate venting and flaring more stringently than under the Revision Rule, Plaintiffs tack on a procedural claim under the National Environmental Policy Act ("NEPA"), and demand that BLM prepare an Environmental Impact Statement ("EIS") instead of an Environmental Assessment ("EA") for the 2018 Revision Rule. But this claim also fails because, given that BLM found that the 2016 Rule had insignificant beneficial or adverse environmental effects, it necessarily follows that BLM's partial repeal of that Rule likewise must have insignificant effects not requiring an EIS.

Accordingly, and for the additional reasons explained by other Defendants, the Court should grant summary judgment for API and Defendants.[4]

BACKGROUND

API incorporates by reference the parties' Joint Statement Regarding Procedural History, and the Background in the opening briefs of Federal Defendants and of the Alliance and IPAA.

[4] API generally concurs with and incorporates by reference the arguments in the briefs of Federal Defendants and of Intervenor-Defendants Western Energy Alliance ("the Alliance") and Independent Petroleum Association of America ("IPAA"). Moreover, API will adhere to the issues identified in its submitted letter brief, ECF No. 94, even though Plaintiffs did not do so.

STANDARD OF REVIEW

All of Plaintiffs' claims arise under the Administrative Procedure Act ("APA"). API incorporates by reference the Standard of Review in the opening briefs of Federal Defendants and of the Alliance and IPAA.

ARGUMENT

I. The Revision Rule Properly Reinstates Well-Established Concepts of "Waste" Prevention and Operator Diligence as Intended Under The MLA. (Issues A-1, A-2)

What Plaintiffs mischaracterize and dismiss as BLM's "new operator profit policy" is instead a fundamental tenet of oil and gas law that is incorporated into the MLA and binds BLM's regulatory discretion. It was the 2016 Rule that, for the first time since the MLA's enactment nearly one hundred years ago, would have impermissibly subverted the principles of "waste" prevention under the MLA to establish a regulatory regime intended instead to force operators to capture and market uneconomic gas, regulate for forecasted air quality and climate change outcomes, and leave mineral resources in the ground. The Revision Rule simply restores and codifies fundamental principles of waste prevention as intended under the MLA, and should not be disturbed by this Court.

A. The MLA Incorporates Traditional Oil and Gas Principles of "Waste" Prevention.

The MLA does not expressly define "waste." However, it requires that all federal oil and gas leases contain provisions to ensure that lessees "exercise . . . reasonable diligence, skill, and care . . ." in operating their leases, and comply with BLM's regulations "for the prevention of undue waste . . . ." 30 U.S.C. § 187. The MLA also requires lessees to "use all reasonable precautions to prevent waste of oil or gas developed in the land …." 30 U.S.C. § 225. Plaintiffs misinterpret these requirements to argue that BLM has the authority—and the obligation—to require lessees to prevent the venting and flaring of gas even where the cost of capture exceeds the market value of the gas. These erroneous conclusions are based on Plaintiffs' misreading of fundamental oil and gas law as reflected in the MLA and observed for decades by the agency.

The concept of waste prevention is as old as the oil and gas industry, and arises from commercial oil and gas leasing, the system Congress selected to develop federal minerals when it enacted the MLA. *See Wyoming v. U.S. Dep't of the Interior*, Nos. 16-cv-285, 2017 WL 161428, at *5 (D. Wyo., Jan 16, 2017) (MLA "creates a program for leasing mineral deposits on federal lands"); *see also Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981) ("The purpose of the [MLA] is to promote the orderly development of oil and gas deposits . . . through private enterprise."). Under a system of oil and gas leasing, the lessor (in this case the federal government on behalf of the public) and the lessee enter into an enforceable contract (i.e., the lease) for mutual economic benefit. *See Gerson v. Anderson-Prichard Prod. Corp.*, 149 F.2d 444, 446 (10th Cir. 1945) ("the purpose of the [oil and gas lease] contract is the mutual benefit of the lessor and lessee"); John S. Lowe, Oil and Gas Law in a Nutshell, 212 (6th ed. 2014) (the fact that the oil and gas lease remains in effect as long as the lease produces "in paying quantities" demonstrates that the lease is an "economic transaction" based on mutual economic benefit). Under the terms of many private oil and gas leases and almost all federal onshore mineral leases, the lessee receives 7/8ths (87.5 percent) of the revenues from the sale of the oil and gas, and the lessor receives 1/8th (12.5 percent). BLM Lease Form 3100-11, Sec. 2. The expectation is that a competent, economically motivated lessee will operate the lease prudently to optimize overall revenue, which is shared by both the lessor and lessee.

Because the purpose of an oil and gas lease is to facilitate mineral development for *mutual economic benefit*, a balance must exist between lessee and lessor expectations. In general, a lessee that fails to expend reasonable efforts to diligently and prudently capture and market oil and gas produced from the lease commits "waste" and is liable for the resulting loss. *See, e.g., Craig v. Champlain Petroleum Co.*, 300 F. Supp. 119, 125 (W.D. Okla. 1969), *aff'd*, 421 F.2d 236 (10th Cir. 1970). Not only would the lessee owe royalties on production negligently lost (*see* 30 U.S.C. § 1756), but also committing "undue waste" can provide grounds for lease cancellation under the MLA. 30 U.S.C. § 225. By the same token, a lessor may not

compel a reasonable and prudent operator to engage in uneconomic gathering and marketing of lease production and also to pay a royalty on the value of the production. "'The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard to his own interests, as well as those of the lessor. No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that the oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required.'" *Clifton v. Koontz*, 160 Tex. 82, 96 (Tex. 1959) (quoting *Brewster v. Lanyon Zinc Co*., 140 F. 801, 814 (8th Cir. 1905)); *see also Nola Grace Ptasynski*, 63 IBLA 240, 247-48 (1982) (same principles apply to federal leases).

Accordingly, the principles of reasonable and prudent lease operation are inextricably linked with the principle of waste. That is, if a reasonable and prudent operator – given the totality of the circumstances – could not economically capture and market the gas, venting or flaring it is not "waste." *See* Stephen L. McDonald, Petroleum Conservation in the United States, an Economic Analysis, Johns Hopkins Press, 1971 (Reprinted in 2011 by Resources for the Future), at 129 (for the purpose of limiting venting and flaring, "waste" is generally defined as a "preventable loss of [oil or gas] the value of which exceeds the cost of avoidance"); *id*. at 117-18, 123-24, 128-29; WYO. STAT. ANN. § 30-5-101 (defining "waste as that term is generally understood in the oil and gas industry," and exempting "gas produced from an oil well pending the time when with reasonable diligence the gas can be sold or otherwise usefully utilized on terms and conditions that are just and reasonable").

The MLA was enacted against this background. There is no evidence that Congress intended to eschew the commonly understood meaning of "waste," "reasonable diligence, skill, and care," or "reasonable precautions [to prevent waste]" prevailing at that time. *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (where Congress uses an established term of art, "it presumably knows and adopts the cluster of ideas that [are] attached . . . . [The] absence of

contrary direction may be taken as satisfaction with widely accepted definitions, not as departures from them."). Like other oil and gas leases generally, leases issued under the MLA are binding contracts. *See D.M. Yates*, 74 IBLA 159 (1983). They depend on the same economic motivation of the lessee to optimize returns also to the lessor. *See* BLM Lease Form 3100-11, Sec. 2 (royalty provision).[5] The BLM standard lease form further formalizes that "waste" can only be assessed in light of the operator's diligence given the circumstances. BLM Lease Form 3100-11, Sec. 2 (requiring lessee to pay royalty on oil or gas "lost or wasted . . . when such loss or waste is due to operator negligence . . . ."); *id.* Sec. 4 (lessee must exercise "reasonable diligence," and prevent "unnecessary damage to, loss of, or waste of leased resources"). Accordingly, the MLA incorporates the longstanding oil and gas industry principles of waste and prudent lease operation, and BLM must adhere to them when administering its MLA waste prevention responsibilities, as it generally did in the Revision Rule.

B. Before 2016, BLM Properly Implemented the MLA's Waste Prevention Principle as an Economic Standard.

Not surprisingly, until the 2016 Rule, the Department of the Interior's ("DOI") implementation of its MLA waste prevention authority always included objective, economic criteria. The DOI's U.S. Geological Survey ("USGS") implemented the concepts of "avoidable" and "unavoidable" loss to determine undue waste. *See* AR_003021-22 (Sec. 5.3.A.). Until BLM promulgated the 2016 Rule, it consistently made "avoidable" loss determinations based on lease-specific economic considerations. *See* AR_003011-12, 003013 (defining "avoidable loss," "unavoidable loss," and authorizing venting and flaring if "expenditures necessary to market or beneficially use such gas are not economically justified"); AR_003036-48 (establishing procedures for determining whether vented or flared gas has been avoidably lost based on individualized economic lease assessments); *North Dakota Petroleum Council*, MT SDR No. 922-15-07, at 8, 10, 12 (Feb. 11, 2016) (remanding "avoidably lost" determinations because

[5] https://www.blm.gov/sites/blm.gov/files/uploads/Services_National-Operations-Center_Eforms_Fluid-and-Solid-Minerals_3100-011.pdf.

BLM did not provide operators the opportunity to demonstrate that gas capture was uneconomic) (attached as Exhibit 1).

Administrative and federal case law also support that an "avoidable loss" determination under the agency's MLA authority necessitates a determination of whether the operator would have been able to economically capture and market the otherwise lost gas. *See, e.g., Rife Oil Properties, Inc.*, 131 IBLA 357, 376 (1994) (whether a loss is "avoidable" turns on "whether it would have been economic to market the gas from the well at issue"); *Maxus Expl. Co.*, 122 IBLA 190, 195 (1992) (economic feasibility "is always relevant to a question [of] whether gas was avoidably lost . . . . Maxus is entitled to be able to present evidence to establish that it was necessary, for reasons of economy, that it vent or flare gas"); *Ladd Petroleum Corp.*, 107 IBLA 5 (1989) (BLM must consider economic factors before determining that the loss of vented gas was "avoidable"); *see also Marathon Oil Co. v. Andrus*, 452 F. Supp. 548 (D. Wyo. 1978) (invalidating NTL-4A's predecessor NTL-4 because, *inter alia*, it assessed royalties on lost production without determining whether production was truly "unavoidably lost"). Plaintiffs unsuccessfully attempt to distinguish these cases as dealing with assessments of "avoidable loss" and not "waste" directly. Cal. Br. at 16. But Plaintiffs' arguments immediately fail because even they cite cases that equate avoidable loss with waste. *E.g., Lomax Expl. Co.*, 105 IBLA 1 (1988) (modified by *Ladd*, 107 IBLA at 5); Citizen Groups' Br. at 13; *see also* Gov't Br. at 17 n.7. In any case, BLM and its predecessor agencies have always utilized the "avoidable loss" rubric to determine whether undue waste had occurred, including under the Revision Rule. And with the exception of the 2016 Rule, this determination has *always* included consideration of whether the value of the lost gas was greater than the costs of its capture and marketing.

C. The Revision Rule Properly Restores and Codifies the Traditional Concept of Waste Prevention Under the MLA.

Although the 2016 Rule did not define "waste," its requirements eschewed BLM's consistent MLA practice and, under the guise of waste prevention, imposed general venting and

flaring prohibitions on lessees for purported air quality benefits. The 2016 Rule erroneously treated nearly all loss of gas as "waste," regardless of whether a reasonable and prudent operator could have captured and marketed it for the mutual benefit of the public and the lessee. *See* AR_000003. The 2016 Rule also would have required lessees to pay to the government a 1/8th royalty on the value of the gas sold at a loss, compounding the lessee's losses. The 2016 Rule would have required lessees to limit venting and flaring by spending whatever it takes, up to the point of the lessee convincing BLM that operation of the entire lease had become uneconomic. Also under the 2016 Rule, if an operator could not meet the prescribed flaring limitations, then BLM could force it to pay a royalty "penalty" on the lost gas and even shut-in gas and oil production altogether, potentially reducing the amount of recoverable lease reserves. This result would serve Plaintiffs' primary objective to keep oil and gas resources in the ground, which ironically is another key form of "waste." *See, e.g.*, McDonald, *supra*, at pp. 121-123 (explaining physical and underground waste); *Breton Energy, L.L.C. v. Mariner Energy Resources, Inc.*, 764 F.3d 394, n.25 (5th Cir. 2014) (imprudent action that renders subsurface hydrocarbons unrecoverable is underground waste); *Phillips Petroleum Co. v. Peterson*, 218 F. 2d 926, 931-32 (10th Cir. 1954) (same). BLM even acknowledged that the 2016 Rule and its deferral or preclusion of production would force significant underground waste of oil, at odds with the MLA. *See* 81 Fed. Reg. at 83,014 (estimating that the 2016 Rule would reduce oil production by up to 3.2 million barrels per year); Gov't Br. at 14. This is inconsistent with the MLA's waste prevention mandate, the MLA's purposes, and the terms of MLA leases. The MLA is designed to promote production of federal resources, and to achieve that end it incorporated prevailing oil and gas principles, including waste prevention. If Plaintiffs prefer a policy change to issue oil and gas leases under different terms, Congress is the only body with the power to make that alteration.

The Revision Rule eliminated the provisions of the 2016 Rule that exceeded BLM's MLA waste prevention authority and properly restored the concept of "waste" as an economic

inquiry where the cost of capture exceeds the value of the lost gas. The Revision Rule's "waste" definition also properly references "prudent and proper" lease operations as the only means by which "waste" can be assessed under the MLA. 43 C.F.R. § 3179.3. Under the Revision Rule, BLM will administer the "waste" standard through "avoidable" or "unavoidable" loss determinations. *See* 43 C.F.R. § 3179.4. The Revision Rule's waste definition ensures that BLM will only be able to deem a loss "avoidable" if it first determines that a reasonable and prudent operator should have economically captured and marketed the production.

Plaintiffs allege that the definition of "waste" in BLM's Onshore Oil and Gas Operations regulations, 43 C.F.R § 3160.0-5, which the Revision Rule did not change, is inconsistent with the "waste" definition in the Revision Rule. This allegation is meritless because the "waste" definition in 43 C.F.R § 3160.0-5 relies on a determination of "avoidable loss," which in turn is defined exclusively in the Revision Rule. 43 C.F.R. § 3179.4. Accordingly, the Revision Rule's avoidable loss determinations, which are governed by the Revisions Rule's "waste" definition, inform the meaning of "waste" in 43 C.F.R § 3160.0-5. There is no functional inconsistency in the concept of "waste" as administered under 43 C.F.R. subparts 3160 and 3179.

II. The 2016 Rule Is Not Compelled by the MLA, FOGRMA or FLPMA, and the Revision Rule Is Not in Derogation of Any Statutory Responsibility. (Issues A-1, A-2, A-4)

Nothing in the statutory text, the administrative record, or Plaintiffs' briefs demonstrates that the MLA, FOGRMA, or FLPMA *compels* the provisions of the 2016 Rule, or that the Revision Rule somehow violates an enforceable statutory obligation. The statutes that Plaintiffs cite provide BLM authority for responsible land, mineral, and royalty management. But, with the exception of the MLA's duty to prevent undue waste, Plaintiffs point to no other statutory requirement that authorizes or compels BLM to regulate venting and flaring, let alone in the manner prescribed in the 2016 Rule. Plaintiffs' effort to shoehorn independent regulation of air quality into BLM's waste prevention authority is unfounded.

Plaintiffs point to the MLA's text that BLM issue leases with provisions "for the

safeguarding of the public welfare" as evidence that BLM has a duty to regulate air quality through limiting venting and flaring of gas that is uneconomic to capture. 30 U.S.C. § 187. But Plaintiffs do not allege that BLM leases fail to protect the public welfare, or explain how this general "public welfare" requirement subsumes and supersedes the specific provisions in that same statutory section that expressly limit BLM to preventing "undue waste." *Id*. Moreover, and as explained in Federal Defendants' brief, when enacting the MLA the Congressional view of "public welfare" primarily focused on increased and orderly private development of public minerals to obtain a reasonable financial return for both the mineral developer and the public, and on providing the consumer with a variety of products at a reasonable price free from monopolistic control. *See* Gov't Br. at 12-14 (discussing MLA legislative history). In the context of the MLA, undeveloped minerals are antithetical to the "public welfare." *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961) (because the purpose of the MLA was "to obtain for the public a reasonable financial return on assets that 'belong' to the public," the public "does not benefit from resources that remain undeveloped, and the Secretary must administer the [MLA] so as to provide some incentive for development"). Plaintiffs' argument that the MLA's general "public welfare" text *compels* the 2016 Rule, or invalidates the Revision Rule, therefore is meritless.

FOGRMA, 30 U.S.C. §§ 1701 *et seq.*, likewise imposes no obligation for BLM to further regulate venting and flaring because FOGRMA is not a mineral or land management statute. Instead, FOGRMA is a royalty management statute concerned solely with ensuring that the public receives full payment due on production of its mineral resources, and is administered primarily by DOI's Office of Natural Resources Revenue ("ONRR"). To that end, FOGRMA requires the establishment of "a comprehensive inspection, collection and fiscal and production accounting and auditing system to provide the capability to accurately determine oil and gas royalties, interest, fines, penalties, fees, deposits, and other payments owed, and to collect and account for such amounts in a timely manner." 30 U.S.C. § 1711(a).

Plaintiffs' citation to Section 1756 of FOGRMA creates no duty to capture gas that is unavoidably lost and thus not waste under the MLA. 30 U.S.C. § 1756. This provision is entirely consistent with the Revision Rule and the MLA's waste prevention authority because it requires royalty payments on gas that an operator loses negligently or imprudently, or in violation of any valid applicable requirement (i.e., the measure of "waste" remains operator diligence). *Id.* ("Any lessee is liable for royalty payments on oil and gas lost or wasted . . . when such loss or waste is due to the negligence on the part of the operator . . . or due to the failure to comply with any rule or regulation, order or citation issued under . . . any mineral leasing law."). Administratively, this means that BLM first determines under its MLA waste prevention authority whether a given loss is avoidable, and then ONRR under its FOGRMA authority collects royalties on all gas that BLM determines is avoidably lost. *See* Onshore Energy and Mineral Lease Management Interagency Standard Operating Procedures, Attachment B, Fluid Minerals – Federal, Activity V.L., Avoidable loss of royalty-bearing minerals, at B-16 (Sep. 17, 2013); *id.* at VI.E., Avoidably lost mineral assessments, B-18; *id.* at VIII.B.1., Undesirable events.[6] Accordingly, FOGRMA does not expand BLM's authority to prevent waste or otherwise restrict venting and flaring.

Neither does FLPMA. "At its core, FLPMA is a land use planning statute" and contains no independent obligation or authority to regulate venting and flaring. *Cf. Wyoming v. U.S. Dep't of the Interior*, Nos. 15-cv-43, 2016 WL 3509415, at *8 (D. Wyo., Jun. 21, 2016). FLPMA obligates BLM only to manage public lands under principles of "multiple use and sustained yield," and to take measures "necessary to prevent unnecessary or undue degradation" of federally-managed lands. 43 U.S.C. §§ 1732(a) & (b). FLPMA "leaves BLM a great deal of discretion in deciding how to achieve" these goals "because it does not specify precisely how BLM is to meet them other than by permitting BLM to manage public lands by regulation or otherwise." *Gardner v. Bureau of Land Mgmt.*, 638 F.3d 1217, 1222 (9th Cir. 2011).

[6] https://www.onrr.gov/about/pdfdocs.FINAL%20Interagency%20SOP%20-%2009-23-13.pdf.

Accordingly, FLPMA's "broad wording . . . does not mandate that the BLM adopt restrictions" or regulations regarding venting and flaring. *Id*. Instead, FLPMA requires BLM to "provide for compliance with *applicable* pollution control laws, including *State and Federal air*, water, noise, or other pollution standards or implementation plans," not to prescribe new overlapping pollution control standards of its own. 43 U.S.C. § 1712(c)(8) (emphasis added). Nor does Plaintiffs' citation to one of FLPMA's several hortatory "policy" paragraphs create a statutory mandate to regulate venting and flaring. 43 U.S.C. § 1701(a)(8); *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, No. 09-1750, 2010 WL 5200944, at *11 (E.D. Cal. Dec. 15, 2010) ("By relying on section 1701, a 'Congressional declaration of policy,' plaintiffs are once again attempting to transform a statement of policy into a command regarding the [agency's] authority to regulate" its jurisdictional lands.), *aff'd*, 697 F.3d 1192 (9th Cir. 2012).

Plaintiffs' contention that BLM must—or even could—regulate venting and flaring for non-MLA air quality purposes directly conflicts with the authority of the EPA and the states regarding air quality under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq*. The U.S. District Court for the District of Wyoming correctly observed that the 2016 Rule "upend[ed] the CAA's cooperative federalism framework and usurp[ed] the authority Congress expressly delegated under the CAA to the EPA, states, and tribes to manage air quality." *Wyoming*, 2017 WL 161428, at *7. "When enacting the Clean Air Act in 1970, Congress directly addressed the issue of air pollution and created a comprehensive scheme for its prevention and control." *Id.* at *7; *California v. BP, p.l.c.*, No. C 17-6011, C 17-6012, 2018 WL 1064293 (N.D. Cal., Mar. 2016, 2018) ("Through the Clean Air Act, Congress established a comprehensive state and federal scheme to control air pollution in the United States."). EPA and the states must adhere to this scheme when determining whether and under what circumstances to impose emissions limits on any category of facilities, including for example the requirement to regulate new and modified facilities before existing ones. *See* 42 U.S.C. § 7411; *see also Wyoming*, 2017 WL 161428, at *6-9 (further explaining the CAA regulatory scheme). Accordingly, it is not BLM's

role to fill Plaintiffs' perceived regulatory gap in EPA's administration of the CAA to limit emissions from certain federal oil and gas leases, even if it wanted to. Despite Plaintiffs' insistence, BLM does not administer any part of the CAA and may not "hijack" this process "under the guise of waste management," much less do so under cover of other general statutory provisions. *Wyoming*, 2017 WL 161428, at *9.

Simply put, neither the record nor Plaintiffs' briefs provides any foundation for Plaintiffs' suggestion that the 2016 Rule was authorized—much less compelled—under the MLA, FOGRMA, FLPMA, or the CAA, or that the Revision Rule violated any statutory provision.

Moreover, BLM's prior incorrect legal conclusions do not enable or compel the agency to continue misinterpreting its legal obligations to prevent undue waste as Plaintiffs suggest. In promulgating the Revision Rule, BLM explained why it "believes that many provisions of the 2016 rule exceeded the BLM's statutory authority to regulate for the prevention of 'waste' under the [MLA]," and further provided case law support for its conclusion. AR_000002-3. BLM also explained why it erred in promulgating the 2016 Rule under the belief that it could regulate venting and flaring beyond the traditional scope of waste prevention. *Id*. Plaintiffs argue that because BLM concluded in the 2016 Rule—without analysis or support—that the MLA, FOGRMA, and FLPMA compelled its promulgation, BLM is now stuck with that incorrect legal interpretation, at least until it provides a robust administrative record for its reversal of legal position. But that is incorrect. BLM's prior erroneous legal conclusions cannot free it from Congress's statutory directions or preclude the agency from properly interpreting its legal authorities and obligations. *See Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (observing that "agencies may play the sorcerer's apprentice but not the sorcerer himself," where agency regulation attempted to create a private enforcement right not expressly granted by Congress); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *United Farm Workers v. Solis*, 697 F. Supp. 2d 5, 11 (D.D.C. 2010)

(judicial deference accorded to agency reversal of legal opinion that it was "mandated by Congress" to regulate in a particular fashion); *Wyoming*, 2016 WL 3509415, at *7 ("an agency's regulatory authority emanates from Congress, not an agency's self-proclaimed prior regulatory activity"). BLM's statutory authority is a legal issue, not a factual one, and cannot expand or shrink on the basis of an administrative record. In any event, BLM explained how the Revision Rule is permissible under applicable statutes while the 2016 Rule's legal footing was uncertain, and that satisfies the APA.

III. BLM Did Not "Delegate" its Waste Prevention Authority to the States and Tribes. (Issue A-3)

Under the Revision Rule, BLM directly regulates venting and flaring associated with (1) initial production testing, (2) well testing, (3) downhole well maintenance and liquids unloading, and (4) emergency response. 43 C.F.R. §§ 3179.101-3179.104. In all other cases, the applicable rules, regulations, and orders of the appropriate state or tribal authority control. 43 C.F.R. § 3179.201. BLM reasonably considers flaring conducted in compliance with acceptable state and tribal requirements as necessary, and not "undue waste." If BLM determines that the appropriate state or tribal authority lacks requirements sufficient to protect against waste of federal or Indian minerals, then lessees must seek a BLM "unavoidable loss" determination authorizing flaring of uneconomic gas. *See* 43 C.F.R. § 3179.201(c); Gov't Br. at 24-25.

Plaintiffs assert that this conditional deference to prevailing state and tribal standards is an impermissible "delegation" of BLM's statutory responsibility to the states and tribes. But this assertion misapprehends the meaning of the term "delegation." A delegation of authority is the assignment of congressionally mandated authority to another entity. *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n,* 359 F.3d 554, 565 (D.C. Cir. 2004). BLM here abdicated none of its statutory authority to another entity. States and tribes already have authority to regulate venting and flaring within their borders, and that authority is more extensive than BLM's. In promulgating the Revision Rule, BLM evaluated venting and flaring restrictions in the 10 states where more than 98 percent of federal oil and 99 percent of federal gas production, and the vast

majority of venting and flaring, occurs. AR_000019, 000340-345. States—including Plaintiff California—regulate venting and flaring under numerous legal authorities related to public health, air quality, environmental protection, economic regulation, and general state police power. CAL. CODE REGS. tit. 17, §§ 95668-95669, 95671, 95672-95674. In contrast, BLM may only regulate for the prevention of "undue waste," and lacks authority to restrict venting and flaring for other purposes such as air quality protection, which is within the exclusive purview of the states and EPA under the CAA. Accordingly, states and tribes need no delegation of Congressional authority from BLM to regulate venting and flaring, and BLM conferred none in the Revision Rule.

BLM's opting to defer to state venting and flaring requirements does not "delegate" any of BLM's statutory authority to anyone. Instead, BLM determined that deferring to prevailing state standards is a reasonable and administratively efficient means of avoiding unnecessarily burdensome, and possibly inconsistent, regulation to prevent the undue waste of federal mineral resources. 83 Fed. Reg. at 49,202. BLM's analysis reveals that although the states regulate venting and flaring differently, they generally regulate more restrictively under their various broader authorities than BLM could under its MLA waste prevention authority. Accordingly, the Revision Rule's conditional deference to state standards is more than sufficient to protect against "undue waste" of federal minerals.

Plaintiffs argue that because some states do not require operators to seek an unavoidable loss determination from the relevant state authorities like BLM once required under NTL-4A, deference to these states' venting and flaring regulations authorizes per-se waste. Citizen Groups' Br. at 13. But this assertion is inaccurate and disingenuous. Under their various authorities, states can and do impose venting and flaring restrictions that are more restrictive than BLM otherwise would without making individualized avoidable loss determinations as BLM does.[7] Plaintiffs' assertion that BLM's acceptance of state venting and flaring regulations

[7] To the extent that Plaintiffs suggest that *Lomax Expl. Co.*, 105 IBLA 1, 7 (1988), demonstrates that BLM is authorized to make an avoidable loss determination without first allowing a lessee to

authorizes waste rings particularly hollow because Plaintiffs champion the 2016 Rule, which likewise did not require lessees to seek a BLM "unavoidable loss" determination before flaring.

Moreover, BLM's decision to defer to state regulation comports with the MLA, which encourages BLM to minimize conflict between state and federal regulations. 30 U.S.C. § 189. Deference to state and tribal venting and flaring standards is also consistent with BLM's pre-2016 Rule regulations, which authorized venting and flaring pursuant to the rules, regulations, and orders of the appropriate state regulatory agency when BLM "ratified or accepted" the applicable state standards. NTL-4A, Sec. I.; Gov't Br. at 23-25. Notably, Plaintiffs do not take issue with the legality of these pre-2016 regulations. Thus, the inconsistent outlier is the 2016 Rule, where BLM deemed states' venting and flaring requirements insufficient to protect against waste of federal mineral resources. AR_000911, 000918-920, 000933-935. But the agency was only able to reach that conclusion because, at the time, BLM's 2016 Rule fundamentally misapplied the concept of "waste" and the scope of BLM's authority to prevent undue waste under the MLA. AR_000911. When appropriately viewed through the prism of BLM's authority to prevent undue waste under the MLA, the agency now properly concludes that state regulations are sufficient to prevent the undue waste of federal mineral resources. AR_000019.

In the Revision Rule BLM reserves the right in the future to reject state standards that the agency finds insufficiently protective against undue waste, and to regulate venting and flaring directly through making avoidable loss determinations under the MLA. *See* 43 C.F.R. § 3179.201(c); Gov't Br. at 24-25. But any quarrel Plaintiffs, including State Plaintiffs, may have with any individual state standards provides no ground to vacate the entire Revision Rule.

IV. The Revision Rule Did Not Violate NEPA. (Issue D)

Plaintiffs' procedural NEPA claim is that the Revision Rule "significantly affect[s] the quality of the human environment" and thus requires preparation of an EIS. 42 U.S.C.

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demonstrate that gas capture was uneconomic, they are wrong. Citizen Groups' Br. at 10, n.6, 13. As Federal Defendants point out, the *Lomax* decision was expressly modified by *Ladd*, which held that BLM must consider economic factors before determining that the loss of gas was "avoidable." 107 IBLA at 5; *see* Gov't Br. at 17 n.7.

§ 4332(2)(C); 40 C.F.R. § 1508.18. But it is axiomatic that the effects of partially repealing a rule with insignificant effects are themselves insignificant.

Under NEPA, "both beneficial and adverse" effects on the quality of the human environment determine whether a proposed federal action is "significant" and thus requires an EIS. 40 C.F.R. § 1508.27(b)(1) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial."). Here, for the 2016 Rule, BLM prepared an 87-page EA concluding that the 2016 Rule would have no significant environmental effects and that an EIS is not necessary AR_001233; *see also id.* ("The rulemaking is programmatic and not expected to have any direct impacts on the human environment."). BLM finalized its determination in a 6-page Finding of No Significant Impact ("FONSI"). AR_001317. No party has challenged that NEPA analysis.

Subsequently, for the Revision Rule, BLM prepared a 37-page EA and 8-page FONSI. AR_000295; AR_000332. Relying upon the 2016 EA's analysis as an environmental baseline, BLM concluded that repealing certain requirements in the 2016 Rule would likewise not have significant environmental effects. AR_000332. The Revision Rule creates no difference on the ground since the repealed provisions of the 2016 Rule never have been implemented, while other 2016 Rule requirements were preserved or modified only slightly. The record points to no significant environmental effects, one way or the other, from the 2016 Rule or Revision Rule.

Plaintiffs' implication that BLM should have produced a lengthier NEPA document ignores that (1) the 2018 EA "incorporated by reference" its recent prior analysis as NEPA regulations expressly instruct BLM to do; (2) unlike an EIS, an EA is a "concise public document" that includes "brief discussions"; (3) a FONSI similarly "briefly present[s]" why the environmental consequences of an action are not significant; and (4) "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action." 40 C.F.R. §§ 1502.21, 1508.9, 1508.13, 1500.1. BLM wrote all that it had to write in its EA, without duplicating its prior work.

Plaintiffs' attempts to poke holes in the EA all miss the mark, as Federal Defendants' brief explains in detail, and API supplements here. First, as Plaintiffs concede elsewhere and this Court has found, BLM had no obligation to use the global social cost of methane, and its choice of modeling methodology is entitled to deference. *See California v. BLM*, 286 F. Supp. 3d 1054, 1069-70 (N.D. Cal. 2018); *cf.* Citizen Groups' Br. at 34. Second, beyond Plaintiffs' mischaracterizations of it, EPA's proposed rule regarding its new source performance standards for certain onshore oil and gas operations is not a final agency action and has no legal effect; BLM could not prejudge the outcome of that rulemaking in its EA. *See* 83 Fed. Reg. 52,056 (Oct. 15, 2018); *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 843 (9th Cir. 2013) ("[P]roposed regulations have no legal effect."). Finally, Plaintiffs' desired analysis of "cumulative climate impacts of [BLM's pre-existing] fossil fuel program for federal and tribal lands," including even "coal," is unprecedented. *See* Citizen Groups' Br. at 35-36. Indeed, "practical considerations of feasibility" preclude such a far-reaching and freewheeling analysis. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976).[8]

Plaintiffs' concerns with the 2018 EA, but not the 2016 EA, highlight that their NEPA claims are predicated not on BLM's level of analysis, but on BLM's final decision to issue the Revision Rule. A substantive policy outcome that Plaintiffs dislike is not a NEPA violation. *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) ("NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by any agency, as 'NEPA was not intended to resolve fundamental policy disputes.'"). For purposes of this case, BLM satisfied its

[8] Plaintiffs do not take issue with BLM's alternatives analysis in their NEPA arguments (Issue D), but lump NEPA into a passing footnote to their misguided one-paragraph argument that the APA separately mandates additional alternatives analysis (Issue B-2c). Citizen Groups' Br. at 21, n.12. As explained by the Alliance and IPAA, the Revision Rule was not a full repeal, and BLM sufficiently handled its consideration and dismissal of alternatives. Moreover, *Muckleshoot Indian Tribe v. U.S. Forest Serv.* is distinguishable because it involved the proper scope of reserved federal rights in a specific land exchange, not a rulemaking or agency policy under the MLA, and the court principally found the agency improperly tiered to a prior NEPA analysis. 177 F.3d 800, 812-14 (9th Cir. 1999). Here, Plaintiffs do not contest the 2016 EA that the Revision Rule incorporated by reference and utilized as an analytical baseline.

procedural NEPA obligations in issuing the Revision Rule.

CONCLUSION

For the reasons above, and in the other Defendants' opening briefs, the Court should enter summary judgment for API and Defendants and dismiss Plaintiffs' claims.

Respectfully submitted this 26th day of August, 2019.

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