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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. 2:16-cv-00285-SWS [Lead]

[Consolidated with 2:16-cv-00280-SWS]

**STATE RESPONDENTS' OPPOSITION TO INDUSTRY PETITIONERS' SECOND MOTION FOR PRELIMINARY INJUNCTION**

Date: December 18, 2017
Time: 1:30 p.m.
Courtroom: Casper Courtroom No. 2
Judge: Hon. Scott W. Skavdahl

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## INTRODUCTION

On October 27, 2017, in the midst of briefing the merits of this action, Petitioners Western Energy Alliance and the Independent Petroleum Association of America (collectively, "Industry Petitioners") filed a second motion for preliminary injunction ("Motion") seeking to enjoin the U.S. Bureau of Land Management's ("BLM") updated 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"). Despite this Court's denial of a similar motion earlier this year, Industry Petitioners now claim that they are suffering "immediate and irreparable harm" due to the Waste Prevention Rule's January 2018 compliance deadlines, and that the other standards for a preliminary injunction have been met. Memorandum in Support of Motion for Preliminary Injunction, Dkt. No. 161 ("Memo.") at 1. Industry Petitioners request that the Court enjoin BLM "from enforcing the Rule … pending resolution of this litigation." *Id*.

The States of California (by and through the California Air Resources Board) and New Mexico ("State Respondents") disagree with these contentions. Industry Petitioners are precluded from relitigating the issues that this Court has already decided in its Order denying their first preliminary injunction motion—a ruling that Industry Petitioners have not appealed. The only new contention made by Industry Petitioners, that they are now spending money to comply with the Waste Prevention Rule's January 2018 deadlines, is insufficient to demonstrate irreparable harm. Further, the fact that the merits of this action have yet to be decided is entirely a product of Industry Petitioners' multiple requests for extensions. Given that the parties are currently briefing the merits of this action and oral argument is set for the same day as the preliminary injunction hearing, this Court should decline to issue an injunction "pending resolution of this litigation." In short, a ruling on the merits—whether granting or denying Petitioners' claims—moots this Motion. Consequently, the Court should deny Industry Petitioners' second motion for a preliminary injunction.

## 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 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 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

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

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 in 2010 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, afford the agency greater flexibility in rate setting, 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 regulations on these issues. *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 (49 percent) and venting (35 percent), 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(b). 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 GHGs, 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 Industry Petitioners in the D.C. Circuit, where California, New Mexico, and several other states have moved to intervene 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]

[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 of EPA's pending review of the EPA NSPS rule.

## IV. THIS LITIGATION.

Industry Petitioners initiated their challenge to the Waste Prevention Rule on November 15, 2016. Case No. 2:16-cv-00280, Dkt. No. 1. On November 23, 2016, Industry Petitioners filed a motion for a preliminary injunction and memorandum in support. *Id*., Dkt. Nos. 12, 13 ("First PI Motion"). Among other arguments, Industry Petitioners argued in their First PI Motion that the Waste Prevention Rule exceeded BLM's statutory authority and is inconsistent with BLM's authority to regulate waste, and that BLM acted in an arbitrary and capricious manner in promulgating the Rule. *See id*. This challenge was later consolidated with another petition filed by the States of Wyoming and Montana (later joined by North Dakota and Texas) (collectively, "Petitioners") into the present action. The State Respondents, as well as 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 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 also established an accelerated merits briefing schedule that would have completed all briefing in this matter by April 24, 2017. *Id*. at *13. However, on March 3, 2017, Industry 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. On March 30, 2017, Industry Petitioners filed a second request to extend the briefing schedule due to issues related to the administrative record, and requested to 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. On May 10, 2017, the United States Senate voted to reject a Congressional Review Act resolution that would overturn the Rule, leaving the Rule in effect.[3]

Petitioners filed their opening merits briefs in this action on October 2, 2017. Dkt. Nos. 141-43. Despite the Court's earlier denial of their preliminary injunction motion, Industry Petitioners filed a second motion for preliminary injunction on October 27, 2017.

**STATUTORY BACKGROUND**

There is no dispute that Congress granted BLM authority to enact rules to prevent waste and regulate royalties[4] from oil and gas operations on federal and Indian lands. AR 371 (81 Fed. Reg. at 83,019); *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

[3] *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.

[4] Industry 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.

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").[5]

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).

[5] "[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*.

## STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic remedy" that "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal quotations and citations omitted). Rather, such relief "should not be issued unless the movant's right to relief is 'clear and unequivocal.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008) (internal quotations omitted).

To obtain a preliminary injunction, the moving party must demonstrate four factors: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest. *Id*. at 20. A plaintiff's failure to prove any one of the four preliminary injunction factors renders its request for injunctive relief unwarranted. *See id*. at 23–24. "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id*. at 24 (internal quotations and citations omitted).

As noted by Industry Petitioners, "[t]he purpose of a preliminary injunction is to 'preserve the relative position of the parties until a trial on the merits can be held.'" Memo. at 4 (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). Given that the hearing on Industry Petitioners' Motion will occur at the same time as oral argument on the merits, *see* Dkt. No. 164, this Court should decline to rule on the injunction and simply proceed with deciding the merits of this action.[6] *See U.S. ex rel. Beringer v. O'Grady*, 737 F. Supp. 478, 480 n.1 (N.D. Ill. 1990) ("Since a decision on the motion for a preliminary injunction would require the same extensive review of the record necessary to decide the merits of this case, and since the parties

[6] This is particularly true here given that Industry Petitioners have simply attached their merits brief to their Motion in order to demonstrate a likelihood of success on the merits. *See* Memo. at 8-9 and Exhibit C.

have agreed to have the court resolve the merits at this time, the court finds that a decision on the merits is now appropriate in lieu of a ruling on the motion for a preliminary injunction.").

## ARGUMENT

### I. INDUSTRY PETITIONERS' MOTION IS PRECLUDED BY THIS COURT'S PRIOR DENIAL OF THE FIRST REQUEST FOR A PRELIMINARY INJUNCTION.

This Court should deny Industry Petitioners' second attempt to enjoin the Waste Prevention Rule on the same grounds that this Court already rejected when ruling on the First PI Motion. In particular, the doctrine of "issue preclusion bars a party from relitigating an issue once it has suffered an adverse determination on the issue." *Park Lake Resources Ltd. Liability v. U.S. Dept. of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004). Preliminary injunction rulings typically lack preclusive effect in other proceedings because they are not a judgment on the merits. However, "[p]reclusion may properly be applied" where the "same showing" on the merits and balance of hardships "are made and it appears that nothing more is involved than an effort to invoke a second discretionary balancing of the same interest." 18A Charles Alan Wright *et al*., Fed. Prac. & Proc. Juris. § 4445 (2d ed.); *see Hayes v. Ridge*, 946 F. Supp. 354, 364-65 (E.D. Pa. 1996) (discussing cases that "support the proposition that a preliminary injunction ruling has preclusive effect with regard to subsequent motions for preliminary injunction"); *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461, 474 n.11 (3d Cir. 1997) ("findings made in granting or denying preliminary injunctions can have preclusive effect if the circumstances make it likely that the findings are 'sufficiently firm' to persuade the court that there is no compelling reason for permitting them to be litigated again").

Here, Industry Petitioners' Motion should be precluded by the Court's earlier denial of the First PI Motion. Industry Petitioners have failed to raise any new arguments to demonstrate a likelihood of success on the merits of their claims that were not already briefed in their First PI Motion. While Industry Petitioners have focused more narrowly on the costs of complying with the Waste Prevention Rule's January 2018 deadlines to demonstrate irreparable harm, *see* Memo. at 4-8, these allegations are substantially similar to its earlier assertions regarding harm which the Court rejected. *See Wyoming*, 2017 WL 161428, *11. Moreover, as discussed below,

compliance costs alone do not provide an adequate basis to demonstrate irreparable harm for purposes of a preliminary injunction. *See infra* at Part IV. Finally, Industry Petitioners offer no new arguments regarding the balance of the hardships or the public interest. *See* Memo. at 9-11.

In sum, given this Court's thorough consideration of Industry Petitioners' First PI Motion, its Order denying that motion should have preclusive effect here.

## II. INDUSTRY PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR PETITION.

Industry Petitioners have offered nothing new in their Motion to demonstrate a likelihood of success on the merits which this Court has not already considered and rejected. While Industry Petitioners claim that this Court "already has recognized the Rule's fundamental flaws," Memo. at 8-9, they ignore the fact the Court ultimately concluded that their First PI Motion had failed to establish a likelihood of success and was denied. *See Wyoming*, 2017 WL 161428, *11. Rather than briefing new arguments, Industry Petitioners attempt to "incorporate by reference" their merits brief in this action (Dkt. No. 142, "Merits Br."), Memo. at 9, which repeats arguments already considered and results in their Motion greatly exceeding the page limits set for preliminary injunction motions. *See* Local Rule 7.1(b)(2)(B).[7] Even if this Court does consider Industry Petitioners' merits brief as part of its Motion and does not reject these contentions as precluded, these arguments fail.

### A. BLM Has Not Exceeded Its Statutory Authority or Impermissibly Promulgated an Air Quality Rule.

Industry Petitioners' primary argument is that the Waste Prevention Rule is an "air quality" rule that BLM allegedly had no authority to promulgate. *See* Memo. at 9; Merits Br. at 11-13. However, other than noting that the Rule has air quality benefits or misrepresenting the stated purposes of the Rule, Industry Petitioners offer no 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. The fact that the Rule also benefits

[7] On November 16, 2017, the Court denied Industry Petitioners' Motion for Leave to Exceed Page Limit. Dkt. No. 164. As a result, Industry Petitioners' Motion fails to establish any likelihood of success on the merits and should be denied on that basis alone.

air quality does not undermine its waste prevention purpose. A regulation that reduces flaring, venting, and waste 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 manage public resources in a way that takes environmental considerations into account, including "air and atmospheric" values. *See* 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).

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 indisputably directed at waste prevention and addresses each major source of gas loss—venting, flaring, and equipment leaks—through different requirements. AR 362-65 (81 Fed. Reg. at 83,010-13). The Rule has obvious and significant waste-minimization benefits: significantly reducing the total volume of gas vented 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 agencies' "obligations may overlap, but there is no reason to think the two agencies cannot both

administer their obligations and yet avoid inconsistency." *Id.*[8] 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) (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 of public resources, even if the legal obligations imposed may overlap and complement one another.

In addition, there is no preemptive or preclusionary language in the MLA, FLPMA, or 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. Bergen v. Lawrence*, 620 F. Supp. 1414, 1419 (D. Wyo. 1985) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)); *see also 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."). Industry Petitioners have failed to demonstrate why BLM and EPA cannot both achieve

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

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,[9] the Waste Prevention Rule sets no emissions standards for particular pollutants and contains no air quality monitoring requirements. *See* 42 U.S.C. § 7411. Put simply, there is nothing in the Rule that resembles a comprehensive air quality regulation under the Clean Air Act, and BLM did not violate Clean Air Act procedures that it was not required to follow. *See* Merits Br. at 13-17.[10]

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 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 such 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

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

[10] Contrary to their arguments here that the Rule improperly intrudes on EPA's authority, Industry Petitioners have asserted in the D.C. Circuit that EPA has no legal authority to promulgate the NSPS under the Clean Air Act. *See 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 Industry Petitioners' interest is not in avoiding conflicting regulations, but rather to avoid any federal regulation at all.

83,013, 83,027, 83,055, 83,058-59, 83,061, 83,067-68).[11] Many of these changes were specifically made in response to public comments requesting that BLM address potential conflicts in regulatory coverage, including comments from Industry Petitioners. *See* AR 407, 410-11, 413, 419-20 (81 Fed. Reg. at 83,055, 83,058-59, 83,061, 83,067-68); AR 33592-93 (Industry Petitioners' comments at 58-59) (requesting that BLM defer to EPA's NSPS regulations for well completions); AR 33573 (Industry Petitioners' comments at 39) (requesting that BLM defer to EPA's LDAR regulations). 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 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."); *see also Ctr. for Biological Diversity*, 538 F.3d at 1219 ("Energy conservation and environmental protection are not coextensive, but they often overlap.").

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, Industry Petitioners next contend that the Rule exceeds such authority. Merits Br. at 18-22. These arguments must be rejected. First, Industry Petitioners' assertion that the Rule is inconsistent with the "common usage" of the term "waste" because its costs exceed its benefits is

[11] 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.").

misplaced. Merits Br. at 20-21. 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. Industry 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 Part III. Moreover, BLM phased in the Rule's requirements over a ten-year span 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).

Industry 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 removed its own discretion to consider specific circumstances surrounding the loss of gas when determining whether "waste" occurred. Merits Br. at 20-21. Again, however, Industry 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.

Further, 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).

Finally, Industry Petitioners assert that the Rule is "inconsistent with the commonly understood definition of 'waste' because it will lead to premature abandonment of wells." Merits 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)." *Id*. (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 41 billion cubic feet of gas annually that would otherwise be wasted. Industry 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 Industry Petitioners' claims that the Rule exceeds BLM's authority to regulate waste.

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

In addition to challenging BLM's authority to promulgate the Rule, Industry Petitioners make several arguments asserting that BLM acted in an arbitrary and capricious manner. Merits

Br. at 22-26. Each of these arguments fail. First, Industry Petitioners contend that the Rule is arbitrary because BLM improperly considered the social cost of methane and, without including this "ancillary" benefit, the Rule's costs outweigh its benefits by a "significant margin." Merits Br. at 23-26. This argument lacks merit. As an initial matter, Industry 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 on 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 all the important benefits and costs likely to result from the rule."[12] 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 … ."[13]

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).[14]

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

[13] *Id*.

[14] 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

(continued…)

While Industry Petitioners also fault BLM for considering "global" impacts rather than "the well-being of the American people," Merits Br. at 25, 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 should be reported. Given that Executive Order 12866 directs agency to consider "all costs and benefits," and direction from OMB to focus on "benefits and costs that accrue to citizens and residents of the United States," it would have been improper for BLM to limit its consideration of impacts to oil and gas operators or to public lands. *See* Merits Br. at 24; *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."). In any event, Executive Order 12866 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, Industry 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).

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

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(…continued)
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 E.O. 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).

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, Industry Petitioners have failed to identify any legal flaw in BLM's analysis. Industry 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 Industry Petitioners' contentions that the Rule's gas capture requirements were not adequately explained or made available for public comment. *See* Merits Br. at 23. "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 proposed 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*. Further, the agency made changes to the final Rule based on these comments. 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). The final Rule explained that changes from the Proposed Rule were in response to comments received, including those of Industry Petitioners. AR 375 (81 Fed. Reg. at 83,023). 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.

Consequently, Industry Petitioners have failed to demonstrate a likelihood of success on the merits.

## IV. INDUSTRY PETITIONERS HAVE FAILED TO DEMONSTRATE IRREPARABLE HARM.

Industry Petitioners make two arguments to allege they will suffer "irreparable harm" in the absence of an injunction. Memo. at 4-8. First, Industry Petitioners contend that they will be harmed by the costs of complying with the Rule's impending January 2018 compliance deadlines. Memo. at 5-6, 8; Declaration of Kathleen M. Sgamma, Dkt. No. 160-1; Declaration of John Dunham ("Dunham Decl."), Dkt. No. 160-2. Second, Industry Petitioners suggest that these compliance costs will reduce oil production by "approximately 16.9 million barrels … over just the next several months." Memo. at 7. However, there is no merit to these arguments.

First, as Industry Petitioners recognize, "economic loss alone is generally insufficient" to demonstrate irreparable harm. Memo. at 4; *see Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) ("[E]conomic loss usually does not, in and of itself, constitute irreparable harm."); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) ("Financial

injury is only irreparable where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.") (internal quotations and citation omitted). While Industry Petitioners cite case law regarding "damages" that cannot be recovered as constituting irreparable harm, *see* Memo. at 4-5, 8, there are no damages at issue here.

Furthermore, it is well established that compliance costs do not typically constitute irreparable harm for purposes of a preliminary injunction. *See, e.g., Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm"); *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm."); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527–28 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction."); *Wisc. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674-75 (D.C. Cir. 1985) (finding that compliance costs do not support a finding of irreparable injury). Furthermore, operators have already had several months since the Rule's effective date to prepare to meet the January 2018 deadlines,[15] and "[c]ompliance costs already incurred cannot constitute the irreparable harm Plaintiffs must show because the standard is inherently prospective." *Chamber of Commerce of U.S. v. Hugler*, 2017 WL 1062444, *2 (N.D. Tex. Mar. 20, 2017).

The cases cited by Industry Petitioners on this issue do not support their argument. *See* Memo. at 5, 8. First, Justice Scalia's concurring opinion in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), where six justices joined Justice Blackmun's opinion rejecting a claim of irreparable harm, does not provide authority for the proposition that compliance costs provide

[15] In vacating BLM's action to "postpone" the Rule under APA Section 705, the U.S. District Court for the Northern District of California rejected the argument that the pending compliance deadline has no effect on pre-deadline behavior, noting that "the Rule imposed compliance obligations starting on its effective date of January 17, 2017 that increased over time but did not abruptly commence on January 17, 2018." *California v. BLM*, --- F. Supp. 3d ---, 2017 WL 4416409, *8 (N.D. Cal. Oct. 4, 2017) (internal quotation marks omitted).

evidence of such harm. *See United States v. Williams*, 468 F. App'x 899, 910 n.15, 2012 WL 1942249 (10th Cir. 2012) ("[A]bsent a fragmented opinion, a concurring opinion does not create law."). Second, Industry Petitioners misread the Tenth Circuit's decision in *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742 (10th Cir. 2010), where the court found irreparable harm not based on compliance costs but on the threat of enforcement, "debarment from public contracts," and potential penalties for violating an unconstitutional state law. *Id*. at 771. Subsequent decisions from that court have recognized that the *Edmondson* case involved more than compliance costs in its evaluation of irreparable harm. *See Planned Parenthood v. Moser*, 747 F.3d 814, 833 & n.4 (10th Cir. 2014) (describing *Edmondson* as affirming injunction "to halt enforcement action" and block imposition of sanctions and penalties).[16]

As the Tenth Circuit has recognized, "[t]o constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189 (internal quotation marks omitted). Given that compliance costs exist for almost any regulation, allowing such costs to constitute irreparable harm for issuance of the "extraordinary" remedy of a preliminary injunction would effectively render this requirement meaningless. *See A.O. Smith Corp.*, 530 F.2d at 527–28. And unlike the cases above, Industry Petitioners do not even suggest, let alone demonstrate, that the cost of complying with the Waste Prevention Rule will threaten the viability of their business, cause reputational injury, or result in the threat of enforcement for failing to comply with an unconstitutional law. *See Tri–State Generation v. Shoshone River Power, Inc*., 805 F.2d 351, 356 (10th Cir. 1986) (threat to trade or business viability may constitute irreparable harm). As BLM already found in promulgating the Waste Prevention Rule—which Industry Petitioners do not challenge in their Motion—compliance costs 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). Consequently, Industry Petitioners have failed to make showing of harm necessary to support an injunction.

[16] Industry Petitioners also cite an unpublished district court opinion in *Direct Mktg. Ass'n v. Huber*, No. 10-CV-001546, 2011 WL 250556, at *6–7 (D. Colo. Jan. 26, 2011), but that case also found irreparable harm based on a constitutional violation, not simply compliance costs.

Second, Industry Petitioners "suggest" that such costs would result in a reduction of 1,800 potential new (or capped) oil wells, and result in 16.9 million barrels of oil that "would not be produced from the BLM leaseholds." Memo. at 7; Dunham Decl., ¶ 7. As the Tenth Circuit has stated, "purely speculative harm" is insufficient to demonstrate irreparable harm for purposes of a preliminary injunction. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Other than generalized statements in an affidavit, Industry Petitioners provide no evidence to support their contention that the Rule will reduce oil production. This assertion also contradicts BLM's findings in the record, which Industry Petitioners do not challenge, 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)." AR 561. Furthermore, Industry Petitioners fail to even consider the numerous exemptions from the Rule's requirements where compliance "would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease." *See supra* at Part II.B. Finally, even if Industry Petitioners' suggestion were true, there is no authority to support the proposition that reduced oil production constitutes irreparable harm, or that Industry Petitioners cannot simply resume such production activities if they prevail in this litigation. *See Heideman*, 348 F.3d at 1189 ("Plaintiffs presented no evidence that enforcement of the Ordinance during the time it will take to litigate this case in district court will have an irreparable effect in the sense of making it difficult or impossible to resume their activities or restore the status quo ante in the event they prevail.").

In sum, Industry Petitioners have failed to demonstrate irreparable harm from compliance with the Waste Prevention Rule.

## V. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST SUPPORT DENIAL OF THE REQUESTED INJUNCTION.

There is no merit to the Industry Petitioners' contention that the balance of equities and the public interest support their request for a preliminary injunction. *See* Memo. at 9-11. As discussed above, the minor compliance costs that will result from implementation of the Rule do not constitute irreparable harm or outweigh the significant economic and environmental harms that will result from an injunction. *See Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078,

1086 (10th Cir. 2004) ("financial concerns alone generally do not outweigh environmental harm"). These environmental harms include air quality impacts from the emission of 250,000–267,000 tons per year of VOCs, including benzene and other hazardous air pollutants, climate impacts from the emission of 175,000-180,000 tons of methane per year, as well as increased noise and light pollution from flaring activities. AR 366 (81 Fed. Reg. at 83,014). Given that the Rule is already in effect and operators should have been working for months to meet the upcoming January 2018 deadlines, Industry Petitioners are simply wrong that there is no such harm because "key provisions of the Rule have not yet taken effect." *See* Memo. at 10.

A preliminary injunction would also be adverse to the public interest. Industry Petitioners' contentions regarding increased costs and lost revenues from compliance with the Rule (Memo. at 10-11) do not represent or outweigh the public interest in the effective regulation of oil and gas production. *See, e.g., United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989) ("private, financial harm must, however, yield to the public interest in maintaining effective competition"). In fact, significant harm would occur to the public through the waste of resources, loss of royalty payments, and increased air pollution if the Waste Prevention Rule were enjoined. State Respondents believe that BLM has a crucial role to play in ensuring the responsible development of oil and gas resources on federal and Indian lands, and that it is in the public interest to provide a baseline level of protection against the waste of a such resources and a more level playing field for oil and gas development. *See F.T.C. v. Alliant Techsystems Inc.*, 808 F. Supp. 9, 22-24 (D.D.C. 1992) (discussing the "public's clear and fundamental interest in promoting competition"). Because the Rule is likely to result in the stronger protection of federal lands and greater prevention of the waste of natural resources, which belong to the People, the public interest weighs strongly in favor of denying the injunction.

**CONCLUSION**

For the foregoing reasons, the Court should deny Industry Petitioners' Second Motion for a Preliminary Injunction.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 29, 2017, I filed the foregoing STATE RESPONDENTS' OPPOSITION TO INDUSTRY PETITIONERS' SECOND MOTION FOR PRELIMINARY INJUNCTION using the United States District Court CM/ECF system, which caused all counsel of record to be served by electronically.

/s/ George Torgun
GEORGE TORGUN