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UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

STATE OF WYOMING, *et al.*, Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Respondents, and STATE OF CALIFORNIA and STATE OF NEW MEXICO, State Respondent-Intervenors.	Case No. 16-cv-00285-SWS [Lead] [Consolidated with 2:16-cv-00280-SWS] **STATE RESPONDENTS' OPPOSITION TO PETITIONERS' BRIEFS IN SUPPORT OF PETITIONS FOR REVIEW OF FINAL AGENCY ACTION** Date: December 18, 2017 Time: 1:30 p.m. Courtroom: Casper Courtroom No. 2 Judge: Hon. Scott W. Skavdahl

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INTRODUCTION

In this action, several states and industry groups (collectively, "Petitioners") challenge a commonsense rulemaking by the U.S. Bureau of Land Management ("BLM") to update its regulations governing the waste of natural gas and royalty payments from oil and gas operations on federal and Indian lands. 81 Fed. Reg. 83,008 (Nov. 18, 2016) (Waste Prevention, Production Subject to Royalties, and Resource Conservation; Final Rule) (the "Waste Prevention Rule" or "Rule"). The Rule would prevent the waste of 41 billion cubic feet of gas annually and increase royalty collections by up to $14 million per year. Petitioners' primary contention is that BLM lacked statutory authority to promulgate the Rule because it reduces air pollution, a task that they allege can only be accomplished pursuant to the federal Clean Air Act. Petitioners also argue that the Rule is in excess of BLM's statutory authority to prevent "waste" or regulate mineral interests in communitized units, and that the Rule is arbitrary and capricious.

The States of California (by and through the California Air Resources Board) and New Mexico ("State Respondents") fundamentally disagree with these contentions. BLM is the federal agency explicitly charged by statute to prevent waste from oil and gas operations on federal and Indian lands, and the Rule represents a reasonable exercise of this authority. The fact that the Rule also has air quality and climate change benefits does not transform it into an impermissible Clean Air Act rulemaking or otherwise conflict with that statute. BLM acted well within its authority to consider such benefits as part of the rulemaking process, and Petitioners have otherwise failed to show that the Rule was arbitrary and capricious. Thus, the Court should deny the Petitions for Review.

FACTUAL AND PROCEDURAL BACKGROUND

I. WASTE OF FEDERALLY-MANAGED OIL AND GAS RESOURCES.

BLM oversees more than 245 million acres of land and 700 million subsurface acres of federal mineral estate, on which reside nearly 100,000 producing onshore oil and gas wells. AR[1] 366 (81 Fed. Reg. at 83,014). In fiscal year 2015, the production value of this oil and gas

[1] The administrative record in this matter is cited as "AR [page number]," excluding leading zeros.

exceeded $20 billion and generated over $2.3 billion in royalties, which were shared with tribes and states. *Id.*; *see* 30 U.S.C. § 191(a). Oil and gas production in the United States has increased dramatically over the past decade due to technological advances such as hydraulic fracturing and directional drilling. AR 361 (81 Fed. Reg. at 83,009). However, the American public has not fully benefitted from this increase in domestic energy production because it "has been accompanied by significant and growing quantities of wasted natural gas." AR 366 (81 Fed. Reg. at 83,014). For example, between 2009 and 2015, nearly 100,000 oil and gas wells on federal land released approximately 462 billion cubic feet of natural gas through venting and flaring, enough gas to serve about 6.2 million households for a year. AR 361 (81 Fed. Reg. at 83,009). In 2014, operators vented and flared approximately 4.1 percent of the total production from BLM-administered leases, or enough natural gas to supply 1.5 million households for a year. AR 362 (81 Fed. Reg. at 83,010).

When oil and gas operators waste natural gas through venting, flaring, and leaks, this not only squanders a valuable public resource that could be used to supply our nation's power grid and generate royalties, but it also harms air quality. For example, venting, flaring, and leaks of natural gas can release volatile organic compounds ("VOCs"), including benzene and other hazardous air pollutants, and result in the emission of nitrogen oxides ("NOx") and particulate matter, which can cause and worsen respiratory and heart problems. AR 366 (81 Fed. Reg. at 83,014). In addition, the primary constituent of natural gas—methane—is an especially potent greenhouse gas, which contributes to climate change at a rate much higher than carbon dioxide. AR 361 (81 Fed. Reg. at 83,009).

II. THE BLM WASTE PREVENTION RULE.

Prior to 2016, BLM's regulatory scheme governing the minimization of resource waste had not been updated in over three decades. AR 360 (81 Fed. Reg. at 83,008). Several oversight reviews, including those by the Government Accountability Office ("GAO") and the Department of the Interior's Office of the Inspector General, specifically called on BLM to update its "insufficient and outdated" regulations regarding waste and royalties. AR 361-62 (81 Fed. Reg. at 83,009-10). The GAO specifically noted that "around 40 percent of natural gas estimated to

be vented and flared on onshore Federal leases could be economically captured with currently available control technologies." AR 362 (81 Fed. Reg. at 83,010). The reviews recommended that BLM require operators to augment their waste prevention efforts and clarify policies regarding royalty-free, on-site use of oil and gas. *Id*.

In 2014, BLM responded to these reports by initiating the development of a rule to update its existing waste prevention regulations. *Id*. After soliciting and reviewing input from stakeholders and the public, BLM released its proposal in February 2016. AR 2 (81 Fed. Reg. 6,616 (Feb. 8, 2016) ("Proposed Rule")). BLM received approximately 330,000 public comments, including approximately 1,000 unique comments, on the Proposed Rule. AR 373 (81 Fed. Reg. at 83,021). The agency also hosted stakeholder meetings and met with regulators from states with significant federal oil and gas production. *Id*.

BLM issued the final Waste Prevention Rule in November 2016. AR 360 (81 Fed. Reg. at 83,008). In the final Rule, BLM refined many of the provisions of the Proposed Rule based on public comments to ensure both that compliance was feasible for operators and that the Rule achieved its waste prevention objectives. AR 374-75 (81 Fed. Reg. at 83,022-23). The Rule is designed to force considerable reductions in waste from flaring and venting, saving and putting to use up to 41 billion cubic feet of gas per year. AR 366 (81 Fed. Reg. at 83,014). In addition, the Rule would avoid an estimated 175,000-180,000 tons of methane emissions per year and reduce emissions of VOCs, including benzene and other hazardous air pollutants, by 250,000–267,000 tons per year. *Id*.

The Rule addresses each major source of natural gas waste from oil and gas production—venting, flaring, and equipment leaks—through different requirements. AR 362-65 (81 Fed. Reg. at 83,010-13). In particular, the Rule prohibits venting except under specified conditions, and requires updates to existing equipment. AR 363-65 (81 Fed. Reg. at 83,011-13). The Rule's flaring regulations reduce waste by requiring gas capture percentages that increase over time, providing exemptions that are scaled down over time, and requiring operators to submit Waste Minimization Plans. AR 363 (81 Fed. Reg. at 83,011). Leak detection provisions require semi-annual inspections for well-sites and quarterly inspections for compressor stations. *Id*.

III. EPA'S EMISSIONS STANDARDS FOR NEW SOURCES IN THE OIL AND GAS SECTOR.

In June 2016, EPA promulgated standards for new, reconstructed, and modified sources in the oil and natural gas sector ("EPA NSPS"), which limit emissions of both greenhouse gases ("GHGs") and VOCs pursuant to Section 111(b) of the Clean Air Act, 42 U.S.C. § 7411. 81 Fed. Reg. 35,824 (June 3, 2016). These new source performance standards, or NSPS, follow from EPA's 2009 determination that GHGs endanger both public health and welfare of current and future generations by causing or contributing to climate change. *Id*. at 35,825. The EPA NSPS set requirements for reducing GHG emissions, specifically methane, and updated requirements for VOCs across a variety of additional emission sources in the oil and natural gas source category (*i.e*., production, processing, transmission, and storage). *Id*. The EPA NSPS are currently being challenged by Petitioners in the D.C. Circuit, where California, New Mexico, and several other states have intervened in defense of the rulemaking. *See North Dakota v. U.S. EPA*, No. 16-1242 (D.C. Cir. filed July 15, 2016); *IPAA v. U.S. EPA*, No. 16-1262 (D.C. Cir. filed Aug. 1, 2016); *W. Energy Alliance v. U.S. EPA*, No. 16-1266 (D.C. Cir. filed Aug. 2, 2016).[2]

IV. THIS LITIGATION.

In November 2016, Petitioners initiated this challenge to the Waste Prevention Rule. The California Attorney General's Office, on behalf of the California Air Resources Board, the State of New Mexico, and several environmental organizations intervened to defend the Rule.

On January 16, 2017, following briefing and oral argument on the Petitioners' motions for a preliminary injunction, this Court denied the motions, holding that Petitioners had failed to establish a likelihood of success on the merits or irreparable harm in the absence of an injunction. *Wyoming v. U.S. Dep't of the Interior*, 2017 WL 161428, *9-11 (D. Wyo. Jan. 16, 2017). The Court found that "BLM is entitled to deference regarding the determination of how best to minimize losses of gas due to venting, flaring, and leaks, and incentivize the capture and use of produced gas," and recognized that "a regulation that prevents wasteful losses of natural

[2] On January 4, 2017, these cases were consolidated with several other EPA rule challenges under case No. 13-1108, and are currently being held in abeyance in light on EPA's pending review of the EPA NSPS rule.

gas necessarily reduces emissions of that gas." *Id*. at *6. The Court concluded that Petitioners had not established that any aspects of the Rule were inconsistent with the Clean Air Act, lacked an independent waste prevention purpose, or exceeded BLM's authority. *Id*. at *9. This Court also denied Petitioners' claims that the Rule was arbitrary and capricious. *Id*. at *9-10.

The Rule went into effect on January 17, 2017. In its preliminary injunction ruling, the Court established an accelerated merits briefing schedule that required Petitioners' opening briefs to be filed by March 23, 2017. *Id*. at *13. However, on March 3, 2017, Petitioners requested an extension of the briefing schedule "to allow for review of the administrative record and preparation of a merits brief and for Congress to consider whether to exercise its authority under the Congressional Review Act." Dkt. No. 97 at 3. This extension was granted by the Court on March 6, 2017. Dkt. No. 99.[3] On May 10, 2017, the United States Senate voted to reject such a measure, leaving the Rule in effect.[4] Petitioners filed their opening merits briefs in this action on October 2, 2017. Dkt. Nos. 141-43.

STATUTORY BACKGROUND

There is no dispute that Congress granted BLM authority to enact rules to prevent waste and regulate royalties[5] from oil and gas operations on federal and Indian lands. AR 371 (81 Fed. Reg. at 83,019); Brief in Support of Wyoming and Montana's Petition for Review of Final Agency Action, Dkt. No. 141 ("WY Br.") at 2-5, 22 ("The Bureau has clear statutory authority to

[3] On March 30, 2017, Petitioners filed a second request to extend the briefing schedule due to issues related to the administrative record, and requested that the Petitioners file a status report at a later date to establish a briefing schedule. Dkt. No. 110. This request was granted in part by the Court. Dkt. No. 118.

[4] *See* H.J. Res. 36, "Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the final rule of the Bureau of Land Management relating to 'Waste Prevention, Production Subject to Royalties, and Resource Conservation,'" 115th Cong., *available at*: https://www.congress.gov/bill/115th-congress/house-joint-resolution/36.

[5] Petitioners do not appear to challenge BLM's statutory authority to regulate royalty payments pursuant to the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), 30 U.S.C. § 1701 *et seq*. In FOGRMA, Congress reiterated its concern about waste by providing that: "Any lessee is liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence on the part of the operator of the lease, or due to the failure to comply with any rule or regulation, order or citation issued under this chapter or any mineral leasing law." 30 U.S.C. § 1756.

promulgate rules to minimize the waste of federal minerals, including methane, under the Mineral Leasing Act and [the Federal Oil and Gas Royalty Management Act]"); *Wyoming*, 2017 WL 161428 at *5-6 & n.6 (discussing BLM's "undisputed" authority to prevent waste and ensure proper payment of royalties).

First, the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 181 *et seq*., provides BLM with broad regulatory power to require oil and gas lessees to observe "such rules … for the prevention of undue waste as may be prescribed by [the] Secretary," to protect "the interests of the United States," and to safeguard "the public welfare." *Id*. § 187. The MLA specifically requires that "[a]ll leases of lands containing oil or gas … shall be subject to the condition that the lessee will … use all reasonable precautions to prevent waste of oil or gas developed in the land … ." *Id*. § 225. The Secretary is "authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter." *Id*. § 189; *see Boesche v. Udall*, 373 U.S. 472, 478 (1963) (Secretary has authority under MLA to "prescribe … rules and regulations governing in minute detail all facets of the working of the land").

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*., provides BLM with broad authority to regulate "the use, occupancy, and development of the public lands" under the principles of "multiple use and sustained yield." 43 U.S.C. § 1732. Among other requirements, FLPMA mandates that BLM manage public lands "in a manner that will protect the quality of … ecological, environmental, [and] air and atmospheric … values," *id*. § 1701(a)(8), and provides BLM with authority to take any action, by regulation or otherwise, "necessary to prevent unnecessary or undue degradation of the lands." *Id*. § 1732(b). FLPMA also provides BLM with authority to "promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands." *Id*. § 1740.

Pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g, and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–08, BLM has authority to regulate oil and gas development on 56 million acres of Indian mineral estate held in trust by the federal government. *See, e.g.*, 25 U.S.C. § 396d (oil and gas operations on Indian lands subject "to the

rules and regulations promulgated by the Secretary"). As the Tenth Circuit has stated, "[t]he federal statutory and regulatory scheme governing oil and gas operations on Indian land covers virtually every aspect of such operations … ." *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1181 (10th Cir. 2011).

STANDARD OF REVIEW

Judicial review of agency action is governed by Section 706(2)(A) of the Administrative Procedure Act ("APA"), which provides that "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The essential function of this review is to determine "(1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1574 (10th Cir. 1994).

In reviewing an agency's assertion of authority to regulate an activity pursuant to a statute that it administers, the court applies the two-step analysis set forth by the U.S. Supreme Court in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Sinclair Wyoming Refining Company v. U.S. EPA*, 867 F.3d 1211, 1215 (10th Cir. 2017). The first step of this analysis asks "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842–43. If Congress's intent is clear, then both the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id*. at 843. However, if Congress has "not directly addressed the precise question at issue"—if "the statute is silent or ambiguous with respect to the specific issue"—the court must determine at *Chevron* step two "whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843–44. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id*. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by … an agency." *Id*. at 844.

Petitioners' assertions that *Chevron* deference does not apply to BLM's promulgation of

the Waste Prevention Rule must be rejected. *See* WY Br. at 25; Brief in Support of Western Energy Alliance and Independent Petroleum Association of America's Petition for Review of Final Agency Action, Dkt. No. 142 ("WEA Br.") at 7-11; Joint Opening Brief of the States of North Dakota and Texas, Dkt. Nos. 143 and 144-1 ("ND Br.") at 22-24. As discussed in detail below, BLM has not "ventured well outside" its delegated authority to promulgate an impermissible "air quality" regulation, but instead acted well within its clear statutory mandate to prevent the waste of oil and gas resources. *See infra* at Section I.A. Moreover, as this Court previously found, "BLM is entitled to deference regarding the determination of how best to minimize losses of gas due to venting, flaring, and leaks, and incentivize the capture and use of produced gas." *Wyoming*, 2017 WL 161428 at *6.

Given the express delegation from Congress to regulate waste, the decisions cited by Petitioners on this issue (*see* WEA Br. at 8-9) are readily distinguishable and offer no support for Petitioners' argument. *See King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (finding that "in extraordinary cases" involving questions of "deep economic and political significance … had Congress wished to assign that question to an agency, it surely would have done so expressly"); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (finding EPA interpretation "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization"). Although the Rule has other, indirect benefits, those benefits are the result of the Rule's clearly stated purpose of reducing waste, and also fall within the agency's authority to protect public welfare and the environment. *See* 30 U.S.C. § 187; 43 U.S.C. § 1701(a)(9); *see also Hannifin v. Morton*, 444 F.2d 200, 202 (10th Cir. 1971) (MLA should be "broadly construed in order for the Secretary to properly carry out his proprietary function on behalf of the government and its citizens"). Thus, in evaluating BLM's authority to issue the Waste Prevention Rule, this Court should determine whether the Rule is based on a permissible construction of the statute under *Chevron* step 2.

An agency action is arbitrary and capricious if the agency (1) "entirely failed to consider an important aspect of the problem," (2) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a

difference in view or the product of agency expertise," (3) "failed to base its decision on consideration of the relevant factors," or (4) made "a clear error of judgment." *Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) (internal quotations and citation omitted). "[T]he arbitrary and capricious standard focuses on the rationality of an agency's decision making process rather than on the rationality of the actual decision ... ." *Colo. Wild v. U.S. Forest Serv*., 435 F.3d 1204, 1213 (10th Cir. 2006). "This standard of review is 'very deferential' to the agency's determination, and a presumption of validity attaches to the agency action such that the burden of proof rests with the party challenging it." *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183, 1197 (10th Cir. 2014) (quoting *W. Watersheds Project v. Bureau of Land Mgmt*., 721 F.3d 1264, 1273 (10th Cir. 2013)).

ARGUMENT

I. BLM ACTED WELL WITHIN ITS STATUTORY AUTHORITY WHEN IT PROMULGATED THE WASTE PREVENTION RULE.

A. The Waste Prevention Rule is Not an Impermissible Air Quality Rule.

Petitioners' primary argument is that the Waste Prevention Rule is an "air quality" rule that BLM had no authority to promulgate. *See* WY Br. at 23-26, WEA Br. at 11-13, ND Br. at 42-51. However, other than noting that the Rule has air quality benefits or misrepresenting the stated purposes of the Rule, Petitioners offer no record evidence to support this argument. In fact, the record demonstrates that the Rule was promulgated pursuant to BLM's "clear statutory authority" to regulate waste and royalties from oil and gas operations. *See* WY Br. at 22. As this Court has already found, "The terms of the MLA and FOGRMA make clear that Congress intended the Secretary, through the BLM, to exercise its rulemaking authority to prevent the waste of federal and Indian mineral resources and to ensure the proper payment of royalties to federal, state, and tribal governments." *Wyoming*, 2017 WL 161428 at *6. "[T]he delegation of general authority to promulgate regulations extends to all matters 'within the agency's substantive field.'" *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1109 (10th Cir. 2015) (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013)). Where Congress has

unambiguously vested authority in an agency to administer a statute, "courts need not try to discern whether 'the particular issue was committed to agency discretion.'" *Id*.

The fact that the Rule also benefits air quality does not undermine its waste prevention purpose, and it is fully within BLM's authority to promulgate. A regulation that reduces flaring, venting, and other wasteful losses of natural gas necessarily reduces such pollution, but that does not transform it into an impermissible "air quality" rule. Moreover, such a rule is fully consistent with BLM's mandate to safeguard "the public welfare" and to manage public resources in a way that takes environmental considerations into account, including "air and atmospheric" values. *See* 30 U.S.C. § 187; 43 U.S.C. § 1701(a)(8); *see also id*. §§ 1701(a)(9) (BLM must receive "fair market value of the use of the public lands and their resources"), 1702(c) (defining "multiple use" mandate to include environmental considerations).

The record does not support Petitioners' assertions that the "true purpose" of the Rule is to regulate greenhouse gases and air quality (WY Br. at 23), or that "large sections of the Final Rule functionally operate as air regulations" (ND Br. at 43). As stated in the Rule: "The purpose of this rule is to reduce waste of natural gas owned by the American public and tribes, which occurs during the oil and gas production process." AR 367 (81 Fed. Reg. at 83,015). The Rule is clearly a waste prevention rule, which directs "operators to take reasonable and common-sense measures to prohibit routine venting, minimize the quantities of natural gas routinely flared, reduce natural gas losses through leaks, and deploy up-to-date technology to reduce routine losses from production equipment." *Id*. The Rule has obvious and significant waste-minimization benefits: reducing the total volume of gas wasted on BLM-administered leases will result in additional natural gas production of 9-41 billion cubic feet annually, and generate $3-14 million in additional royalties per year. AR 366 (81 Fed. Reg. at 83,014).

Further, the Waste Prevention Rule in no way infringes on EPA's authority under the Clean Air Act. The U.S. Supreme Court has rejected the contention that two agencies with overlapping mandates are somehow prohibited from administering their separate statutory obligations. *In Massachusetts v. EPA*, the Court considered EPA's authority to regulate carbon dioxide emissions under the Clean Air Act. 549 U.S. 497 (2007). EPA argued that doing so

would improperly require it to tighten vehicle mileage requirements, a task that Congress had assigned to the U.S. Department of Transportation ("DOT"). *Id*. at 531-32. The Court rejected this argument, noting that DOT's statutory charge to set mileage standards "in no way licenses EPA to shirk its environmental responsibilities." *Id*. at 532. The Court noted that the two agency's "obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id*.[6] Similarly here, the fact that EPA is charged with protecting air quality does not strip BLM of its mandate to regulate resource waste simply because that waste is emitted in the form of air pollution.

Numerous other courts have reached similar conclusions. *See, e.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1219 (9th Cir. 2008) (rejecting agency's argument that it need not consider reasonable alternatives in setting corporate average fuel economy standards because such standards might overlap with EPA's environmental protection purposes); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1163, 1166–67 (E.D. Cal. 2007) (EPA has authority to promulgate emission control regulations that have an effect on fuel economy under the Energy Policy and Conservation Act); *Alfa Int'l Seafood v. Ross*, --- F. Supp. 3d ---, 2017 WL 3726984, *15 (D.D.C. Aug. 28, 2017) (in the absence of clear congressional intent to the contrary, finding no basis to invalidate Department of Commerce rule "simply because it 'touches on' an area over which the FDA also has regulatory authority"). Thus, the fact that EPA has established emissions standards for new sources in the oil and gas sector in no way precludes BLM from fulfilling its statutory duty to regulate waste from new and existing sources, even if the legal obligations imposed may overlap and complement one another.

In addition, there is no preemptive or preclusionary language in the Mineral Leasing Act, FLPMA, or the Clean Air Act that would prevent BLM from promulgating the Rule. It is a basic principle of statutory construction that courts must interpret the interaction of multiple statutes "'to give effect to each if we can do so while preserving their sense and purpose.'" *U.S. ex rel.*

[6] Given that BLM is not attempting to "administer or enforce" an air quality regulation, Petitioners' attempt to distinguish this authority fails. *See* WEA Br. at 17-18.

Bergen v. Lawrence, 620 F. Supp. 1414, 1419 (D. Wyo. 1985) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)); *see POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). Petitioners have failed to demonstrate why BLM and EPA cannot both achieve their statutory obligations with regard to regulation of the oil and gas industry. In fact, that is precisely what these agencies have done in coordinating their efforts to regulate such operations.

The Waste Prevention Rule does not conflict with or undermine any EPA regulations promulgated pursuant to the Clean Air Act. Unlike EPA's NSPS for new, reconstructed, and modified sources in the oil and natural gas sector, which impose numeric percentage-reduction requirements on emissions of GHGs and VOCs from specified equipment and processes within the oil and natural gas source category, 81 Fed. Reg. at 35,824,[7] the Waste Prevention Rule sets no emissions standards for particular pollutants and contains no air quality monitoring requirements. *See* 42 U.S.C. § 7411. Unlike a Clean Air Act rulemaking that establishes performance standards for private, stationary sources of pollution, the Waste Prevention Rule seeks to prevent waste from the development of public resources on federal and Indian lands. Put simply, there is nothing in the Waste Prevention Rule that resembles a "national air emission regulatory regime." *See* ND Br. at 45.[8] In promulgating the Rule, BLM was well aware that EPA was in the process of finalizing its NSPS and "carefully coordinated" with that agency "to minimize compliance burdens for operators and to avoid unnecessary duplication." AR 4, 21, 365, 370-71 (81 Fed. Reg. at 6,618, 6,635; 81 Fed. Reg. at 83,013, 83,018-19). The Rule addresses the potential for overlapping regulations by (1) allowing compliance with EPA's

[7] *See* 81 Fed. Reg. at 35,826-27 (Table 1, Summary of BSER [best system of emission reduction] and Final Subpart OOOOa Standards for Emission Sources).

[8] Contrary to their arguments here that the Rule improperly intrudes on EPA's authority, Petitioners have asserted in the D.C. Circuit that EPA has no legal authority to promulgate the NSPS under the Clean Air Act. *See North Dakota v. U.S. EPA*, No. 16-1242 (D.C. Cir. filed July 15, 2016); *IPAA v. U.S. EPA*, No. 16-1262 (D.C. Cir. filed Aug. 1, 2016); *W. Energy Alliance v. U.S. EPA*, No. 16-1266 (D.C. Cir. filed Aug. 2, 2016). It is clear that Petitioners' interest is not in avoiding conflicting regulations, but rather to avoid any federal regulation at all.

requirements for new or modified sources to satisfy the requirements of the Rule when both EPA regulations and the Rule apply; (2) exempting from the Rule equipment covered by existing EPA regulations; and (3) allowing a state or tribe to request a variance from provisions of the Rule if their regulations are at least as effective as the Rule in reducing waste. AR 365, 379, 407, 410-11, 413, 419-20 (81 Fed. Reg. at 83,013, 83,027, 83,055, 83,058-59, 83,061, 83,067-68).[9] Many of these changes were specifically made in response to public comments requesting that BLM address potential conflicts in regulatory coverage, including comments from Petitioners. *See* AR 407, 410-11, 413, 419-20 (81 Fed. Reg. at 83,055, 83,058-59, 83,061, 83,067-68); AR 36764 (Wyoming Oil and Gas Conservation Commission comments at 3) (suggesting that BLM "ensure that developing rules within the EPA and BLM do not subject operators to conflicting and duplicative regulations"); AR 33592-93 (Independent Petroleum Association of America and Western Energy Alliance comments at 58-59) (requesting that BLM defer to EPA's NSPS regulations for well completions); AR 33573 (Independent Petroleum Association of America and Western Energy Alliance comments at 39) (requesting that BLM defer to EPA's leak detection and repair regulations); AR 33634 (North Dakota Industrial Commission comments at 6) (same).

Exempting an operator from certain provisions of the Waste Prevention Rule based on compliance with EPA's NSPS requirements is a reasonable compromise and does not transform the Rule into an "air quality regime." In particular, the fact that some aspects of the Rule are similar to EPA requirements or have air quality benefits does nothing to undermine BLM's authority. *See Wyoming*, 2017 WL 161428, *9 ("BLM has authority to promulgate and impose regulations which may have air quality benefits and even overlap with CAA regulations if such rules are independently justified as waste prevention measures pursuant to its MLA authority.");

[9] Similarly, EPA stated in its own rulemaking that it "worked closely with [BLM] during development of this rulemaking in order to avoid conflicts in requirements between the NSPS and BLM's proposed rulemaking." 81 Fed. Reg. at 35,825; *see id*. at 35,831 ("While we intend for our rule to complement the BLM's action, it is important to recognize that the EPA and the BLM are each operating under different statutory authorities and mandates in developing and implementing their respective rules.").

see also Ctr. for Biological Diversity, 538 F.3d at 1219 ("Energy conservation and environmental protection are not coextensive, but they often overlap.").

Given that BLM had statutory authority to promulgate the Waste Prevention Rule, and its coordination with EPA did not transform the Rule into an impermissible "air quality" regulation, Petitioners' remaining arguments on this issue fail. First, the Rule's variance provision does not conflict with the citizen suit provision of the Clean Air Act or the rulemaking process set forth in the APA. The fact that the Rule's variance provisions do not follow the Clean Air Act's citizen suit provisions, 42 U.S.C. § 7604, is irrelevant since BLM is not imposing sanctions for violations of that statute. *See* WY Br. at 30-31. Further, the variance process is not a "rule making" subject to the APA's notice and comment procedures, 5 U.S.C. § 553, and the provision itself was already subject to such procedures during BLM's promulgation of the Rule. *See* WY Br. at 32. Furthermore, the fact that BLM is able to enforce state or tribal rules for which a variance was granted, in lieu of BLM's own rules, does not affect state sovereignty or prevent the Petitioners from continuing to enforce their own regulations. *See* ND Br. at 50-51.

Second, the Rule does not contain a "preference" for flaring over venting in order to achieve air quality benefits. *See* WY Br. at 12-14, 23. Flaring is significantly safer than venting because uncombusted methane is highly explosive and venting it exposes workers to high risks of illness, including hypoxia. AR 401 (81 Fed. Reg. at 83,049). While the requirements regarding venting and flaring differ, the purpose of these provisions of the Rule is the same: to prevent the waste of natural gas. The Rule not only prohibits the venting of natural gas except under specified conditions, but also requires a phased reduction in flaring by increasing capture requirements over time, with the ultimate goal of phasing out routine flaring. AR 363 (81 Fed. Reg. at 83,011).[10] These requirements are based on preventing waste or ensuring the safety of oil and gas operations, which are indisputably within the authority of BLM to regulate. AR 362-63 (81 Fed. Reg. at 83,010-11).

[10] In doing so, BLM did not "ignore" the lack of infrastructure to transport or process gas produced with oil. *See* WEA Br. at 5. The Rule's phased capture requirements are designed to allow operators time "to plan for and build out the additional infrastructure necessary to capture and transport greater volumes of gas in later years." AR 378 (81 Fed. Reg. at 83,026).

In sum, the Waste Prevention Rule represents a reasonable exercise of BLM's statutory authority to regulate waste from oil and gas operations on federal and Indian lands, and there is nothing in the Clean Air Act that precludes BLM's promulgation of the Rule.

B. The Rule is Consistent with BLM's Authority Under the Mineral Leasing Act to Regulate "Waste."

Acknowledging that the Rule represents an exercise of BLM's authority to regulate waste, Petitioners next contend that the Rule exceeds such authority. WEA Br. at 18-22; ND Br. at 32-34. These arguments must be rejected. First, Petitioners' assertion that the Rule is inconsistent with the "common usage" of the term "waste" because its costs exceed its benefits is misplaced. WEA Br. at 20-21; ND Br. at 32-34. While the MLA does not define "waste," the term "waste of oil or gas" is defined by regulation as follows:

> [A]ny act or failure to act by the operator that is not sanctioned by the authorized officer as necessary for proper development and production and which results in: (1) A reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations; or (2) avoidable surface loss of oil or gas.

See 43 C.F.R. § 3160.0-5. Petitioners do not challenge this definition or cite any authority for the proposition that BLM is required to follow the alleged "common usage" of the term rather than its own regulation, which says nothing about costs. In any event, as discussed below, BLM properly analyzed the Rule and determined that its benefits exceed its costs. *See infra* at Section II. Moreover, BLM phased in the Rule's requirements over a ten-year period to provide operators with the ability to spread compliance costs over a multi-year period while increasing revenues due to an increasing amount of gas captured for sale. *See* AR 488, 494, 517, 534, 540 (Regulatory Impact Analysis ("RIA") at 42, 48, 71, 88, 94).[11]

Petitioners further contend that the Rule is inconsistent with the "common usage" of waste because by limiting the term "avoidably lost" to 12 specific circumstances, BLM has

[11] Petitioners' attempt to cite contrary information from a declaration filed with their merits brief (*see* ND Br. at 33 n.15, citing Declaration of Lynn D. Helms, Dkt. No. 143-1) should be rejected. Pursuant to Local Civil Rule 83.6(b)(3), "[e]xtra-record evidence which was not considered by the agency will not be permitted except in extraordinary circumstances. Any request for completion of the record, or for consideration of extra-record evidence, must be filed within fourteen (14) days after the record was lodged with the Clerk of Court." In this case, the record was lodged with the Court on May 17, 2017. Petitioners have failed to file any such request for consideration of extra-record evidence, and the time for doing so has long passed.

removed its own discretion to consider specific circumstances surrounding the loss of gas when determining whether "waste" occurred. WEA Br. at 20-21. Again, however, Petitioners are not challenging the definition of "avoidably lost" in 43 C.F.R. § 3179.4(1), and provide no authority for the proposition that agencies are somehow prohibited from limiting their own discretion through a duly-promulgated rulemaking.

Furthermore, limiting the circumstances under which gas losses can be considered "avoidable" fulfills the MLA's requirement that operators take "reasonable precautions to prevent waste of oil and gas." *See* AR 365, 374, 390-91, 399-400 (81 Fed. Reg. at 83,013, 83,022, 83,038-39, 83,047-48). BLM determined that "[b]y establishing clear-cut categories for unavoidable and avoidable losses," the Rule would more effectively prevent waste of natural gas and would "dramatically reduce the large number of requests for approval to flare royalty-free that operators have had to file and the BLM has had to process each year." AR 365, 374 (81 Fed. Reg. at 83,013, 83,022). So long as the agency's "new policy is permissible under the statute, [] there are good reasons for it, and [] the agency believes it to be better, which the conscious change of course adequately indicates," it must be upheld. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).

Finally, Petitioners assert that the Rule is "inconsistent with the commonly understood definition of 'waste' because it will lead to premature abandonment of wells." WEA Br. at 22. The only evidence cited is one page of the Regulatory Impact Analysis, where BLM estimates that the Rule will reduce crude oil production by "0.0 – 3.2 million barrels per year (0 – 0.07% of the total U.S. production)." WEA at 22 (citing AR 561). Natural resources that stay in the ground are not wasted resources. *See* 43 C.F.R. § 3160.0-5 (defining "waste of oil or gas"). While the Rule *may* cause the development of oil resources to drop by a fraction of a percent, it will also lead to the capture of an additional 9-41 billion cubic feet of gas annually that would otherwise be wasted. Petitioners also fail to consider the multiple economic exemptions in the Rule where compliance with certain requirements "would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease." *See, e.g.*, 43 C.F.R. § 3179.102(c) (exemption from requirements related to well completion);

§ 3179.201(b)(4) (exemption from pneumatic controllers requirements); § 3179.202(f) (exemption from pneumatic diaphragm pump requirements); § 3179.203(c)(3) (exemption from storage vessels requirement); § 3179.303(c) (operator may request approval of a leak detection program that does not meet criterion specific in § 3179.303(b)); § 3179.8(a) (operator may request lower capture percentage). Furthermore, BLM has provided substantial data and analysis demonstrating that compliance costs for the Rule will be affordable for even the smallest operators. AR 454, 575-76 (RIA at 8, 129-30) (estimating an average profit reduction for small businesses of 0.15 percent).

In sum, there is no merit to Petitioners' claims that the Rule exceeds BLM's authority to regulate waste.

C. BLM Has Jurisdiction to Regulate State or Private Oil and Gas Interests in Communitized Units.

Contrary to the arguments made by Petitioners-Intervenors (ND Br. at 24-32, 34-35), BLM has authority to regulate federally-managed leases subject to unitization or communitization agreements, including the state or private interests within such units. These arrangements are specifically recognized under the MLA, which provides:

> When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement ... when determined by the Secretary of the Interior to be in the public interest, and operations or production pursuant to such an agreement shall be deemed to be operations or production as to each such lease committed thereto.

30 U.S.C. § 226(m); *see also* 43 C.F.R. §§ 3105.2-2, 3181.1. "Under those provisions, any mining activity on any leasehold in the unitized area is deemed to occur on all leaseholds." *Entek GRB, LLC v. Stull Ranches*, LLC, 763 F.3d 1252, 1256 (10th Cir. 2014). Given BLM's clear statutory authority to prevent waste of oil and gas resources, waste that occurs anywhere in communitized areas must be deemed to occur in all leaseholds therein and is therefore subject to BLM's authority to regulate.

Pursuant to Section 226(m), "regulations have been promulgated directing the BLM to manage all aspects of said unit agreements." *Froholm v. Cox*, 934 F.2d 959, 965 (8th Cir. 1991)

(citing 43 C.F.R. §§ 3180.0-1–3183.7); *see* 30 U.S.C. 226(m) (Secretary is authorized "to make such regulations with reference to such leases, with like consent on the part of the lessees, in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of the public interest."). Similarly, under FOGRMA, BLM has extensive powers relating to the collection of royalties from federal and Indian lessees, including over State and private tracts in federally-approved units in order to ensure royalty accountability. *See* 30 U.S.C. §§ 1717-22; AR 391 (81 Fed. Reg. at 83,039).

BLM also has contractual authority to apply the Waste Prevention Rule to private and state interests that are part of such agreements. BLM's "model onshore unit agreement"—signed by the owners oil and gas interests in the unit area—provides that the Authorized Officer may regulate the quantity and rate of production of unitized oil and gas to prevent waste and in the interest of conservation. 43 C.F.R. § 3186.1, ¶¶ 16 ("Operations hereunder and production of unitized substances shall be conducted to provide for the most economical and efficient recovery of said substances without waste, as defined by or pursuant to State or Federal law or regulation"), 21 (Authorized Officer is "vested with authority to alter or modify …, in his discretion, … the quantity and rate of production under this agreement when such alteration or modification is in the interest of attaining the conservation objectives stated in this agreement and is not in violation of any applicable Federal or State law.").

In addition, the standard communitization agreement provided in the BLM Manual provides that the Secretary or her authorized representative "shall have the right of supervision over all fee and state mineral operations within the communitized area to the extent necessary to monitor production and measurement, and to assure that no avoidable loss of hydrocarbons occurs . . .." *See* BLM Manual 3160-9 – Communitization, App'x 1, ¶ 12[12] ("It is agreed between the parties hereto that the Secretary of the Interior, or his duly authorized representative, shall have the right of supervision over all fee and State mineral operations within the communitized area to the extent necessary to monitor production and measurement, and to assure

[12] BLM, Model Form of a Federal Communization Agreement, *available at*: https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3160-9.pdf.

that no avoidable loss of hydrocarbons occurs in which the United States has an interest pursuant to applicable oil and gas regulations of the Department of the Interior relating to such production and measurement."). This same language is also included in the communitization agreements for Montana and the Dakotas.[13]

Simply put, under the standard agreements that have long governed unitized and communitized leases, operators assent to the Secretary's authority and duty to regulate the waste of unitized oil and gas resources.[14]

II. BLM'S PROMULGATION OF THE WASTE PREVENTION RULE WAS NOT ARBITRARY AND CAPRICIOUS.

In addition to challenging BLM's statutory authority to promulgate the Waste Prevention Rule, Petitioners make several arguments asserting that BLM acted in an arbitrary and capricious manner in promulgating the Rule. WY Br. at 26-30; WEA Br. at 22-26; ND Br. at 51-58. Each of these arguments fails. Petitioners first contend that the Rule is arbitrary and capricious because BLM improperly considered the social cost of methane and, without including this "ancillary" benefit, the Rule's costs would outweigh its benefits by a "significant margin." WY Br. at 26-30; WEA Br. at 23-26. This argument lacks merit for several reasons. As an initial matter, Petitioners cite no authority for the proposition that it was improper for BLM to consider the social cost of methane or otherwise evaluate the benefits of its Rule to the public. To the contrary, Executive Order 12866 specifically requires agencies to assess "*all* costs and benefits" of regulatory actions, and, for significant actions such as the Waste Prevention Rule, submit a detailed report of their assessment to the OMB for review. Executive Order 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (emphasis added). Similarly, OMB Circular A-4, which provides guidance to agencies in implementing Executive Order 12866, recommends that such analysis "encompass

[13] BLM, Communitization Agreement, ¶ 12, *available at*: https://www.blm.gov/site-page/programs-oil-and-gas-communitization-montana-dakotas.

[14] For these reasons, the application of the Rule to pooled or communitized units does not represent an "unexplained change" in BLM's position to regulate such areas. *See* ND Br. at 35-42.

all the important benefits and costs likely to result from the rule."[15] It further states that an agency's analysis should include "any important ancillary benefits," meaning any "favorable impact of the rule that is typically unrelated or secondary to the statutory purpose of the rulemaking … ."[16]

This is exactly what BLM did. As explained in the Regulatory Impact Analysis, BLM considered all of the costs and benefits of the Rule, including the social cost of methane pursuant to a metric endorsed by the U.S. government's Interagency Working Group on Social Cost of Greenhouse Gases pursuant to Executive Order 12866. AR 477-78 (RIA at 31-32). This metric represents the best available information regarding the monetary value of impacts arising from changes in methane emissions, taking into account a "range of anticipated climate impacts, such as net changes in agricultural productivity and human health, property damage from increased flood risk, and changes in energy system costs, such as reduced costs for heating and increased costs for air conditioning." AR 478-79 (RIA at 32-33).[17]

While Petitioners also fault BLM for considering "global" impacts rather than "the well-being of the American people" (*see* WEA Br. at 25; WY Br. at 29), nothing prevents BLM from considering global impacts as well as domestic ones. OMB Circular A-4 specifically contemplates that a regulation may "have effects beyond the borders of the United States" that

[15] Office of Management and Budget, Circular A-4 (Sept. 17, 2003), *available at*: https://www.whitehouse.gov/omb/circulars_a004_a-4.

[16] *Id*.

[17] BLM and other agencies within the Department of the Interior are required to consider the climate change impacts of their decisions, including through the use of the Social Cost of Greenhouse Gas metrics developed for the implementation of Executive Order 12866, in many different contexts. *See, e.g., WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222, 1233-38 (10th Cir. 2017) (BLM's failure to adequately consider climate impacts in environmental analysis of coal leases was arbitrary and capricious); *Montana Environmental Information Center v. U.S. Office of Surface Mining*, --- F. Supp. 3d ---, 2017 WL 3480262, *12-14 (D. Mont. Aug. 14, 2017) (agency acted "arbitrarily and capriciously by failing to adequately consider the costs of greenhouse gas emissions" in environmental assessment for mining plan, especially given availability of Social Cost of Carbon protocol developed pursuant to Executive Order 12866); *High Country Conservation Advocates v. United States Forest Serv*., 52 F. Supp. 3d 1174, 1189-93 (D. Colo. 2014) (finding it arbitrary and capricious for agencies to quantify the benefits of the coal lease modifications but fail to disclose effects of greenhouse gas emissions, especially given availability of Social Cost of Carbon protocol).

should be reported. Given that Executive Order 12866 directs agencies to consider "all costs and benefits," it would have been improper for BLM to limit its consideration of impacts to oil and gas operators or to public lands. *See* WEA Br. at 24; WY Br. at 29; *see also Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2457 (2014) (Breyer, J., concurring in part and dissenting in part) ("The effects of greenhouse gases … are global, not local."). Executive Order 12866 also creates no private right of action. *See, e.g., Teledyne, Inc. v. United States*, 50 Fed. Cl. 155, 190 (Fed. Cl. 2001) ("Executive Order 12,866, by its plain terms, precludes judicial review of an agency's compliance with its directive"). Moreover, Petitioners wholly disregard BLM's analysis of local and regional social impacts, such as reductions in VOCs and other hazardous air pollutants as well as visual and noise impacts from flaring. AR 361, 553-556, 572 (81 Fed. Reg. at 83,009; RIA at 107-10, 126).

The U.S. Supreme Court decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015) provides no support for Petitioners' arguments. *See* WY Br. at 26-28. In that case, the court found that EPA violated Section 112(n)(1)(A) of the Clean Air Act, which authorizes the agency to regulate hazardous air pollutants from power plants when such regulation is "appropriate and necessary," when it failed to consider cost in making this finding. *Michigan*, 135 S. Ct. at 7411-12; *see* 42 U.S.C. § 7412(n)(1)(A). As the court noted, however, Section 112's "broad reference to appropriateness encompasses *multiple* relevant factors (which include but are not limited to cost)." *Id*. at 2709 (emphasis in original).[18] Other courts have found that agencies should consider the full range of costs and benefits of a rule when making regulatory decisions. *See, e.g., Ctr. for Biological Diversity*, 538 F.3d at 1198 (9th Cir. 2008) (agency's failure to "include in its analysis the benefit of carbon emissions reduction in either quantitative or qualitative form" was arbitrary and capricious).

Furthermore, in evaluating the air quality and climate benefits of the Rule, BLM relied entirely on factors which Congress intended it to consider. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 29, 43 (1983). Indeed, given

[18] Like the situation here, the regulatory impact analysis conducted by EPA pursuant to Executive Order 12866 fully considered the costs and benefits of the rule, including "ancillary benefits," but that analysis was not at issue. *Id*. at 2705-06.

BLM's statutory duties under the MLA and FLPMA to safeguard "the public welfare" and protect "air and atmospheric values," and given the impact that oil and gas activities can have on local air quality, it was entirely appropriate for BLM to consider these issues as part of its rulemaking and in its overall management of public lands. *See* AR 366 (81 Fed. Reg. at 83,014) (discussing benefits of improved air quality); 30 U.S.C. § 187 (BLM required to ensure that mineral leases safeguard "the public welfare"); 43 U.S.C. § 1701(a)(8) (public lands shall be "managed in a manner that will protect the quality of … ecological, environmental, [and] air and atmospheric… values"). Stated another way, it would have been arbitrary and capricious if BLM had failed to consider the social cost of methane and other "ancillary benefits" as part of its rulemaking.

In sum, Petitioners have failed to identify any legal flaw in BLM's regulatory impact analysis. Petitioners' dispute with BLM's methodological choices is yet another attack on the agency's well-reasoned technical judgments and does not render the Rule arbitrary and capricious. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377-78 (1989).

Second, there is no merit to Petitioners' contentions that the Rule's gas capture requirements were not adequately explained or made available for public comment. *See* WEA Br. at 23; ND Br. at 56-57 n.19. "It is a well settled and sound rule which permits administrative agencies to make changes in the proposed rule after the comment period without a new round of hearings." *Beirne v. Sec'y of Dep't of Agric*., 645 F.2d 862, 865 (10th Cir. 1981). This "well settled" rule applies where the final rule is a "logical outgrowth" of the proposed rule. *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 637 (10th Cir. 1985). "A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1154 (10th Cir. 2016) (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–80 (D.C. Cir. 2009)) (internal quotation marks omitted). In *Zen Magnets*, the Tenth Circuit found that a rule revision was a logical outgrowth of the proposed rulemaking where the agency (1) sought comments on the rule's scope; (2) evinced concern about the definition in the proposed rule that

was later revised in the final rule; and (3) the revision to the rule reflected earlier concerns about the proposed rule. *Id*.

Here, BLM's rulemaking expressly sought comments on the leasehold flaring limits, including their reasonableness. AR 27 (81 Fed. Reg. at 6,641). The Proposed Rule summarized North Dakota's state-wide capture target approach, to which the Final Rule expressly looked in crafting its provisions, and requested comment on other "innovative" approaches to limit flaring. *Id*. The agency made changes to the final Rule based on the comments its received, including those from Petitioners. For example, in response to comment on the Proposed Rule's monthly flaring limits, BLM adopted a more flexible capture-percentage approach, modeled on North Dakota's regulations, that gives operators additional flexibility in how to comply with the capture requirements by allowing them to meet those requirements on a lease-by-lease, county-wide, or state-wide basis. AR 375-76 (81 Fed. Reg. at 83,023-26). Thus, the change to the capture requirements represented a "logical outgrowth" of BLM's goal of reducing flaring in the Proposed Rule and satisfied the APA's notice-and-comment requirements.

Finally, there is no legal basis for Petitioners' challenge to the Rule's federalism assessment. *See* ND Br. at 51-58. As an initial matter, Executive Order 13132 "is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person." 64 Fed. Reg. 43,255, 43,259 (Aug. 10, 1999); *see Valentine Properties Associates, LP v. U.S. Dept. of Housing and Urban Development*, 785 F. Supp. 2d 357, 386 (S.D. N.Y. 2011) (finding that Executive Order 13132 does not create a private right of action and dismissing claim). In any event, the Rule does not obligate the states to act or limit their authority, and to the extent the Rule may have an impact on non-federal or non-Indian oil and gas development, the Rule expressly requires coordination with the States. AR 406, 423, 436 (81 Fed. Reg. at 83,054, 83,071, 83,084). Consequently, BLM did not act arbitrarily or capriciously in addressing federalism issues related to the Waste Prevention Rule.

CONCLUSION

For the foregoing reasons, the Court should deny the Petitions for Review of the Waste Prevention Rule.

Dated: December 11, 2017

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CERTIFICATE OF WORD COUNT

I hereby certify that this response complies with the type-volume limitation set forth in U.S.D.C.L.R. 83.6(c) because this brief contains 9,233 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

/s/ George Torgun
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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2017, I filed the foregoing STATE RESPONDENTS' OPPOSITION TO PETITIONERS' BRIEFS IN SUPPORT OF PETITIONS FOR REVIEW OF FINAL AGENCY ACTION using the United States District Court CM/ECF system, which caused all counsel of record to be served electronically.

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