IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 18-8027 and 18-8029

STATE OF WYOMING, ET AL.
Petitioner-Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Intervenors-Appellees,

WYOMING OUTDOOR COUNCIL, ET AL.,
Intervenors-Appellees.

STATE OF WYOMING, ET AL.
Petitioner-Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Intervenors-Appellees,

STATE OF CALIFORNIA, ET AL.,
Intervenors-Appellees.

On Appeal from the
United States District Court
for the District of Wyoming

The Honorable Scott W. Skavdahl

District Court Nos. 2:16-cv-00280-SWS, 2:16-cv-00285

WESTERN ENERGY ALLIANCE AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA'S MOTION TO DISMISS FOR LACK OF APPELLATE JURISDICTION

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Various citizen groups and the States of California and New Mexico ("Appellants"), as intervenor-respondents in the proceedings before the District Court, improperly seek interlocutory review of an April 4, 2018 order in an effort to force operators of oil and gas facilities on federal and Indian leases to comply with a rule that the Bureau of Land Management (BLM) recently proposed to revise in a Federal Register notice dated February 22, 2018. The District Court's Order Staying Implementation of the Rule Provisions and Staying Action Pending Finalization of Revision Rule, Dkt. No. 215 ("Order," attached as Exhibit 1) is not reviewable under 28 U.S.C. § 1292(a)(1) because it is not an injunction and does not function as one. The Order neither forces action by any party nor restrains a party from taking any action. Accordingly, pursuant to Federal Rule of Appellate Procedure 27 and 10th Circuit Rule 27.3(A)1(1), Petitioner-Appellees Western Energy Alliance ("the Alliance") and the Independent Petroleum Association of America (IPAA) move this Court to dismiss these appeals.[1]

[1] The federal Appellees and Appellees Wyoming and Montana do not oppose this motion. The Appellants oppose this motion. Appellees North Dakota and Texas take no position and reserve the right to file a response. Mindful of the Motion to Dismiss filed by the States of Wyoming and Montana on April 16, 2018, the Alliance and IPAA propose that consolidated responses to both motions be due on May 3, 2018. The undersigned conferred with the parties regarding this proposal and received no objections.

BACKGROUND

This action is the latest in a series of legal entanglements surrounding BLM's Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Waste Prevention Rule"). The rule is BLM's attempt to regulate emissions of methane from operations on federal and Indian oil and gas leases—even though methane emissions from oil and gas facilities have been steadily declining[2] and even though the United States Environmental Protection Agency (EPA) and not BLM has the exclusive authority to regulate air quality. Hastily finalized one week after the 2016 presidential election, the Waste Prevention Rule took effect on January 17, 2017. *Id.* at 83,008. The Waste Prevention Rule, however, did not require compliance with its most burdensome and expensive provisions until one year later on January 17, 2018. *See* 43 C.F.R. §§ 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, 3179.301–305 (the "phase-in provisions").

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[2] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2014* 2-3 (2016). This document is included in the administrative record filed with the District Court. The relevant excerpt of this document is attached as Exhibit 2.

The Alliance and IPAA initiated this litigation by petitioning the District Court for review of the Waste Prevention Rule,[3] and the Appellants intervened in the litigation to defend the Waste Prevention Rule. Although BLM maintained that the Waste Prevention Rule principally regulates waste of oil and natural gas rather than air quality, 81 Fed. Reg. at 83,019–21, the Appellants primarily asserted global climate change interests as the basis for their participation. *See, e.g.*, Mem. in Supp. of Citizen Groups' Mot. to Intervene as Resp'ts, Dkt. No. 27-1, at 5–6 (Dec. 2, 2016) (attached as Exhibit 3).[4]

Alongside the States of Wyoming, Montana, North Dakota, and Texas, the Alliance and IPAA sought a preliminary injunction in late 2016 to halt the Waste Prevention Rule from taking effect. When resolving the motions for preliminary injunction, the District Court observed that the Waste Prevention Rule "conflicts with the statutory scheme under the [Clean Air Act] for regulating air emissions from oil and natural gas sources" and "upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under

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[3] The Alliance and IPAA's case (docketed as 2:16-cv-000280) was consolidated with another case brought by the States of Wyoming and Montana (2:16-cv-00285).

[4] Pleadings filed with the District Court are referenced first by the pleading name, docket number (filed under Docket No. 2:16-cv-00285), page with the pinpoint citation, and date of the filing. Copies of these pleadings are attached.

the [Clean Air Act] to the EPA, states, and tribes to manage air quality." Order on Mots. for Prelim. Inj., Dkt. No. 92, at 17, 18 (Jan. 16, 2017) (attached as Exhibit 4). Ultimately, however, the District Court denied the preliminary injunction partly because the deadline to comply with the phase-in provisions was a year away. *See id.* at 25, 28.

Although the Waste Prevention Rule expressly provided operators with a full year to come into compliance with the phase-in provisions, these provisions were not in effect for almost half of 2017. Instead, the phase-in provisions were suspended, or their deadlines postponed, while BLM reconsidered and ultimately proposed to rewrite the Waste Prevention Rule. BLM first postponed the compliance deadlines for the phase-in provisions on June 15, 2017. *See* 82 Fed. Reg. 27,430 (June 15, 2017). Even though the litigation over the Waste Prevention Rule had been pending before the District Court since November 2016, the Appellants challenged this postponement in the Northern District of California. *See California v. Bureau of Land Mgmt.*, No. 3:17-cv-03804-EDL (N.D. Cal. filed July 5, 2017); *Sierra Club v. Zinke*, No. 3:17-cv-03885 (N.D. Cal. filed July 10, 2017). On October 5, 2017, a magistrate judge in the Northern District of California invalidated BLM's postponement, putting the original January 17, 2018 deadline for the phase-in provisions back into effect. *See California v. Bureau of*

Land Mgmt., 277 F. Supp.3d 1106 (N.D. Cal. 2017). At this point, the compliance deadline for the phase-in provisions had been postponed for nearly four months.

Then, on December 8, 2017, BLM announced it was suspending certain provisions of the Waste Prevention Rule, including the phase-in provisions, to allow BLM to consider revisions to the rule. 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Suspension Rule"). The Suspension Rule remained in effect until February 22, 2018, when the District Court for the Northern District of California preliminarily enjoined it. *See California v. Bureau of Land Mgmt.*, 286 F. Supp.3d 1054 (N.D. Cal. 2018).

Coincidentally, on the same day the Northern District of California enjoined the Suspension Rule, BLM published a proposed rule that, if finalized, would substantially revise the Waste Prevention Rule. 83 Fed. Reg. 7,924 (Dec. 22, 2018) ("Revision Rule"). Critically, the Suspension Rule would eliminate all of the phase-in provisions and modify other provisions of the Waste Prevention Rule. *See id.* The BLM estimates it may finalize the Revision Rule as early as August 2018. Federal Resp'ts' Resp. to Pet'rs' and Intervenor-Pet'rs' Mots. to Lift the Stay and for Other Relief, Dkt. 207, at 4 (Mar. 14, 2018) (attached as Exhibit 5).

The Revision Rule, however, did not blunt the effect of the February 22 decision from the Northern District of California enjoining BLM's Suspension

Rule. This decision thrust the Waste Prevention Rule into full force and effect. Oil and gas operators were obligated to be in immediate compliance with all of the rule's provisions, including the phase-in provisions which had a deadline of January 17, 2018. Yet because the Waste Prevention Rule had been suspended for nearly five months of 2017 and the first seven weeks of 2018, members of the Alliance and IPAA were not afforded the full time BLM deemed necessary to comply with the rule's phase-in provisions. Even if immediate compliance was possible, which it is not, the Alliance and IPAA estimate that oil and gas producers would be required to expend $115 million to fully comply with the phase-in provisions. Sgamma Decl., Dkt. No. 197-3 ¶ 10 (Feb. 22, 2018) (accompanying Mem. in Supp. of Mot. for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review and attached hereto as Exhibit 6).

Furthermore, oil and gas operators are not the only entities unprepared for the Waste Prevention Rule to take full effect. BLM has admitted it has "limited resources" to administer the rule while it completes the ongoing rulemaking. *See* Ex. 5, Federal Resp'ts' Resp. to Pet'rs' and Intervenor-Pet'rs' Mots. to Lift the Stay and for Other Relief, Dkt. 207, at 13 (Mar. 14, 2018). Oil and gas operators, however, have witnessed that BLM is not prepared to administer or enforce the Waste Prevention Rule. BLM and the Office of Natural Resources Revenue have

not coordinated or set up the necessary systems to allow royalty to be reported under the Waste Prevention Rule. Sgamma Decl., Dkt. No. 212-1 ¶ 12 (Mar. 23, 2018) (accompanying Reply Supp. of Mot. for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review and attached hereto as Exhibit 7). BLM has not conducted staff training or issued written guidance on how to implement the Waste Prevention Rule. *Id.* ¶ 13. When Alliance members have sought guidance from BLM on how to comply with the Waste Prevention Rule, BLM has not been able to advise operators on expectations for compliance and has provided conflicting or confusing information. *Id.* Therefore, both the regulators and the regulated community are unprepared for the Waste Prevention Rule to take effect.

Due to the absurdity of forcing oil and gas operators to spend millions of dollars to comply with a rule that may be substantially revised in merely a few months and that BLM is unprepared to administer, the Alliance and IPAA again asked the District Court to preliminarily enjoin the Waste Prevention Rule. *See* Mot. to Lift Litigation Stay and for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review, Dkt. No. 196 (Feb. 22, 2018) (attached as Exhibit 8). The District Court denied this motion. *See* Order at 11.

Instead, in the Order, the District Court exercised its equitable authority and issued a narrowly tailored, temporary stay of the phase-in provisions while BLM completes its rulemaking process. The District Court reasoned that "[i]f the proposed Revision Rule becomes final, many of the changes and modifications required under the 2016 Rule . . . will be eliminated." Order at 9. The District Court explained that, in light of the "substantial and unrecoverable" costs to comply with the Waste Prevention Rule, "[t]o force temporary compliance with those provisions makes little sense and provides minimal public benefit, while significant resources may be unnecessarily expended." *Id.* In the Order, the District Court also elected to stay the litigation over the Waste Prevention Rule while BLM reconsiders the rule. The District Court reasoned that it "should allow the administrative process to run its course and restrain from prematurely conducting a merits analysis." *Id.* at 8 (citing *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017)). Importantly, the District Court explained that the temporary stay was issued "until the BLM finalizes the Revision Rule so that this Court can meaningfully and finally engage in a merits analysis of the issues raised by the parties." *Id*. at 10.

The Appellants now ask this Court to review the Order staying the phase-in provisions of the Waste Prevention Rule and the litigation surrounding the rule.

Because appellate review of the Order is not available, however, the appeals must be dismissed.

ARGUMENT

The Appellants seek this Court's review of the Order pursuant to 28 U.S.C. § 1292(a)(1), which allows for interlocutory review of orders "granting, continuing, modifying, refusing or dissolving injunctions." This statute is to be narrowly construed in light of "the general congressional policy against piecemeal review." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). Because the Order is not an injunction, it is not reviewable.

This Court has recognized "two strands of analysis" for appeals brought pursuant to 28 U.S.C. § 1292(a)(1). "The first strand applies to orders regarding 'express motions for injunctive relief' and the second applies to orders with the 'practical effect' of disposing of a request for injunctive relief." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1184–85 (10th Cir. 1999) (quoting *Utah State Dep't of Health v. Kennecott Corp.*, 14 F.3d 1489, 1496 (10th Cir.1994)). The Order may not be appealed under either strand.

The Order fails under the first strand because the Appellants do not challenge the grant or denial of an express motion for preliminary injunction. The Order expressly denied the Alliance and IPAA's motion for preliminary injunction,

which the Appellants opposed. *See* Order at 11. Thus, the Alliance and IPAA, not the Appellants, would be the only proper parties to appeal the denial, which they have not done.

The Order also fails under the second strand of analysis. "In order to have appellate jurisdiction under this second strand of analysis, the challenged order must: (1) have the practical effect of refusing [or granting] an injunction, (2) threaten a serious, perhaps irreparable, consequence, and (3) be effectually challenged only by immediate appeal." *Forest Guardians*, 174 F.3d at 1185 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)) (internal quotations omitted and emphasis added). The Order does not meet any one of these elements, let alone all three as required.

A. The Order Lacks the Practical Effect of an Injunction.

Most significant, the Order does not have the practical effect of refusing or granting an injunction. The Order suspends portions of the Waste Prevention Rule from having any regulatory effect while BLM reconsiders the Rule. This effect is distinguishable from an injunction. An injunction "command[s] or prevent[s] an action." *Black's Law Dictionary* (10th ed. 2014) ("injunction"). Stated otherwise, an injunction "is directed at someone, and governs that party's conduct." *Nken v. Holder*, 556 U.S. 418, 428 (2009). Furthermore, this direction has "the backing of

[a court's] full coercive powers." *Id.* at 428; *accord* 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3922 (3d ed. 2017) (characterizing an injunction as "enforceable by contempt"). This Order has none of these hallmark characteristics. It is not directed at any party and, therefore, does not command any party to take an action or restrain any party from taking an action. It does not require any party to comply with or enforce the Waste Prevention Rule. The Order also does not restrain BLM from enforcing the Waste Prevention Rule. Most notably, the Order does not direct or modify the conduct of the Appellants.[5]

Instead, the Order stays the phase-in provisions of the Waste Prevention Rule so that they lack any regulatory effect. A stay cannot be conflated with an injunction, and the Supreme Court has expressly distinguished the two. The Court has recognized that although a stay "can have the practical effect of preventing some action before the legality of that action has been conclusively determined," it "achieves this result by temporarily suspending the source of authority to act—the

[5] In contrast, this Court held an order to have the practical effect of an injunction when it "instruct[ed] the parties to participate in family counseling sessions, provide[d] that [an individual] will continue to reside in her current placement until further order of the court, and set[ ] the terms for visitation of family members with [the individual]." *Wallace ex rel. Wallace v. Okla. Dep't of Human Servs.*, 109 Fed. App'x 240, 242 (10th Cir. 2004) (unpublished).

order or judgment in question—not by directing an actor's conduct." *Nken v. Holder*, 556 U.S. at 428–29. The Order temporarily suspends the source of authority to act: the phase-in provisions of the Waste Prevention Rule. As a result, operators of oil and gas facilities producing from federal and Indian leases are not obligated to comply with the stayed provisions. Similarly, BLM has no legal basis to enforce the stayed provisions. And as the District Court expressly recognized, this result is temporary "pending finalization or withdrawal of the proposed Revision Rule." Order at 11. Therefore, the District Court's Order does not have the practical effect of refusing or granting an injunction.

B. The Order Does Not Threaten an Irreparable Consequence that Requires Immediate Appeal.

The Order also fails to meet the remaining two elements in the second strand of analysis. The Order does not threaten a "serious, perhaps irreparable, consequence" that the Appellants can "effectually challenge[ ] only by immediate appeal." *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1995)) (internal quotations omitted). The Order does not deny the Appellants their interest in this litigation: a defense of the Waste Prevention Rule. Rather, the Order simply defers an evaluation of the merits of the Waste Prevention Rule until BLM completes its rulemaking process. This deferral accommodates the possibility that

BLM's rulemaking will render the challenges to the Waste Prevention Rule moot and gives BLM the latitude to reevaluate the rule free from judicial interference. *See Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017) ("the ripeness doctrine is designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way" (internal quotations omitted)).

Further, the Order avoids rather than threatens irreparable consequences by preserving the parties' rights while the litigation is stayed. By staying the phase-in provisions of the Waste Prevention Rule, the Order preserves the regulatory landscape that was in place during all of 2017. As a result, the Order will not cause more methane emissions than occurred during 2017. Additionally, the stay prevents irreparable harm to oil and gas operators because, absent a stay of the phase-provisions, oil and gas operators would be forced to spend more than $115 million to comply with the rule. Mem. in Supp. of Mot. for Prelim. Inj. or Vacatur of Certain Provisions of the Rule Pending Administrative Review, Dkt. No. 197-3, Sgamma Decl. ¶ 10 (Feb. 22, 2018). Such expenditures would not be recoverable even if BLM finalizes the proposed revisions to the Waste Prevention Rule, which

may occur as soon as August, or if the Alliance and IPAA successfully challenge the rule. Such expenditures constitute irreparable injury when sovereign immunity precludes money damages. *See, e.g.*, *Crowe Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) ("imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury" (internal alterations omitted)). Accordingly, because the Order appropriately preserves each party's respective rights and interests until BLM completes its rulemaking process associated with the Waste Prevention Rule, it does not threaten any consequences that cannot be addressed later in the litigation.

CONCLUSION

In an effort to force operators of oil and gas facilities on federal and Indian leases to comply with an improperly issued rule that BLM is actively reviewing, the Appellants prematurely ask this Court to review an interlocutory Order pursuant to 28 U.S.C. § 1292(a)(1). Review is not appropriate, however, because the Order is not an injunction and lacks the effect of an injunction. Therefore, the appeals must be dismissed.

Dated: April 19, 2018

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of F.R.A.P. 27(d)(2)(A) because, according to the word count feature of Microsoft Word 2016, the response contains 3,142 words.

This motion complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point, Times New Roman type style.

s/ Kathleen C. Schroder

CERTIFICATE OF SERVICE

The undersigned certified that the foregoing Western Energy Alliance and Independent Petroleum Association of America's Motion to Dismiss for Lack of Appellate Jurisdiction was electronically filed on this 19th day of April, 2018, with the Clerk of the Tenth Circuit Court of Appeals using CM/ECF and was served upon all attorneys of record.

Privacy Redaction Certification: No privacy redactions were required.

Paper Copy Certification: No paper copies.

Virus Scan Certification: The digital form of this document submitted to the Court was scanned for viruses using Sophos Product Version 10.8, last updated April 19, 2018, and according to the program the document is virus-free.

s/ Brigid Bungum
Brigid Bungum

EXHIBIT 1

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
2018 APR -4 AM 10: 28
STEPHAN HARRIS, CLERK
CASPER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and STATE OF MONTANA,

Petitioners,

STATE OF NORTH DAKOTA and STATE OF TEXAS,

Intervenor-Petitioners,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management,

Respondents,

WYOMING OUTDOOR COUNCIL, et al.; EARTHWORKS; STATE OF CALIFORNIA and STATE OF NEW MEXICO,

Intervenor-Respondents.

Case No. 2:16-CV-0285-SWS
(Lead Case)

WESTERN ENERGY ALLIANCE, and the INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Petitioners,

vs.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; and BUREAU OF LAND MANAGEMENT,

Respondents.

Case No. 2:16-CV-0280-SWS

ORDER STAYING IMPLEMENTATION OF RULE PROVISIONS AND STAYING ACTION PENDING FINALIZATION OF REVISION RULE

Sadly, and frustratingly, this case is symbolic of the dysfunction in the current state of administrative law. And unfortunately, it is not the first time this dysfunction has frustrated the administrative review process in this Court.[1]

PROCEDURAL BACKGROUND

On November 18, 2016, the Bureau of Land Management ("BLM") published the final version of its regulations with the stated intent "to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian (other than Osage Tribe) leases." *See* "Waste Prevention, Production Subject to Royalties, and Resource Conservation: Final Rule." 81 Fed. Reg. 83,008 ("Waste Prevention Rule"). Petitioners promptly raised various challenges to the Waste Prevention Rule in these consolidated cases. On January 16, 2017, the day before the Rule became effective, this Court denied Petitioners' request for preliminary injunctive relief, in part because significant portions of the Rule would not become effective until January 17, 2018 ("phase-in provisions"). Thereafter, the Court set an expedited briefing schedule so that the merits of Petitioners' challenges could be addressed prior to the phase-in provisions of the Rule becoming effective. Regrettably, this approach has been derailed.

Uncertainty in the Waste Prevention Rule's fate was first created by Congress. On February 3, 2017, the U.S. House of Representatives passed a Congressional Review Act resolution to disapprove the Waste Prevention Rule, which would have voided the Rule and barred any other "substantially similar" rule in the future. H.R.J. Res. 36, 115th Cong. (2017-2018). The U.S. Senate defeated this Congressional Review Act resolution on May 10, 2017. Then on June 15, 2017, in compliance with a directive from the President to review the Rule for

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[1] *See State of Wyoming, et al. v. Dep't of Interior*, No. 15-CV-043-S (D. Wyo.).

consistency with the policies of the new administration,[2] the BLM announced it was postponing the January 17, 2018 compliance dates for the phase-in provisions of the Rule,[3] pending judicial review in this Court, pursuant to its authority under 5 U.S.C. § 705. *See* 82 Fed. Reg. 27,430 (June 15, 2017) ("Postponement Notice"). In doing so, the BLM considered "the substantial cost that complying with these requirements poses to operators . . ., and the uncertain future these requirements face in light of the pending litigation and administrative review of the Rule." *Id.* at 27,431. The BLM further stated its intention to conduct notice-and-comment rulemaking to suspend or extend the compliance dates of those sections affected.[4] *Id.* The Rule's provisions with compliance dates that had already passed were unaffected by the Postponement Notice.

Five days later, and in light of BLM's plan to propose revision or rescission of the Rule, the Federal Respondents filed a *Motion to Extend the Briefing Deadlines* (ECF No. 129) which this Court granted, making the opening merits briefs due October 2, 2017 and response briefs due November 6, 2017 (ECF No. 133).[5] In granting the extension, this Court determined: "To move forward on the present schedule would be inefficient and a waste of both the judiciary's and the parties' resources in light of the shifting sands surrounding the Rule and certain of its provisions, making it impossible to set a foundation upon which the Court can base its review under the Administrative Procedures Act." *Id.* at 3. Then on July 5th and 10th, 2017, several of the Intervenor-Respondents in this case, along with the elected Attorney Generals from the States of California and New Mexico, challenged the BLM's Postponement Notice in a Federal District

[2] *See* Executive Order No. 13783, "Promoting Energy Independence and Economic Growth" (March 28, 2017).
[3] The BLM postponed the future compliance dates for the following sections of the Rule: 43 C.F.R. 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, and 3179.301-3179.305. These provisions obligate operators to comply with the Rule's "capture percentage," flaring measurement, pneumatic equipment, storage tank, and LDAR requirements beginning on January 17, 2018. *See* 82 Fed. Reg. at 27,431.
[4] "Given this legal uncertainty, operators should not be required to expend substantial time and resources to comply with regulatory requirements that may prove short-lived as a result of pending litigation or the administrative review that is already under way." *Id.*
[5] The Court also ordered the BLM to file a status report on September 1, 2017, notifying the Court and parties of its progress in promulgating a suspension of certain requirements of the Rule.

Court in the Northern District of California. *See California and New Mexico, et al. v. BLM*, No. 3:17-CV-03804-EDL (N.D. Cal.); *Sierra Club, et al. v. Zinke*, No. 3:17-CV-03885-EDL (N.D. Cal.). On October 4, 2017, the Northern District of California Court held unlawful and vacated the Postponement Notice, thereby reinstating the (by then) three-and-one-half-month away compliance dates for the phase-in provisions.

Meanwhile, back in this Court, Petitioners and Intervenor-Petitioners timely filed their opening briefs. On October 20, 2017, the Federal Respondents filed a second *Motion for an Extension of the Merits Briefing Deadlines* (ECF No. 155), requesting the Court again extend the briefing deadlines then in place by thirty-seven (37) days, allowing time for the BLM to complete a rule ("Suspension Rule") which will suspend or delay the majority of the provisions of the Waste Prevention Rule, including the portions of the Rule that would otherwise become effective on January 17, 2018.[6] At that time, BLM had also begun working on a rule to revise or rescind the Waste Prevention Rule ("Revision Rule"). The Court granted the second extension, again stressing the inefficient use and likely waste of resources by proceeding to address the merits of challenges to a rule when the agency has begun the process for suspending and revising that same rule. (ECF No. 158.)

On December 8, 2017, the BLM published the final "Suspension Rule," temporarily suspending or delaying certain requirements of the Waste Prevention Rule that are at the heart of this litigation.[7] *See* 82 Fed. Reg. 58,050. "The 2017 final delay rule does not substantively change the 2016 final rule, but simply postpones implementation of the compliance requirements for certain provisions of the 2016 final rule for 1 year." *Id.* "The BLM has concerns regarding

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[6] On October 27, 2017, the Industry Petitioners again sought preliminary injunctive relief in light of the impending January 2018 compliance dates put back into effect after the California court's ruling. (ECF No. 160.)

[7] The Suspension Rule delayed the effective date for the following provisions of the Waste Prevention Rule: 43 C.F.R. 3162.3-1(j), 3179.7, 3179.9, 3179.10, 3179.101, 3179.102, 3179.201, 3179.202, 3179.203, 3179.204, and 3179.301 through 3179.305.

the statutory authority, cost, complexity, feasibility, and other implications of the 2016 final rule, and therefore intends to avoid imposing likely considerable and immediate compliance costs on operators for requirements that may be rescinded or significantly revised in the near future." *Id.* The Suspension Rule's stated effective date was January 8, 2018.

The Federal Respondents, together with the Industry Petitioners and Petitioner States of Wyoming and Montana, then moved the Court to stay these cases on the basis that it would not be a wise use of the parties' or the Court's resources to adjudicate the merits in light of the Suspension Rule and the fact that the BLM is in the process of issuing a proposed Revision Rule. Intervenor-Petitioner States of North Dakota and Texas opposed a stay, arguing that the limited number of provisions that will remain in effect during the suspension period continue to harm those states by infringing upon the States' sovereignty, unlawfully expanding BLM's jurisdiction to state and private interests, and intruding upon the States' congressionally-granted authority to regulate air quality within their borders. Intervenor-Respondents chose to challenge the Suspension Rule by again filing separate actions in the Northern District of California. *See State of California et al. v. BLM et al.*, No. 3:17-CV-07186-WHO (N.D. Cal. Dec. 19, 2017); *Sierra Club et al. v. Zinke et al.*, No. 3:17-CV-07187-MMC (N.D. Cal. Dec. 19, 2017). Requests to transfer the venue of those cases to this Court were denied.

On December 29, 2017, given the on-going rulemaking process that would materially impact the merits of the present challenges to the Waste Prevention Rule and the prudential ripeness concerns relating to the issues before this Court, the requested stay was granted pending finalization of revisions to the Rule, or at least while the Suspension Rule was in effect. (*See* ECF No. 189.) For a third time, this Court emphasized that moving forward to address the merits of the present challenges would be a waste of resources, as such an analysis is dependent

upon which "rules" are in effect. *Id.* at 4 (citing *Wyoming v. Zinke*, 871 F.3d 1133, 1142 (10th Cir. 2017) ("proceeding to address whether the district court erred in invalidating the BLM's Fracking Regulation when the BLM has now commenced rescinding that same regulation appears to be a very wasteful use of limited judicial resources . . . [as] [i]t is clearly evident that the disputed matter that forms the basis for our jurisdiction has thus become a moving target")). This Court further determined prudential ripeness concerns weigh against interfering in the administrative process. *See id.* at 4-5 (citing *Farrell-Cooper Min. Co. v. U.S. Dep't of the Interior*, 728 F.3d 1229, 1234-35 (10th Cir. 2103) ("In order to determine the fitness of issues for review, we may consider whether judicial intervention would inappropriately interfere with further administrative action and whether the courts would benefit from further factual development of the issues presented.")).

On February 22, 2018, the BLM published the proposed Revision Rule, "proposing to revise the 2016 final rule in a manner that reduces unnecessary compliance burdens, is consistent with the BLM's existing statutory authorities, and re-establishes long-standing requirements that the 2016 final rule replaced." 83 Fed. Reg. 7924 (Feb. 22, 2018). Also on February 22, 2018, the District Court for the Northern District of California preliminarily enjoined enforcement of the Suspension Rule, arguably making the phase-in provisions immediately effective.[8] Accordingly, this Court lifted the stay in these cases and set a briefing schedule to resolve the following pending motions now before this Court: (1) *Joint Motion by the States of North Dakota and Texas to Lift the Stay entered December 29, 2017 and to Establish Expedited Schedule for Further Proceedings* (ECF No. 194); (2) *Motion to Lift Stay and Suspend Implementation Deadlines* filed by Petitioner States of Wyoming and Montana (ECF No. 195);

[8] The California court's decision also put back into effect certain provisions that were not part of the Rule's initial phase-in provisions, but had been delayed by the Suspension Rule: 43 C.F.R. 3162.3-1(j); 3179.10, 3179.101, 3179.102, and 3179.204.

and Industry Petitioners' *Motion to Lift Litigation Stay and for Preliminary Injunction or Vacatur of Certain Provisions of the Rule Pending Administrative Review* (ECF No. 196).

The Federal Respondents urge the Court to stay this litigation and the Waste Prevention Rule's implementation deadlines to preserve the status and rights of the regulated parties and avoid entanglement with the administrative process. The Federal Respondents argue the BLM should not be forced to litigate – and implement – the Waste Prevention Rule while the agency is actively reconsidering the Rule and has engaged in rulemaking to suspend and revise the Rule. The Intervenor-Petitioners, North Dakota and Texas, urge the Court to move forward with the merits of these cases on an expedited basis. The Intervenor-Respondents, the States of California and New Mexico and the Environmental Groups, oppose the Industry Petitioners' motion for a preliminary injunction or vacatur, and further oppose any stay of these cases or the existing implementation deadlines.

DISCUSSION

This Court cannot escape the reality of the difficult, and somewhat unique, procedural circumstances facing it – that going forward on the merits at this point remains a waste of judicial resources and disregards prudential ripeness concerns. The Court's consideration of the various requests for relief must begin by recognizing that the BLM has the inherent authority to reconsider its own rule, in the same manner and pursuant to the same constraints as when initially promulgating the rule. *See Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."); *ConocoPhillips Co. v. U.S. E.P.A.*, 612 F.3d 822, 832 (5th Cir. 2010) (agency has inherent authority to reconsider its decisions unless to do so would be arbitrary, capricious, or an abuse of

discretion). Wish as they might, neither the States, industry members, nor environmental groups are granted authority to dictate oil and gas policy on federal public lands. In light of the BLM's clearly expressed concerns about certain provisions of the Waste Prevention Rule, and the agency's publication of the proposed Revision Rule, the Court should allow the administrative process to run its course and restrain from prematurely conducting a merits analysis. *See Wyoming v. Zinke*, 871 F.3d at 1141 ("The Supreme Court has long held the ripeness doctrine is designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.") (internal quotation marks and citations omitted).

Also implicated here is the related doctrine of prudential mootness, which is rooted in the court's equitable powers to fashion remedies and to withhold relief. *See Fletcher v. U.S.*, 116 F.3d 1315, 1321 (10th Cir. 1997). "Under the doctrine of prudential mootness, there are circumstances under which a controversy, not constitutionally moot, is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." *Id.* (internal quotation and citation omitted). *See also S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) ("Prudential mootness addresses not the power to grant relief but the court's discretion in the exercise of that power."). The central inquiry is whether "circumstances [have] changed since the beginning of litigation that forestall any occasion for *meaningful* relief." *Id.* (emphasis added). Courts typically apply the prudential mootness doctrine where a defendant, "usually the government, has already changed or is in the process of changing its policies or where it appears

that any repeat of the actions in question is otherwise highly unlikely." *Bldg. & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993).

The public comment period for the proposed Revision Rule presently ends April 23, 2018. The proposed revisions substantially change those provisions of the 2016 Waste Prevention Rule that were to be phased in over time and are at the heart of this litigation. If the proposed Revision Rule becomes final, many of the changes and modifications required under the 2016 Rule, including the phase-in provisions, will be eliminated. Yet, the costs and difficulties of immediate compliance with those provisions – particularly considering that the intended period for "ramping up" never came to be because of the BLM's ongoing efforts to suspend and revise those provisions – are undoubtedly substantial and unrecoverable.[9] To force temporary compliance with those provisions makes little sense and provides minimal public benefit, while significant resources may be unnecessarily expended.

"[T]o the extent necessary to prevent irreparable injury," the Administrative Procedures Act gives a reviewing court discretion to "issue *all necessary and appropriate process* . . . to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705 (emphasis added).[10] Petitioners, particularly Industry Petitioners, will be irreparably harmed by full and immediate implementation of the 2016 Waste Prevention Rule, magnified by temporary

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[9] The Intervenor-Respondents assert that the Petitioners brought any compliance difficulties upon themselves, apparently by not taking steps toward compliance regardless of the BLM's stated intentions and ongoing efforts to suspend, revise and/or rescind portions of the Rule. Such an assertion suggests the invalidation of the Postponement Notice and Suspension Rule were, and the ultimate upending of the Revision Rule is, a foregone conclusion. However, "a presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action." *WildEarth Guardians v. U.S. Fish and Wildlife Serv.*, 784 F.3d 677, 691 (10th Cir. 2015). Thus, the States, industry, and public may appropriately rely on agency action unless and until it is held unlawful. No reasonable person would rush to comply with a rule that was delayed, suspended, and is soon to be revised, particularly when such compliance requires the expenditure of significant resources.

[10] While the Court acknowledges that some courts have employed the four-factor preliminary injunction test in determining whether to grant relief under § 705, nothing in the language of the statute itself, or its legislative history, suggests it is limited to those situations where preliminary injunctive relief would be available. *See State of California, et al. v. U.S. B.L.M.*, 277 F. Supp. 3d 1106, 1124-25 (N.D. Cal. 2017) ("The plain language of the statute leaves room to dispute whether such an analysis is required, and the legislative history provides limited and not entirely consistent evidence of Congress' intent.").

implementation of significant provisions meant to be phased-in over time that will be eliminated in as few as four months.[11] The Revision Rule is presently subject to notice-and-comment rulemaking on the very issues before the Court. The proposed Revision Rule would rescind the provisions of the Waste Prevention Rule addressing waste minimization plans, well drilling, well completion, pneumatic controllers, pneumatic diaphragm pumps, storage vessels, and leak detection and repair, and would also modify many other requirements of the 2016 Rule. *See* 83 Fed. Reg. at 7928. Moreover, proceeding to address the merits of these cases will put the BLM in the difficult situation of litigating and defending a rule that it is in the midst of reconsidering and of taking positions on issues that are currently subject to public comment. There is simply nothing to be gained by litigating the merits of a rule for which a substantive revision has been proposed and is expected to be completed within a period of months.

Petitioners have proposed a range of different mechanisms by which this Court could provide relief from the unusual procedural circumstances which have technically, though not realistically, made the phase-in provisions immediately effective. Unfortunately, none of the proposed solutions is comprehensively satisfying, and the circumstances presented here do not fall nicely into any particular legal doctrine. Still, the circumstances that justified this Court's stay of this litigation in the first place have not changed. Accordingly, in order to preserve the status quo, and in consideration of judicial economy and prudential ripeness and mootness concerns, the Court finds the most appropriate and sensible approach is to exercise its equitable discretion to stay implementation of the Waste Prevention Rule's phase-in provisions and further stay these cases until the BLM finalizes the Revision Rule, so that this Court can meaningfully and finally engage in a merits analysis of the issues raised by the parties. A stay will provide

[11] The BLM anticipates completing and publishing the final Revision Rule in August 2018. (Tichenor Decl. ¶ 10, ECF No. 207-1.)

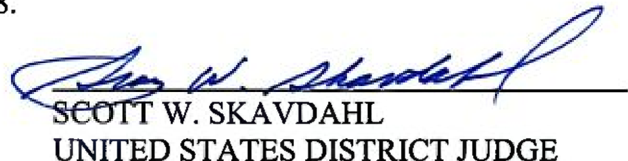
certainty and stability for the regulated community and the general public while BLM completes its rulemaking process, will allow the BLM to focus its limited resources on completing the revision rulemaking, and would prevent the unrecoverable expenditure of millions of dollars in compliance costs. The waste, inefficiency, and futility associated with a ping-ponging regulatory regime is self-evident and in no party's interest. THEREFORE, it is hereby

ORDERED that the *Joint Motion by the States of North Dakota and Texas to Lift the Stay entered December 29, 2017 and to Establish Expedited Schedule for Further Proceedings* (ECF No. 194) is DENIED; the *Motion to Lift Stay and Suspend Implementation Deadlines* filed by Petitioner States of Wyoming and Montana (ECF No. 195) is GRANTED IN PART and DENIED IN PART; and Industry Petitioners' *Motion to Lift Litigation Stay and for Preliminary Injunction or Vacatur of Certain Provisions of the Rule Pending Administrative Review* (ECF No. 196) is DENIED; it is further

ORDERED that implementation of the Waste Prevention Rule's phase-in provisions (43 C.F.R. 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, and 3179.301-3179.305) is **STAYED**; it is further

ORDERED that these consolidated matters are **STAYED** pending finalization or withdrawal of the proposed Revision Rule.

DATED this 4th day of April, 2018.



SCOTT W. SKAVDAHL
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

EPA 430-R-16-002

Inventory of U.S. Greenhouse Gas Emissions and Sinks:

1990 – 2014

APRIL 15, 2016

U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
U.S.A.

Energy

Energy-related activities, primarily fossil fuel combustion, accounted for the vast majority of U.S. CO_2 emissions for the period of 1990 through 2014. In 2014, approximately 82 percent of the energy consumed in the United States (on a Btu basis) was produced through the combustion of fossil fuels. The remaining 18 percent came from other energy sources such as hydropower, biomass, nuclear, wind, and solar energy (see Figure 2-5 and Figure 2-6). A discussion of specific trends related to CO_2 as well as other greenhouse gas emissions from energy consumption is presented in the Energy chapter. Energy-related activities are also responsible for CH_4 and N_2O emissions (45 percent and 10 percent of total U.S. emissions of each gas, respectively). Table 2-4 presents greenhouse gas emissions from the Energy chapter, by source and gas.

Figure 2-5: 2014 Energy Chapter Greenhouse Gas Sources (MMT CO_2 Eq.)

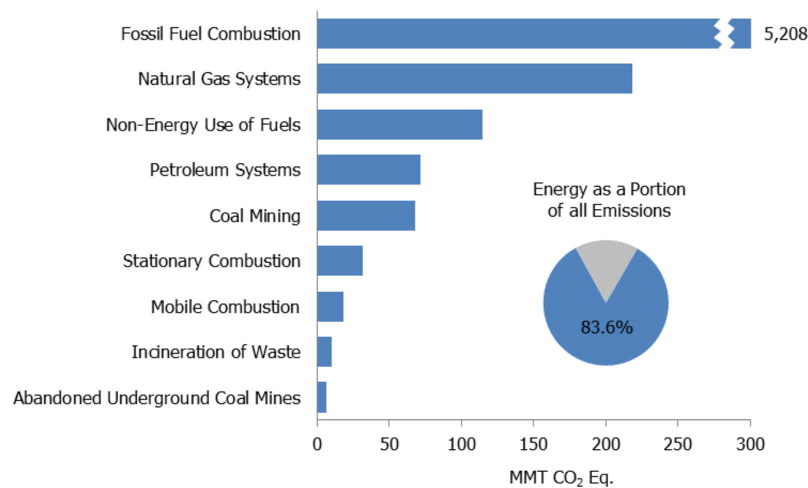


Figure 2-6: 2014 U.S. Fossil Carbon Flows (MMT CO_2 Eq.)

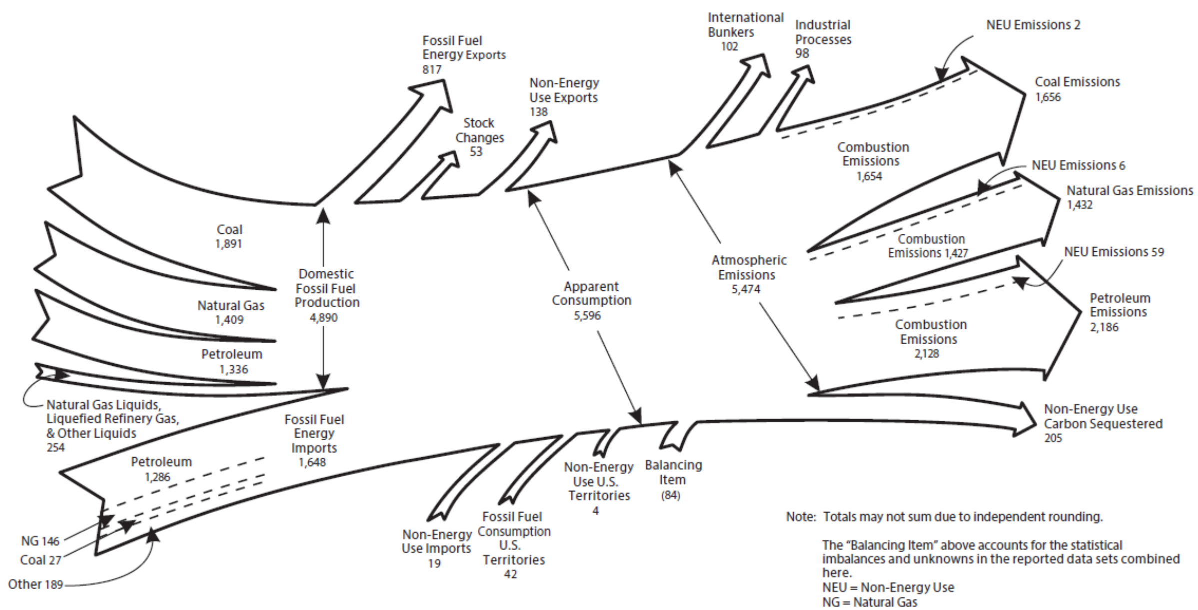


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Table 2-4: Emissions from Energy (MMT CO_2 Eq.)

Gas/Source	1990	2005	2010	2011	2012	2013	2014
CO_2	**4,908.0**	**5,932.5**	**5,520.0**	**5,386.6**	**5,179.7**	**5,330.8**	**5,377.9**
Fossil Fuel Combustion	4,740.7	5,747.1	5,358.3	5,227.7	5,024.7	5,157.6	5,208.2
Electricity Generation	*1,820.8*	*2,400.9*	*2,258.4*	*2,157.7*	*2,022.2*	*2,038.1*	*2,039.3*
Transportation	*1,493.8*	*1,887.0*	*1,728.3*	*1,707.6*	*1,696.8*	*1,713.0*	*1,737.6*
Industrial	*842.5*	*828.0*	*775.5*	*773.3*	*782.9*	*812.2*	*813.3*
Residential	*338.3*	*357.8*	*334.6*	*326.8*	*282.5*	*329.7*	*345.1*
Commercial	*217.4*	*223.5*	*220.1*	*220.7*	*196.7*	*221.0*	*231.9*
U.S. Territories	*27.9*	*49.9*	*41.4*	*41.5*	*43.6*	*43.5*	*41.0*
Non-Energy Use of Fuels	118.1	138.9	114.1	108.5	105.6	121.7	114.3
Natural Gas Systems	37.7	30.1	32.4	35.7	35.2	38.5	42.4
Incineration of Waste	8.0	12.5	11.0	10.5	10.4	9.4	9.4
Petroleum Systems	3.6	3.9	4.2	4.2	3.9	3.7	3.6
Biomass-Wood[a]	*215.2*	*206.9*	*192.5*	*195.2*	*194.9*	*211.6*	*217.7*
International Bunker Fuels[b]	*103.5*	*113.1*	*117.0*	*111.7*	*105.8*	*99.8*	*103.2*
Biomass-Ethanol[a]	*4.2*	*22.9*	*72.6*	*72.9*	*72.8*	*74.7*	*76.1*
CH_4	**363.3**	**307.0**	**318.5**	**313.3**	**312.5**	**321.2**	**328.3**
Natural Gas Systems	206.8	177.3	166.2	170.1	172.6	175.6	176.1
Petroleum Systems	38.7	48.8	54.1	56.3	58.4	64.7	68.1
Coal Mining	96.5	64.1	82.3	71.2	66.5	64.6	67.6
Stationary Combustion	8.5	7.4	7.1	7.1	6.6	8.0	8.1
Abandoned Underground Coal Mines	7.2	6.6	6.6	6.4	6.2	6.2	6.3
Mobile Combustion	5.6	2.7	2.3	2.2	2.2	2.1	2.0
Incineration of Waste	+	+	+	+	+	+	+
International Bunker Fuels[b]	*0.2*	*0.1*	*0.1*	*0.1*	*0.1*	*0.1*	*0.1*
N_2O	**53.6**	**55.0**	**46.1**	**44.0**	**41.7**	**41.4**	**40.0**
Stationary Combustion	11.9	20.2	22.2	21.3	21.4	22.9	23.4
Mobile Combustion	41.2	34.4	23.6	22.4	20.0	18.2	16.3
Incineration of Waste	0.5	0.4	0.3	0.3	0.3	0.3	0.3
International Bunker Fuels[b]	*0.9*	*1.0*	*1.0*	*1.0*	*0.9*	*0.9*	*0.9*
Total	**5,324.9**	**6,294.5**	**5,884.6**	**5,744.0**	**5,533.9**	**5,693.5**	**5,746.2**

+ Does not exceed 0.05 MMT CO_2 Eq.
[a] Emissions from Wood Biomass and Ethanol Consumption are not included specifically in summing energy sector totals. Net carbon fluxes from changes in biogenic carbon reservoirs are accounted for in the estimates for LULUCF.
[b] Emissions from International Bunker Fuels are not included in totals.
Note: Totals may not sum due to independent rounding.

Carbon dioxide emissions from fossil fuel combustion are presented in Table 2-5 based on the underlying U.S. energy consumer data collected by the U.S. Energy Information Administration (EIA). Estimates of CO_2 emissions from fossil fuel combustion are calculated from these EIA "end-use sectors" based on total consumption and appropriate fuel properties (any additional analysis and refinement of the EIA data is further explained in the Energy chapter of this report). EIA's fuel consumption data for the electric power sector are comprised of electricity-only and combined-heat-and-power (CHP) plants within the North American Industry Classification System (NAICS) 22 category whose primary business is to sell electricity, or electricity and heat, to the public (nonutility power producers can be included in this sector as long as they meet they electric power sector definition). EIA statistics for the industrial sector include fossil fuel consumption that occurs in the fields of manufacturing, agriculture, mining, and construction. EIA's fuel consumption data for the transportation sector consists of all vehicles whose primary purpose is transporting people and/or goods from one physical location to another. EIA's fuel consumption data for the industrial sector consists of all facilities and equipment used for producing, processing, or assembling goods (EIA includes generators that produce electricity and/or useful thermal output primarily to support on-site industrial activities in this sector). EIA's fuel consumption data for the residential sector consist of living quarters for private households. EIA's fuel consumption data for the commercial sector consist of service-providing facilities and equipment from private and public organizations and businesses (EIA includes generators that produce electricity and/or useful thermal output primarily to support the activities at commercial establishments in this sector). Table

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2-5 and Figure 2-7 summarize CO_2 emissions from fossil fuel combustion by end-use sector. Figure 2-8 further describes the total emissions from fossil fuel combustion, separated by end-use sector, including CH_4 and N_2O in addition to CO_2.

Table 2-5: CO_2 Emissions from Fossil Fuel Combustion by End-Use Sector (MMT CO_2 Eq.)

End-Use Sector	1990	2005	2010	2011	2012	2013	2014
Transportation	**1,496.8**	**1,891.8**	**1,732.7**	**1,711.9**	**1,700.6**	**1,717.0**	**1,741.7**
Combustion	1,493.8	1,887.0	1,728.3	1,707.6	1,696.8	1,713.0	1,737.6
Electricity	3.0	4.7	4.5	4.3	3.9	4.0	4.1
Industrial	**1,529.2**	**1,564.6**	**1,416.5**	**1,398.0**	**1,375.7**	**1,407.0**	**1,406.8**
Combustion	842.5	828.0	775.5	773.3	782.9	812.2	813.3
Electricity	686.7	736.6	641.0	624.7	592.8	594.7	593.6
Residential	**931.4**	**1,214.1**	**1,174.6**	**1,117.5**	**1,007.8**	**1,064.6**	**1,080.3**
Combustion	338.3	357.8	334.6	326.8	282.5	329.7	345.1
Electricity	593.0	856.3	840.0	790.7	725.3	734.9	735.2
Commercial	**755.4**	**1,026.8**	**993.0**	**958.8**	**897.0**	**925.5**	**938.4**
Combustion	217.4	223.5	220.1	220.7	196.7	221.0	231.9
Electricity	538.0	803.3	772.9	738.0	700.3	704.5	706.5
U.S. Territories[a]	**27.9**	**49.9**	**41.4**	**41.5**	**43.6**	**43.5**	**41.0**
Total	**4,740.7**	**5,747.1**	**5,358.3**	**5,227.7**	**5,024.7**	**5,157.6**	**5,208.2**
Electricity Generation	**1,820.8**	**2,400.9**	**2,258.4**	**2,157.7**	**2,022.2**	**2,038.1**	**2,039.3**

[a] Fuel consumption by U.S. Territories (i.e., American Samoa, Guam, Puerto Rico, U.S. Virgin Islands, Wake Island, and other U.S. Pacific Islands) is included in this report.

Notes: Combustion-related emissions from electricity generation are allocated based on aggregate national electricity consumption by each end-use sector. Totals may not sum due to independent rounding.

Figure 2-7: 2014 CO_2 Emissions from Fossil Fuel Combustion by Sector and Fuel Type (MMT CO_2 Eq.)

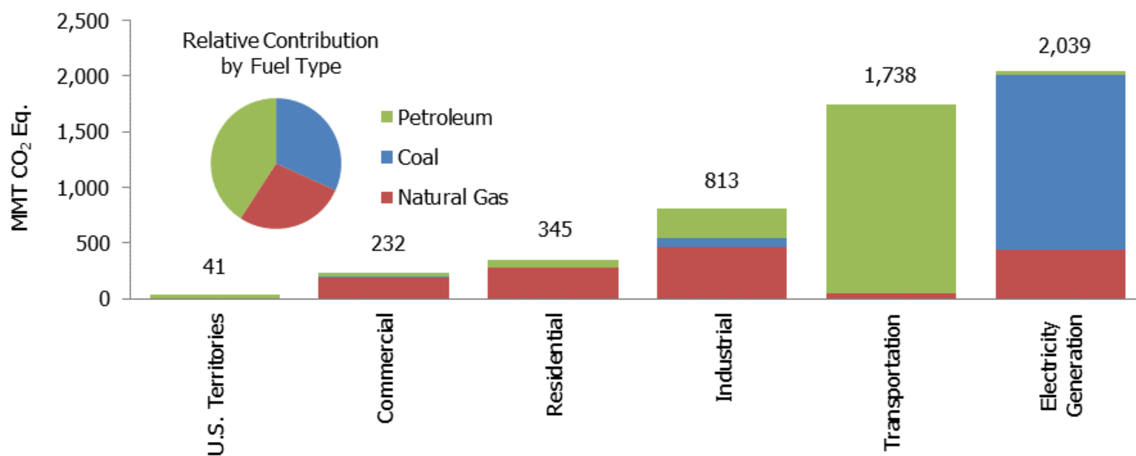

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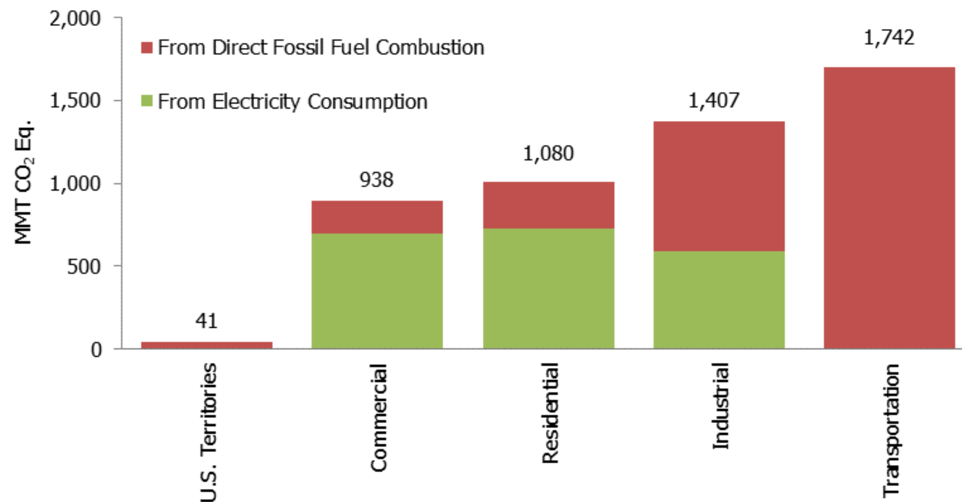
Figure 2-8: 2014 End-Use Sector Emissions of CO_2 from Fossil Fuel Combustion (MMT CO_2 Eq.)



The main driver of emissions in the Energy sector is CO_2 from fossil fuel combustion. Electricity generation is the largest emitter of CO_2, and electricity generators consumed 34 percent of U.S. energy from fossil fuels and emitted 39 percent of the CO_2 from fossil fuel combustion in 2014. Electricity generation emissions can also be allocated to the end-use sectors that are consuming that electricity, as presented in Table 2-5. The transportation end-use sector accounted for 1,741.7 MMT CO_2 Eq. in 2014 or approximately 33 percent of total CO_2 emissions from fossil fuel combustion. The industrial end-use sector accounted for 27 percent of CO_2 emissions from fossil fuel combustion. The residential and commercial end-use sectors accounted for 21 and 18 percent, respectively, of CO_2 emissions from fossil fuel combustion. Both of these end-use sectors were heavily reliant on electricity for meeting energy needs, with electricity consumption for lighting, heating, air conditioning, and operating appliances contributing 68 and 75 percent of emissions from the residential and commercial end-use sectors, respectively. Significant trends in emissions from energy source categories over the twenty five-year period from 1990 through 2014 included the following:

- Total CO_2 emissions from fossil fuel combustion increased from 4,740.7 MMT CO_2 Eq. in 1990 to 5,208.2 MMT CO_2 Eq. in 2014 – a 9.9 percent total increase over the twenty five-year period. From 2013 to 2014, these emissions increased by 50.6 MMT CO_2 Eq. (1.0 percent).
- Methane emissions from natural gas systems and petroleum systems (combined here) decreased very slightly from 245.5 MMT CO_2 Eq. in 1990 to 244.3 MMT CO_2 Eq. (1.2 MMT CO_2 Eq. or less than 1 percent) from 1990 to 2014. Natural gas systems CH_4 emissions decreased by 30.6 MMT CO_2 Eq. (14.8 percent) since 1990, largely due to a decrease in emissions from transmission, storage, and distribution. The decrease in transmission and storage emissions is largely due to reduced compressor station emissions (including emissions from compressors and fugitives). The decrease in distribution emissions is largely attributed to increased use of plastic piping, which has lower emissions than other pipe materials, and station upgrades at metering and regulating (M&R) stations. Petroleum systems CH_4 emissions increased by 29.4 MMT CO_2 Eq. (or 76 percent) since 1990. This increase is due primarily to increases in emissions from production equipment.
- Carbon dioxide emissions from non-energy uses of fossil fuels decreased by 3.8 MMT CO_2 Eq. (3.2 percent) from 1990 through 2014. Emissions from non-energy uses of fossil fuels were 114.3 MMT CO_2 Eq. in 2014, which constituted 2.1 percent of total national CO_2 emissions, approximately the same proportion as in 1990.
- Nitrous oxide emissions from stationary combustion increased by 11.5 MMT CO_2 Eq. (96.4 percent) from 1990 through 2014. Nitrous oxide emissions from this source increased primarily as a result of an increase in the number of coal fluidized bed boilers in the electric power sector.

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- Nitrous oxide emissions from mobile combustion decreased by 24.9 MMT CO_2 Eq. (60.4 percent) from 1990 through 2014, primarily as a result of N_2O national emission control standards and emission control technologies for on-road vehicles.
- Carbon dioxide emissions from incineration of waste (9.4 MMT CO_2 Eq. in 2014) increased by 1.4 MMT CO_2 Eq. (18.2 percent) from 1990 through 2014, as the volume of plastics and other fossil carbon-containing materials in municipal solid waste grew.

The increase in CO_2 emissions from fossil fuel combustion in 2014 was a result of multiple factors, including: (1) colder winter conditions in the first quarter of 2014, which resulted in an increased demand for heating fuel in the residential and commercial sectors; (2) an increase in industrial production across multiple sectors, resulting in slight increases in industrial sector emissions;[1] and (3) an increase in transportation emissions resulting from an increase in VMT and fuel use across on-road transportation modes.

Industrial Processes and Product Use

The Industrial Processes and Product Use (IPPU) chapter includes greenhouse gas emissions occurring from industrial processes and from the use of greenhouse gases in products.

Greenhouse gas emissions are produced as the by-products of many non-energy-related industrial activities. For example, industrial processes can chemically transform raw materials, which often release waste gases such as CO_2, CH_4, and N_2O. These processes include iron and steel production and metallurgical coke production, cement production, ammonia production, urea consumption, lime production, other process uses of carbonates (e.g., flux stone, flue gas desulfurization, and glass manufacturing), soda ash production and consumption, titanium dioxide production, phosphoric acid production, ferroalloy production, CO_2 consumption, silicon carbide production and consumption, aluminum production, petrochemical production, nitric acid production, adipic acid production, lead production, zinc production, and N_2O from product uses (see Figure 2-9). Industrial processes also release HFCs, PFCs, SF_6, and NF_3. In addition to their use as substitutes for ozone depleting substances (ODS), fluorinated compounds such as HFCs, PFCs, SF_6, NF_3, and others are employed and emitted by a number of other industrial sources in the United States. These industries include aluminum production, HCFC-22 production, semiconductor manufacture, electric power transmission and distribution, and magnesium metal production and processing. Table 2-6 presents greenhouse gas emissions from industrial processes by source category.

[1] Further details on industrial sector combustion emissions are provided by EPA's GHGRP. See <http://ghgdata.epa.gov/ghgp/main.do>.

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EXHIBIT 3

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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 WYOMING OUTDOOR COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY, CITIZENS FOR A HEALTHY COMMUNITY, DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW AND POLICY CENTER, MONTANA ENVIRONMENTAL INFORMATION CENTER, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, SAN JUAN CITIZENS ALLIANCE, SIERRA CLUB, THE WILDERNESS SOCIETY, WESTERN ORGANIZATION OF RESOURCE COUNCILS, WILDERNESS WORKSHOP, AND WILDEARTH GUARDIANS. Applicants for Intervention.	Civil Case No. 2:16-cv-00285-SWS [Lead] [Consolidated With 2:16-cv-00280-SWS] Assigned: Hon. Scott W. Skavdahl **MEMORANDUM IN SUPPORT OF CITIZEN GROUPS' MOTION TO INTERVENE AS RESPONDENTS**

INTRODUCTION

This case challenges the legality of Bureau of Land Management's ("BLM") recently promulgated Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Waste Prevention Rule" or "Rule"). 81 Fed. Reg. 83,008 (Nov. 18, 2016). Oil and gas development on federal and Indian leases contributes significantly to our nation's oil and gas supplies. *Id.* at 83,009. However, operators are wasting large quantities of natural gas in developing these resources. Lessees wasted over 462 billion cubic feet ("bcf") of natural gas on public and tribal lands between 2009 and 2015—enough gas to serve about 6.2 million households for a year. *Id.* As a result of this waste, States, Tribes and federal taxpayers are losing millions of dollars annually in royalty revenue that could be used to fund schools, health care, and infrastructure. *Id.* at 83,014, 83,069. The Rule addresses this problem by requiring oil and gas operators to take low-cost, proven measures to reduce natural gas waste from venting, flaring, and leaks. *Id.* at 83,009. BLM estimates that the Rule will conserve up to 41 bcf of natural gas and produce up to $14 million in royalties per year. *Id.* at 83,014.

Because wasted natural gas is comprised largely of methane—a powerful greenhouse gas—the Rule will also help to reduce the significant climate impacts of oil and gas development on federal and Indian leases. *Id.* at 83,009. Additionally, the Rule will benefit communities suffering the impacts of such development by reducing emissions of smog-forming compounds and carcinogens like benzene and limiting the use of noisy and unsightly flares. *Id.* at 83,009, 83,014, 83,049. BLM estimates that the Rule could have net benefits of up to $204 million per year. *Id.* at 83,013.

Petitioners Western Energy Alliance, Independent Petroleum Association of America, and the States of Wyoming, Montana and North Dakota (collectively, "Petitioners") seek to

invalidate the Waste Prevention Rule. Wyoming Outdoor Council et al. (collectively, the "Citizen Groups") seek intervention to defend the Rule and the conservation, environmental, health and safety benefits it provides their members.

ARGUMENT

I. THE CITIZEN GROUPS ARE ENTITLED TO INTERVENE AS OF RIGHT.

Under Federal Rule of Civil Procedure 24(a), a movant is entitled to intervene as of right if: (1) the motion is "timely"; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) that interest is not "adequately represent[ed]" by existing parties. Fed. R. Civ. P. 24(a)(2); Local Rule 83.6(e).

The Tenth Circuit follows "a somewhat liberal line in allowing intervention." *WildEarth Guardians v. Nat'l Park Serv.* (*Nat'l Park Serv.*), 604 F.3d 1192, 1198 (10th Cir. 2010) (quoting *WildEarth Guardians v. U.S. Forest Serv.* (*U.S. Forest Serv.*), 573 F.3d 992, 995 (10th Cir. 2009)). The court has explained that the Rule 24 factors are "not rigid, technical requirements." *San Juan Cty. v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc). Rule 24(a) was intended to "expand the circumstances" in which intervention as of right would be allowed, and thus the principal focus is on "the practical effect of litigation on a prospective intervenor rather than legal technicalities." *Id.* at 1188. The Citizen Groups satisfy each of Rule 24(a)'s requirements and are entitled to intervene in this action as of right.

A. The Motion to Intervene is Timely.

A motion to intervene under Rule 24(a) must be timely. Timeliness is determined "in light of all the circumstances," principally "the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence

of any unusual circumstances." *Utah Ass'n of Ctys. v. Clinton* (*UAC*), 255 F.3d 1246, 1250 (10th Cir. 2001) (quoting *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984)). Where no prejudice would result, intervention is favored. *See id.* at 1050–51.

The Citizen Groups' motion is timely. BLM issued a pre-publication version of the Waste Prevention Rule on November 15, 2016, and the Rule was published in the Federal Register on November 18, 2016. Petitioners Western Energy Alliance and Independent Petroleum Association of America filed their Petition for Review on November 15; the States of Wyoming and Montana filed their Petition for Review on November 18; and the State of North Dakota moved to intervene as a Petitioner on November 23. On November 30, the Court consolidated the cases and set a briefing schedule for preliminary injunction motions. Meanwhile, Citizen Groups moved swiftly to coordinate among numerous organizations and submit this motion less than three weeks after Petitioners' initial filings and only two days after consolidation. The Citizen Groups' intervention at this early stage will not prejudice the existing parties: the groups plan to file joint briefs and will comply with the existing briefing schedule. This motion is therefore timely.

B. The Citizen Groups Have an Interest in the Subject Matter of this Litigation.

To intervene as of right under Rule 24(a), the movant must demonstrate "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a); *Nat'l Park Serv.*, 604 F.3d at 1198. "The movant's claimed interest is measured in terms of its relationship to the property or transaction that is the subject of the action, not in terms of the particular issue before the district court." *Nat'l Park Serv.*, 604 F.3d at 1198. "With respect to Rule 24(a)(2), [the Tenth Circuit has] declared it 'indisputable' that a prospective intervenor's environmental concern is a legally protectable interest." *Id.* In addition, when litigation raises

an issue of significant public interest—rather than solely private rights—"the requirements for intervention may be relaxed." *San Juan Cty.*, 503 F.3d at 1201. The Citizen Groups have multiple interests in the Rule that meet the standard for intervention in this case.

1. The Citizen Groups Have Long Advocated for Waste Prevention Measures.

The Citizen Groups have an interest in this litigation because they worked extensively to support promulgation of a waste prevention rule. "A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *see also N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 540 F. App'x 877, 880 (10th Cir. 2013) (holding environmental groups that had submitted comments and appealed the challenged plan "easily" demonstrated an interest sufficient to support intervention as of right); *Coal. of Ariz./N.M Ctys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (holding a party with a "persistent record of advocacy" for an environmental protection adopted by an agency has a "direct and substantial interest" in defending its adoption in subsequent litigation).

The Citizen Groups urged BLM to update and strengthen its regulations regarding prevention of waste for many years.[1] They submitted numerous comment letters on the proposed rule, testified at public hearings and tribal consultation sessions during the scoping process, prepared expert reports, and met repeatedly with agency officials.[2] Because Petitioners attack

[1] *See* Decl. of John Stith ¶ 7, attached as Ex. 1; Decl. of Meleah A. Geertsma ¶¶ 3–4, attached as Ex. 2; Decl. of Lena Moffitt ¶¶ 9, 11, attached as Ex. 3; Decl. of Nada Culver ¶ 6, attached as Ex. 4; Decl. of Sara Kendall ¶¶ 8–9, attached as Ex. 5; Decl. of Michael A. Saul ¶¶ 5–8, attached as Ex. 6; Decl. of Mini Schmitz ¶¶ 3–4, attached as Ex. 7.
[2] *See* Stith Decl. ¶ 7 (Ex. 1); Geertsma Decl. ¶¶ 3–4 (Ex. 2); Moffitt Decl. ¶¶ 9, 11 (Ex. 3); Culver Decl. ¶ 6 (Ex. 4); Kendall Decl. ¶¶ 8–9 (Ex. 5); Saul Decl. ¶¶ 5–8 (Ex. 6); Schmitz Decl. ¶¶ 3–4 (Ex. 7).

the Rule that resulted from these intensive and years-long efforts, the Citizen Groups' have a sufficient interest to support intervention as of right.

2. The Waste Prevention Rule Will Benefit the Interests of the Citizen Groups and Their Members and Staff.

In addition to their history of advocacy, the Citizen Groups have an interest in protecting public lands, the environment, and their members' health and safety from the impacts of oil and gas operations, and in ensuring that such operations do not result in waste of a public resource. It is "indisputable" that a movant's environmental concerns represent a legally-protectable interest sufficient to support intervention. *Nat'l Park Serv.*, 604 F.3d at 1198; *see also N.M. Off-Highway Vehicle All.*, 540 F. App'x at 880 (finding a sufficient interest where groups' "staff, members, and volunteers regularly enjoy the forest for recreation and aesthetic reasons").

The Citizen Groups' members and staff live and work on and near public and tribal lands impacted by venting, flaring, and leakage.[3] They also enjoy hiking, camping, fishing, nature photography, and viewing cultural artifacts on or near public lands where venting and flaring is common.[4] The Rule will reduce the harmful impacts of oil and gas development on the Citizen Groups' members and staff.

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[3] *See* Moffitt Decl. ¶ 6 (Ex. 3); Kendall Decl. ¶ 4 (Ex. 5); Saul Decl. ¶¶ 11–12, 15 (Ex. 6); Decl. of Christopher Merrill ¶¶ 4–5, attached as Ex. 8; Decl. of Francis Don Schreiber ¶¶ 2, 5–6, attached as Ex. 9; Decl. of Judith J. Fox-Perry ¶¶ 1–2, attached as Ex. 10; Decl. of Wade Sikorski ¶¶ 2, 7–10, attached as Ex. 11; Decl. of Peter Hart ¶ 3, attached as Ex. 12; Decl. of Michael Eisenfeld ¶¶ 4–6, attached as Ex. 13; Decl. of James Murphy ¶ 4, attached as Ex. 14; Decl. of Anne Hedges ¶ 4, attached as Ex. 15; Decl. of Natasha Leger, ¶¶ 3–4, 13, attached as Ex. 16; Decl. of Mary Jursinovic ¶¶ 2, 4, 9, attached as Ex. 17; Decl. of Michael L. Drake ¶¶ 2, 4, 6, attached as Ex. 18; Decl. of Treciafaye (Tweeti) Blancett ¶¶ 3, 5, attached as Ex. 19; Decl. of Gina Trujillo ¶ 8, attached as Ex. 20; Decl. of Jeremy Nichols ¶¶ 9–10, attached as Ex. 21; Decl. of Kendra Pinto ¶¶ 1, 4–6, 8, attached as Ex. 22; Decl. of Jim Brett ¶¶ 3, 8–9, attached as Ex. 23.

[4] *See* Moffitt Decl. ¶ 10 (Ex. 3); Culver Decl. ¶ 5 (Ex. 4); Saul Decl. ¶¶ 10, 12 (Ex. 6); Schmitz Decl. ¶ 6 (Ex. 7); Hart Decl. ¶ 3 (Ex. 12); Eisenfeld Decl. ¶ 6 (Ex. 13); Murphy Decl. ¶ 4 (Ex. 14); Hedges Decl. ¶ 4 (Ex. 15); Leger Decl. ¶ 4 (Ex. 16); Nichols Decl. ¶¶ 9–10, 12 (Ex. 21);

For example, the Rule's waste prevention measures will decrease emissions of cancer-causing pollutants and volatile organic compound emissions that lead to ozone formation—the primary component of smog. *See, e.g.*, 81 Fed. Reg. at 83,014–15. These emission reductions will improve the health of the Citizen Groups' members and staff.[5] One member who lives on a ranch in New Mexico with over one hundred BLM-managed wells on or adjacent to it described the "near-constant smell from leaking wells" and "odors [which] make breathing uncomfortable," which cause him to worry about his grandchildren's exposure to pollutants.[6] Another member who ranches in western Colorado on land adjacent to a compressor station described how, soon after the compressor station was built, juniper trees surrounding the station—"large, mature trees in their natural habitat"—"suddenly died" and were "quickly removed."[7] She worries about her children's exposure to volatile organic compounds during off-gassing from the compressor.[8] Other members are concerned about the impacts of oil and gas industry pollution on organic farms, ranches, orchards and wineries in the North Fork Valley in Colorado.[9]

Flaring reductions will benefit Citizen Groups' members and staff who contend day and night with loud flares lighting up prairies and sagebrush seas near their homes and where they

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Decl. of Rosalie Chilcoat ¶ 4, attached as Ex. 24; Decl. of Camilla Feibelman ¶ 13, attached as Ex. 25.

[5] *See* Geertsma Decl. ¶ 5 (Ex. 2); Culver Decl. ¶ 9 (Ex. 4); Kendall Decl. ¶ 5 (Ex. 5); Saul Decl. ¶¶ 14–15, 17–18, 26–27 (Ex. 6); Merrill Decl. ¶ 9 (Ex. 8); Schreiber Decl. ¶ 14 (Ex. 9); Fox-Perry Decl. ¶ 5 (Ex. 10); Sikorski Decl. ¶¶ 13–14 (Ex. 11); Hart Decl. ¶ 4 (Ex. 12); Eisenfeld Decl. ¶¶ 4, 7, 9 (Ex. 13); Murphy Decl. ¶ 5 (Ex. 14); Hedges Decl. ¶ 5 (Ex. 15); Leger Decl. ¶¶ 5, 7 (Ex. 16); Jursinovic Decl. ¶¶ 7–8 (Ex. 17); Drake Decl. ¶ 8 (Ex. 18); Blancett Decl. ¶ 14 (Ex. 19); Nichols Decl. ¶¶ 7, 11, 13–14 (Ex. 21); Pinto Decl. ¶¶ 7–8 (Ex. 22); Brett Decl. ¶ 12 (Ex. 23); Chilcoat Decl. ¶ 5 (Ex. 24); Feibelman Decl. ¶ 15 (Ex. 25); Decl. of Lisa Deville ¶¶ 6, 7, attached as Ex. 26; Decl. of Matthew Hamilton ¶ 9, attached as Ex. 27.

[6] Schreiber Decl. ¶¶ 5, 10–11 (Ex. 9); *see also* Chilcoat Decl. ¶ 5 (Ex. 24)

[7] Fox-Perry Decl. ¶ 5 (Ex. 10).

[8] Fox-Perry Decl. ¶ 5 (Ex. 10).

[9] *See, e.g.,* Brett Decl. ¶ 12 (Ex. 23).

ranch, hike, and camp.[10] For example, one enrolled member of the Mandan, Hidatsa and Arikara Nation who lives on the Fort Berthold Reservation in North Dakota with her husband and their five children can see flares in every direction: "They sound like the roaring of jet engines, and they can light up the night sky as bright as day."[11] The Rule will help to mitigate these harms.

The Rule also will result in up to an additional $14 million in royalties accruing to the federal government annually. 81 Fed. Reg. at 83,014. Half of these royalties will be allocated to the states to spend in areas "socially or economically impacted" by mineral development for planning, public facility construction and maintenance, and public service provision. 30 U.S.C. § 191(a). Citizen Groups' members and staff living in areas impacted by oil and gas development benefit from these expenditures in their communities.[12]

These impacts demonstrate that the Citizen Groups have legally protectable interests under Rule 24. *See Nat'l Park Serv.*, 604 F.3d at 1198; *San Juan Cty.*, 503 F.3d at 1199.

C. The Citizen Groups' Interests May Be Impaired as a Result of this Litigation.

Rule 24(a) also requires the Citizen Groups to show that the litigation "may, as a practical matter, impair or impede [their] interest." Fed. R. Civ. P. 24(a)(2); *Nat'l Park Serv.*, 604 F.3d at 1198. To meet this "minimal burden," the movant must show "only that impairment of its substantial legal interest is *possible* if intervention is denied." *Nat'l Park Serv.*, 604 F.3d at 1199 (emphasis added) (citation omitted).

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[10] *See* Saul Decl. ¶¶ 13, 19 (Ex. 6); Schreiber Decl. ¶ 9 (Ex. 9); Fox-Perry Decl. ¶ 6 (Ex. 10); Hart Decl. ¶ 8 (Ex. 12); Eisenfeld Decl. ¶ 10 (Ex. 13); Murphy Decl. ¶ 8 (Ex. 14); Hedges Decl. ¶ 8 (Ex. 15); Leger Decl. ¶ 8 (Ex. 16); Nichols Decl. ¶¶ 11–12 (Ex. 21); Pinto Decl. ¶¶ 8, 11 (Ex. 22); Brett Decl. ¶ 12 (Ex. 23); Chilcoat Decl. ¶ 4 (Ex. 24); Deville Decl. ¶ 5 (Ex. 26).

[11] Deville Decl. ¶ 5 (Ex. 26).

[12] *See* Geertsma Decl. ¶ 5 (Ex. 2); Culver Decl. ¶¶ 5, 8 (Ex. 4); Kendall Decl. ¶ 6 (Ex. 5); Schreiber Decl. ¶ 16 (Ex. 9); Sikorski Decl. ¶ 16 (Ex. 11); Hart Decl. ¶ 9 (Ex. 12); Eisenfeld Decl. ¶ 11 (Ex. 13); Murphy Decl. ¶ 9 (Ex. 14); Hedges Decl. ¶ 9 (Ex. 15); Leger Decl. ¶ 9 (Ex. 16); Jursinovic Decl. ¶ 10 (Ex. 17); Pinto Decl. ¶ 12 (Ex. 22).

If the Petitioners succeed in this case, the benefits that the Waste Prevention Rule provides to the Citizen Groups' members will be lost. Petitioners have asked this Court to "invalidate and set aside" BLM's Waste Prevention Rule. States' Pet. for Review 2–3; Industry Pet. for Review 3. If the Rule is enjoined or set aside, the result will be increased waste of a valuable federal resource and the associated environmental, health, and safety harms.

D. The Citizen Groups' Interests Are Not Adequately Represented by BLM.

Rule 24(a) requires a showing that the Citizen Groups' interests may not be adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2); *Nat'l Park Serv.*, 604 F.3d at 1198. To meet this "minimal burden," the movant need only show "the *possibility* that representation may be inadequate." *Nat'l Park Serv.*, 604 F.3d at 1200 (emphasis added).

The Tenth Circuit repeatedly has held that it is generally "impossible for a government agency to protect both the public's interests and the would-be intervenor's private interests." *N.M. Off-Highway Vehicle All.*, 540 F. App'x at 880; *see also Nat'l Park Serv.*, 604 F.3d at 1200; *U.S. Forest Serv.*, 573 F.3d at 996; *UAC*, 255 F.3d at 1255. Even when both entities take the same position at the outset of the litigation, "[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *N.M. Off-Highway Vehicle All.*, 540 F. App'x at 880–81 (quoting *UAC*, 255 F.3d at 1255–56). As such, the inadequacy of representation requirement is satisfied "[w]here a government agency may be placed in the position of defending both public and private interests." *Nat'l Park Serv.*, 604 F.3d at 1200.

That is the case here. BLM cannot adequately represent the Citizen Groups' focused interests in advancing conservation, environmental, and health and safety values because the agency operates under the broad statutory mandate to manage public lands for "multiple use"—a

standard that involves balancing both mineral extraction and environmental protection. *See* 43 U.S.C. § 1712(c)(1); *id.* § 1702(c). Indeed, BLM rejected many of the Citizen Groups' proposals to strengthen the Rule, such as imposing more stringent controls for methane and eliminating certain exceptions. *See, e.g.*, 81 Fed. Reg. at 83,031–32; 83,042, 83,050, 83,058. Because the Citizen Groups' interests are not "wholly aligned" BLM's interests, intervention is appropriate. *N.M. Off-Highway Vehicle All.*, 540 F. App'x at 881. Moreover, BLM makes no claim that it will adequately represent the Citizen Groups' interests, instead taking no position on the motion. As the Tenth Circuit has recognized, such silence is "deafening." *Id.* at 882 (citation omitted).

It is also possible that BLM could cease to defend the rule or reach a settlement that is adverse to the Citizen Groups' interests. *See id.* at 881 (finding agency did not adequately represent environmental organizations' interests because "there is no guarantee that the Forest Service's policy will not shift during litigation"); *UAC*, 255 F.3d at 1256 (granting intervention and noting that "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts" (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998))). The chances of a shift in agency policy are higher in a case like this one where the rule was adopted during one presidential administration but will be litigated by a new administration. *See, e.g.*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002) (noting George W. Bush administration stopped defending challenge to Roadless Rule promulgated by Clinton administration). The Citizen Groups cannot rely on the agency to represent their interests, and should be allowed to intervene in order to protect their interests in conservation, environmental protection, and the health and safety of their members.

Because each of the four requirements is satisfied, the Court should grant the Citizen Groups intervention as of right.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT THE CITIZEN GROUPS PERMISSIVE INTERVENTION.

In addition to qualifying for intervention as of right, the Citizen Groups satisfy the requirements for permissive intervention under Rule 24(b). Permissive intervention is appropriate where the movant demonstrates: (1) it has a claim or defense that shares a common question of law or fact with the main action; (2) the intervention will not cause undue delay or prejudice; and (3) the motion to intervene is timely. Fed. R. Civ. P. 24(b); *see also Am. Wild Horse Pres. Campaign v. Jewell*, No. 1-14-CV-152-F, 2014 WL 11462717, at *2 (D. Wyo. Aug. 19, 2014). Courts may also consider whether the intervenor will "significantly contribute to the underlying factual and legal issues." *Utah ex rel. Utah State Dep't of Health v. Kennecott Corp.*, 801 F. Supp. 553, 572 (D. Utah 1992).

Here, the Citizen Groups intend to address the same questions of law that are at the heart of this litigation: BLM's legal authority to adopt the Waste Prevention Rule as well as the reasonableness of the measures adopted. In addition, this motion to intervene is timely and intervention will not cause undue delay or prejudice to the existing parties. *See supra* pp. 2–3. Moreover, due to their extensive involvement in the development of the Rule and their perspective as impacted parties, the Citizen Groups will significantly contribute to the underlying facts and legal issues. *See supra* pp. 4–7. As such, if the Court does not grant intervention as of right, permissive intervention is warranted.

CONCLUSION

Because the Citizen Groups meet each of the standards under Rule 24(a), they should be permitted to intervene as of right. Alternatively, the Court should allow permissive intervention under Rule 24(b).

Respectfully submitted on December 2, 2016,

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CERTIFICATE OF SERVICE

I certify that on December 2, 2016, I filed the foregoing **MEMORANDUM IN SUPPORT OF CITIZEN GROUPS' MOTION TO INTERVENE AS RESPONDENTS** using the United States District Court CM/ECF which caused all counsel of record to be served by electronically.

/s/ Lisa McGee
Lisa McGee
Attorney for Proposed Respondent-Intervenors

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and STATE OF MONTANA, Petitioners, STATE OF NORTH DAKOTA, Intervenor-Petitioner, vs. UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the Bureau of Land Management, Respondents, WYOMING OUTDOOR COUNCIL, et al.; EARTHWORKS; STATE OF CALIFORNIA and STATE OF NEW MEXICO, Intervenor-Respondents.	)	Case No. 2:16-CV-0285-SWS **(Lead Case)** **ORDER ON MOTIONS FOR PRELIMINARY INJUNCTION**

WESTERN ENERGY ALLIANCE, and the INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, Petitioners, vs. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; and BUREAU OF LAND MANAGEMENT, Respondents.	)	Case No. 2:16-CV-0280-SWS

This matter comes before the Court on the respective motions for preliminary injunction filed by the Petitioners and Intervenor-Petitioner (collectively, "Petitioners"): *Wyoming and Montana's Motion for Preliminary Injunction* (ECF No. 21),[1] *North Dakota's Motion for Preliminary Injunction* (ECF No. 39), and *Motion for Preliminary Injunction* filed by Petitioners Western Energy Alliance and the Independent Petroleum Association of America (ECF No. 12 in 16-CV-280). The Court, having considered the briefs and materials submitted in support of the motions and the oppositions thereto, having heard witness testimony and oral argument of counsel, and being otherwise fully advised, FINDS and ORDERS as follows:

BACKGROUND

On November 18, 2016, the Department of the Interior, Bureau of Land Management ("BLM") issued its final rule related to the reduction of waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on federal and Indian lands. *See* 81 Fed. Reg. 83,008 (Nov. 18, 2016), *Waste Prevention, Production Subject to Royalties, and Resource Conservation* (the "Final Rule" or "Rule"). By their motions, Petitioners request that the Court enjoin the Rule before it takes effect on January 17, 2017. Petitioners contend the Rule represents unlawful agency action because it exceeds BLM's statutory authority and is otherwise arbitrary and capricious.

[1] Unless otherwise noted, all filings referenced herein are from the docket in Case No. 2:16-CV-0285-S, which has been designated the Lead Case in these consolidated cases. (*See* ECF No. 23.)

During oil production, operators frequently dispose of the associated gas by venting or flaring if the gas cannot be easily captured for sale or used on-site. Associated gas is the natural gas that is produced from an oil well during normal production operations and is either sold, re-injected, used for production purposes, vented (rarely) or flared, depending on whether the well is connected to a gathering line or other method of capture. AR at 457 (BLM Regulatory Impact Analysis for the Final Rule ("RIA") at 11). In addition, emergency flaring or venting may be necessary for safety reasons. *Id.* Venting is the release of gases into the atmosphere, such as opening a valve on a tank to relieve tank pressure. Flaring is the controlled burning of emission streams through devices called flares or combustors, releasing the byproducts of that combustion into the atmosphere. While venting or flaring is sometime unavoidable, it is also sometimes done in the absence of infrastructure to transport the gas to market.

The Department of the Interior ("DOI") has regulated venting and flaring to prevent the waste of federal and Indian natural gas since 1979 when it issued Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases ("NTL-4A") (ECF No. 13-3), which the Waste Prevention Rule purports to replace. *See* 81 Fed. Reg. 83,008. NTL-4A prohibits venting and flaring of gas produced by oil wells, except when the gas is "unavoidably lost" as defined in NTL-4A and when the operator has sought and received BLM's approval to vent or flare. NTL-4A § IV.B. While unavoidably lost gas and gas vented or flared with BLM approval are exempted from royalties, gas that is "avoidably lost" – that is, gas lost due to an operator's negligence or failure to comply with the law – is subject to royalties. NTL-4A § I, II.A & C. NTL-4A also requires

operators to measure and report each month the volume of gas sold, avoidably or unavoidably lost, vented or flared, or used for beneficial purposes. NTL-4A § V.

Over the past decade, oil and natural gas production in the United States, and on BLM-administered leases, has increased dramatically. AR 366 (81 Fed. Reg. at 83,104). Domestic production from over 96,000 federal oil and gas wells now accounts for 11 percent of the National's natural gas supply and 5 percent of its oil supply. In FY 2015, federal and Indian leases produced oil and gas valued at $20.9 billion, which generated $2.3 billion in royalties. *Id*. BLM represents that this increase in oil production has been accompanied by "significant and growing quantities of wasted natural gas." *Id*. According to the DOI's Office Natural Resources Revenue ("ONRR"), between 2009 and 2015, operators reported venting or flaring 2.7 percent of the natural gas produced on BLM-administered leases – purportedly enough natural gas to supply over 6.2 million households for one year. AR at 367 (81 Fed. Reg. at 83,015). According to the BLM, the problem of natural gas loss on BLM-administered leases is growing, evidenced by a 318 percent increase in reported volumes of flared oil-well gas and an increased number of operator applications to vent or flare royalty-free (between 2005, 2011, and 2014, the number of applications per year went from 50, to 622, to 1,248). *Id*.

While recognizing that flaring is sometimes unavoidable, the BLM determined the majority of flaring on its leases results from the rate of new well construction outpacing the existing infrastructure capacity. AR 5 (81 Fed. Reg. at 6619) (Proposed Rule). The other situation resulting in substantial flaring of associated gas on BLM-administered leases is when capture and processing infrastructure has not yet been built out. *Id*.

Flaring in these circumstances may be due to insufficient information about how much gas will be produced or to an operator's decision to focus on near-term oil production rather than investing in the gas capture and transmission infrastructure necessary to realize a profit from the associated gas. *Id*.

In December 2007, the Royalty Policy Committee issued a report recommending the BLM update its rules and identified specific actions to improve production accountability. AR 369 (81 Fed. Reg. at 83,107). In 2010, the DOI's Office of Inspector General and the U.S. Government Accountability Office ("GAO") both recommended that BLM's regulations regarding the royalty-free use of gas be updated to take advantage of new capture technologies. *Id*. The GAO estimated that the economically recoverable volume of natural gas being wasted through venting and flaring at oil and gas production sites on federal and Indian lands represents about $23 million in lost royalties. AR 448 (RIA at 2). The GAO determined that around 40 percent of the natural gas vented and flared on onshore federal leases could be economically captured using currently available technologies. AR 16 (81 Fed. Reg. at 6630). In 2016, the GAO issued another report finding that BLM's regulations failed to provide operators clear guidance on accounting for and reporting lost gas. AR 369 (81 Fed. Reg. at 83,017).

Concluding there is a "compelling need to update [NTL-4A's] requirements to make them clearer, more effective, and reflective of modern technologies and practices" (*id*.), BLM published the Proposed Rule on February 8, 2016 (81 Fed. Reg. 6616). The BLM accepted public comments, met with stakeholders and state regulators in states with significant federal oil and gas production, and discussed the Rule with personnel from the

Environmental Protection Agency ("EPA") on over 40 conference calls between January 2015 and October 2016. Only 9 months after publishing the Proposed Rule, BLM issued the Final Rule, with an effective date of January 17, 2017.

The Final Rule prohibits venting, except in certain limited situations such as emergencies or when flaring the gas is technically infeasible. 43 C.F.R. § 3179.6. Unlike the Proposed Rule's monthly flaring limits, the Final Rule adopts a more flexible capture-percentage approach, modeled on North Dakota's regulations, that requires operators to capture a certain percentage of the gas they produce each month, excluding specified volumes of allowable flared gas. 43 C.F.R. § 3179.7; AR 374-76 (81 Fed. Reg. at 83,023-24). Both the capture percentage and the flaring allowance phase in over a ten-year period. *Id*. The Final Rule allows operators to choose whether to comply with the capture targets on a lease-by-lease, county-wide, or state-wide basis. *Id*. at 83,023.

The Final Rule retains NTL-4A's distinction between avoidably and unavoidably lost gas – with royalties owed on the former but not the latter – but eliminates BLM's discretion to make unavoidable loss determinations on a case-by-case basis and instead lists twelve categories in which a loss is always considered unavoidable. 43 C.F.R. § 3179.4. Any gas flared in excess of the capture requirements is deemed an avoidable loss. *Id*. The Final Rule also requires operators to measure and report the amount of gas vented or flared above 50 million cubic feet per day. *Id*. § 3179.9. For leaks, the Final Rule requires that all operators inspect equipment twice a year and timely repair any leaks found. *Id*. §§ 3179.301-304. It also requires that operators update old and

inefficient equipment that contributes to waste and minimize gas lost from storage vessels and during well maintenance, drilling, and completion. *Id*. §§ 3179.201-204.

BLM characterizes the environmental benefits of reducing the amount of methane and other air pollutants released into the atmosphere as ancillary to the Rule's primary purpose of waste prevention. As phrased by New Mexico's counsel during the hearing on Petitioners' motions, in these circumstances, "the product is also the pollutant." Thus, there can be no escaping the potential conflict between the BLM's regulation of waste and loss of gas and the EPA's regulation of air pollutants from oil and gas operations. In an attempt to alleviate the obvious problems potentially caused by overlapping regulations, the Rule incorporates the following provisions: (1) allows compliance with EPA's emissions requirements for *new or modified sources* to satisfy the requirements of the Rule when both EPA regulations and the Rule apply, 43 C.F.R. §§ 3179.102(b), 3179.301(j); (2) exempts from the Rule equipment covered by existing EPA regulations, *id*. §§ 3179.201(a)(2), 3179.202(a)(2), 3179.203(a)(2); and (3) allows a State or tribe to *request* a variance from provisions of the Rule, so long as state or tribal regulations are at least as effective as the Rule in reducing waste, *id*. § 3179.401. *See* AR 362, 365 (81 Fed. Reg. at 83,010, 83,013). The decision to grant or deny a variance is within the BLM's discretion and is not subject to review. *Id*. § 3179.401(b). If the BLM approves a variance, the State or tribal regulations can be enforced by the BLM; however, the State's or tribe's "own authority to enforce its regulation(s) or rule(s) *to be applied under the variance* would not be affected by the BLM's approval of a variance." *Id*. § 3179.401(f) (emphasis added).

Petitioners contend the Rule is, in actuality, an attempt by BLM to regulate air pollution which it lacks authority to do, and the Rule, at best, duplicates, and at worst, undermines, the agencies tasked by Congress with regulating air quality. Congress expressly delegated authority to the states and the EPA to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and productive capacity of its population." 42 U.S.C. § 7401(b)(1). The Clean Air Act ("CAA") provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State[.]" *Id*. § 7407(a). Thus, in enacting the CAA, Congress established a comprehensive scheme for regulating air quality through "a cooperative-federalism approach" under which the EPA develops baseline air quality standards that the states implement and enforce. *Oklahoma v. U.S. E.P.A.*, 723 F.3d 1201, 1204 (10th Cir. 2013). Petitioners ask this Court to enjoin BLM from implementing the Rule because it exceeds BLM's authority by comprehensively regulating air quality and is arbitrary and capricious.

STANDARD OF REVIEW

To obtain a preliminary injunction, petitioners must show: "(1) a likelihood of success on the merits; (2) that they will [likely] suffer irreparable harm; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest." *Petrella v. Brownback*, 787 F.3d 1242, 1257 (10th Cir. 2015). *See also Glossip v. Gross*, 135 S. Ct. 2726, 2736 (2015) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "[B]ecause a preliminary injunction is an extraordinary remedy, the movant's right to relief must be clear and unequivocal." *Fundamentalist Church of Jesus*

Christ of Latter-Day Saints v. Horne, 698 F.3d 1295, 1301 (10th Cir. 2012) (internal quotation marks and citation omitted); *see also Johnson & Johnson Vision Care, Inc. v. Reyes*, Nos. 15-4071, -4072, -4073, 2016 WL 7336568, at *3 (10th Cir. Dec. 19, 2016).

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citations omitted). *See also Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (primary goal of preliminary injunction is to preserve the pre-trial status quo). The grant or denial of a preliminary injunction lies within the sound discretion of the district court. *Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 557 (10th Cir. 1984). *See also Dine Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

DISCUSSION

Petitioners challenge the Rule pursuant to the Administrative Procedure Act, claiming the Rule should be set aside as arbitrary and capricious and in excess of the BLM's statutory authority. *See* 5 U.S.C. § 706(2)(A) & (C).[2]

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[2] The APA's scope of review provisions relevant here are:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

A. Likelihood of Success on Merits

Judicial review of agency action is governed by the standards set forth in § 706 of the APA, requiring the reviewing court to engage in a "substantial inquiry." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-74 (10th Cir. 1994) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)). While an agency's decision is entitled to a "presumption of regularity," the presumption does not shield the agency from a "thorough, probing, in-depth review." *Id*. at 1574. "[T]he essential function of judicial review is a determination of (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." *Id*. "Determination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency's authority and discretion, and consideration of whether on the facts, the agency's action can reasonably be said to be within that range." *Id*.

Under the arbitrary and capricious standard, a court must ascertain "whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Id*. The agency must provide a reasoned basis for its

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* * *
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
* * *
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
* * *
In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

5 U.S.C. § 706.

action and the action must be supported by the facts in the record. *Id.* at 1575. Agency action is arbitrary if not supported by "substantial evidence" in the administrative record. *Olenhouse*, 42 F.3d at 1575; *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pennaco Energy,* 377 F.3d at 1156 (quoting *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003)). "Because the arbitrary and capricious standard focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision, '[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Olenhouse*, 42 F.3d at 1575 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50 (1983)).

1. BLM's Authority to Promulgate the Rule

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "Regardless of how serious the problem an administrative agency seeks to address, [] it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Accordingly, an "essential function" of a court's review under the APA is to determine "whether an agency acted within the scope of its authority." *WildEarth Guardians v. U.S. Fish and Wildlife Serv.*, 784 F.3d 677, 683 (10th Cir. 2015).

Where a case involves an administrative agency's assertion of authority to regulate a particular activity pursuant to a statute that it administers, the court's analysis is governed by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Brown & Williamson*, 529 U.S. at 132.

> Under *Chevron*, a reviewing court must first ask whether Congress has directly spoken to the precise question at issue. If Congress has done so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress. But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. Such deference is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated[.]

Id. (internal quotation marks and citations omitted). Unlike the situation in *State of Wyoming, et al. v. Dep't of Interior*, No. 15-CV-043-S (June 21, 2016) (setting aside BLM's final rule related to hydraulic fracturing), Congress has not directly announced that the precise activity in question not be subject to federal regulation. Absent clear expression of Congressional intent, the Court must proceed to the second step of the *Chevron* abyss.[3]

[3] As a sister federal district court has recently observed:

> *Chevron's* second step is the easier one to describe, because it is all but toothless: if the agency's decision makes it to step two, it is upheld almost without exception. *See* Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI. KENT L.REV. 1253, 1261 (1997) ("[T]he Court has never once struck down an agency's interpretation by relying squarely on the second *Chevron* step." (footnote omitted)); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L.REV. 767, 775 (2008) ("Due to the difficulty in defining step two, courts rarely strike down agency action under step two, and the Supreme Court has done so arguably only twice."). Courts essentially never conclude that an agency's interpretation of an unclear statute is unreasonable.

Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv., 140 F. Supp. 3d 1123, 1168-69 (D.N.M. 2015).

The Mineral Leasing Act of 1920 ("MLA") creates a program for leasing mineral deposits on federal lands.[4] Congress authorized the Secretary "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of the [the MLA]." 30 U.S.C. § 189. "The purpose of the Act is to promote the orderly development of oil and gas deposits in publicly owned lands of the United States through private enterprise." *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981) (citing *Harvey v. Udall*, 384 F.2d 883 (10th Cir. 1967)). *See also Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 358 (8th Cir. 1984) ("broad purpose of the MLA was to provide incentives to explore new, unproven oil and gas areas through noncompetitive leasing, while assuring through competitive bidding adequate compensation to the government for leasing in producing areas").[5]

Specifically, for oil and gas leasing, the MLA, *inter alia,* establishes terms of the lease and royalty and rental amounts (30 U.S.C. §§ 223, 226(d)&(e)), requires the lessee to "**use all reasonable precautions to prevent waste of oil or gas developed in the land**" (*id*. § 225) (emphasis added), authorizes the Secretary of Interior to lease all public lands subject to the Act for oil and gas development (*id*. § 226(a)), directs the Secretary to regulate *surface*-disturbing activities (*id*. § 226(g)), and allows for the establishment of cooperative development plans to conserve oil and gas resources (*id*. § 226(m)). Section 187 confirms the BLM's authority to issue regulations to carry out the MLA's waste prevention objectives: "Each lease shall contain provisions for the purpose of insuring

[4] The MLA applies to deposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite, or gas, and virtually all lands containing such deposits owned by the United States. 30 U.S.C. § 181.
[5] The Indian Mineral Leasing Act ("IMLA"), generally, grants the Secretary broad regulatory jurisdiction over oil and gas development and operations on Indian lands. 25 U.S.C. § 396d.

the exercise of reasonable diligence, skill and care in the operation of said property" and "a provision that **such rules . . . for the prevention of undue waste as may be prescribed by said Secretary** shall be observed." (Emphasis added.)

The Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), 30 U.S.C. § 1751, creates a thorough system for collecting and accounting for federal mineral royalties. FOGRMA reiterates Congress' concern about wasted oil and gas: "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. Like the MLA, FOGRMA contains a broad grant of rulemaking authority to achieve its objectives. 30 U.S.C. § 1751 ("The Secretary shall prescribe such rules and regulations as he deems reasonably necessary to carry out this chapter.").

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.[6] "[T]he delegation of general authority to promulgate regulations extends to all matters 'within the agency's substantive field.' Because 'the whole includes all of its parts,' courts need not try to discern whether '*the particular issue* was committed to agency discretion.'" *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1109 (10th Cir. 2015) (quoting *City of Arlington v. F.C.C.*,

[6] Petitioners do not challenge BLM's authority to regulate waste and promulgate rules governing royalty payments.

133 S. Ct. 1863, 1874 (2013)). The question here, then, is not whether the MLA and FOGRMA specifically grant BLM the authority to regulate venting, flaring, and equipment leaks, but rather whether they unambiguously grant BLM authority to regulate the development of federal and Indian oil and gas resources *for the prevention of waste*. The answer to that question, largely undisputed by Petitioners, is "yes." "The [MLA] was intended to promote wise development of these natural resources and to obtain for the public a reasonable financial return on assets that 'belong' to the public." *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961).

The rub here, however, is whether the Rule, or at least certain provisions of the Rule, was promulgated *for the prevention of waste* or instead for the *protection of air quality*, which is expressly within the "substantive field" of the EPA and states pursuant to the Clean Air Act. The BLM argues the Rule's benefits to air quality do not undercut its waste prevention purpose – to be sure, a regulation that prevents wasteful losses of natural gas necessarily reduces emissions of that gas. The Court further agrees that the 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. In doing so, the Federal Land Policy and Management Act ("FLPMA") arguably directs BLM to consider any impact to "the quality of . . . air and atmospheric . . . values." 43 U.S.C. § 1701(1)(8).[7] While the statutory obligations of two separate

[7] The Court does not agree with BLM's suggestion that FLPMA grants it broad authority to promulgate its own regulations directed at air quality control. *See* Fed. Resp'ts' Br. at 25 (ECF No. 70 at 38). FLPMA primarily establishes congressional policy that the Secretary manage the public lands under principles of multiple use and sustained yield. At its core, FLPMA is a land use planning statute. *See* 43 U.S.C. § 1712; *Rocky Mtn. Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 739 (10th Cir. 1982) ("FLPMA contains comprehensive inventorying and land use

agencies may overlap, the two agencies must administer their obligations to avoid inconsistencies or conflict. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007).

As stated above, an administrative agency may not exercise its authority "in a manner that is inconsistent with administrative structure that Congress enacted into law." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125. Further, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Id*. at 133. When enacting the Clean Air Act in 1970, Congress directly addressed the issue of air pollution and created a **comprehensive** scheme for its prevention and control.

> The Clean Air Act, 42 U.S.C. § 7401 *et seq*., enacted in 1970, is a comprehensive federal law that regulates air emissions under the auspices of the United States Environmental Protection Agency ("EPA"). Congress enacted the law in response to evidence of the increasing amount of air pollution created by the industrialization and urbanization of the United States and its threat to public health and welfare. 42 U.S.C. § 7401(a)(2). The Clean Air Act states that **air pollution prevention and control is the primary responsibility of individual states and local governments** but that federal financial assistance and leadership is essential to accomplish these goals. *Id*. § 7401(a)(3)-(4). Thus, it employs a "**cooperative federalism**" structure under which the federal government develops baseline standards that the **states individually implement and enforce**. *GenOn REMA, LLC v. EPA*, 722 F.3d 513, 516, No. 12–1022, 2013 WL 3481486, at *1 (3d Cir. July 12, 2013). In so doing, states are expressly allowed to employ standards more stringent than those specified by the federal requirements. 42 U.S.C. § 7416. The Clean Air Act makes the EPA responsible for developing acceptable national ambient air quality standards

planning provisions to ensure that the 'proper multiple use mix of retained public lands' be achieved"); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 57 (FLPMA establishes a dual regime of inventory and planning); *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 555 (9th Cir. 2006) (FLPMA establishes requirements for land use planning on public land). *See also* "Memorandum of Understanding Among the U.S. Dep't of Agric., U.S. Dep't of Interior, and U.S. Envt. Prot. Agency, Regarding Air Quality Analyses and Mitigation for Federal Oil and Gas Decisions through the NEPA Process at 7 (June 23, 2011) (describing BLM's authority over air quality as limited to developing land use plans and providing for compliance with state and Federal pollution control laws, including the CAA), available at https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/29704-Joint-MOU-Air-Quality-FINAL.pdf.

> ("NAAQS"), which are meant to set a uniform level of air quality across the country in order to protect the populace and the environment. *Id.* § 7409(b)(1). Before such levels are adopted or modified by the EPA, "a reasonable time for interested persons to submit written comments" must be provided. *Id.* § 7409(a)(1)(B). The EPA itself does not typically regulate individual sources of emissions. Instead, decisions regarding how to meet NAAQS are left to individual states. *Id.* § 7410(a)(1). Pursuant to this goal, each state is required to create and submit to the EPA a State Implementation Plan ("SIP") which provides for implementation, maintenance, and enforcement of NAAQS within the state. *Id.* All SIPs must be submitted to the EPA for approval before they become final, and once a SIP is approved, "its requirements become federal law and are fully enforceable in federal court." *Her Majesty the Queen in Right of the Province of Ontario v. Detroit*, 874 F.2d 332, 335 (6th Cir.1989) (citing 42 U.S.C. § 7604(a)). States are tasked with enforcing the limitations they adopt in their SIPs. They must regulate all stationary sources located within the areas covered by the SIPs, 42 U.S.C. § 7410(a)(2)(C), and implement a mandatory permit program that limits the amounts and types of emissions that each stationary source is allowed to discharge, id. §§ 7661a(d)(1), 7661c(a). "[E]ach permit is intended to be a source-specific bible for Clean Air Act compliance containing in a single, comprehensive set of documents, all [Clean Air Act] requirements relevant to the particular polluting source." *North Carolina, ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 300 (4th Cir.2010) (internal quotation marks omitted).

Bell v. Cheswick Generating Station, 734 F.3d 188, 190 (3d Cir. 2013) (emphasis added).

Although the Rule's overlapping regulations themselves appear consistent with EPA regulations,[8] the Rule has potential conflict and inconsistency with the implementation and enforcement provisions of the CAA. The Rule upends the CAA's cooperative federalism framework and usurps the authority Congress expressly delegated under the CAA to the EPA, states, and tribes to manage air quality. *See Texas v. U.S. EPA*, 690 F.3d 670, 674-75 (5th Cir. 2012) (discussing the CAA's regulatory design which requires cooperation between federal government and states in administering the

[8] Indeed, BLM harmonized the definitions of certain terms with the overlapping EPA definitions in response to public comments, *see* 81 Fed. Reg. at 83,047, and certain other provisions of the Rule are taken directly from EPA air control requirements under 40 C.F.R. subparts OOOO or OOOOa.

CAA). For example, the Rule recognizes compliance with the EPA's oil and gas production facility performance standards as compliance with the Rule; but no similar automatic compliance recognition exists for those very same standards if the EPA has approved enforcement authority to a state. *See* AR 365 (81 Fed. Reg. at 83,013). Instead, the Rule requires states and tribes to request a variance from a particular BLM regulation, placing the burden on the states and tribes to prove its already-EPA approved rule "would perform at least as well as the BLM provision to which the variance would apply, in terms of reducing waste of oil and gas, reducing environmental impacts from venting and/or flaring of gas, and ensuring the safe and responsible production of oil and gas." *Id*. The Rule further empowers the BLM to enforce the state or tribal rules if the variance is granted (*id.*), creating the potential for inconsistent or conflicting enforcement.

The Rule also conflicts with the statutory scheme under the CAA for regulating air emissions from oil and natural gas sources, particularly by extending its application of overlapping air quality provisions to existing facilities, which the EPA itself has not yet done. *See* 42 U.S.C. § 7411(d) ("[t]he Administrator shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . and (B) provides for the implementation and enforcement of such standards of performance"). While the EPA has begun the rulemaking process for regulation of

existing sources under the CAA,[9] the BLM has hijacked the EPA's authority under the guise of waste management.[10] AR 371 (81 Fed. Reg. at 83,019).

Of course, 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. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction." *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (internal quotation marks and citation omitted). In other words, the BLM cannot use overlap to justify overreach. Petitioners contend the Rule is fundamentally an air quality regulation, not a resource conservation rule.

Portions of BLM's stated rationale for the Rule undermine Respondents' insistence that the Rule is foremost a waste prevention regulation that simply has incidental benefits to air quality: "wasted gas . . . contribute[s] to regional and global air pollution problems of smog, particulate matter, and toxics, [and] vented or leaked gas contributes to climate change, because the primary constituent of natural gas is methane, an especially powerful greenhouse gas (GHG), with climate impacts roughly 25 times those of carbon dioxide (CO_2), if measured over a 100-year period, or 86 times those of

[9] On June 3, 2016, the EPA issued a final rule entitled "Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources" published in the Federal Register at 81 Fed. Reg. 35824. A challenge to EPA's Rules has been filed in the United States Court of Appeals for the District of Columbia Circuit. *See North Dakota v. U.S. EPA*, 16-1242.

[10] One could also construe BLM's incorporation of EPA's air quality rules (OOOO and OOOOa) as doubling down in the event the challenge to EPA's final rule is successful. The BLM arrogantly justifies the Rule's application of overlapping air quality regulations to existing sources by expressing its dissatisfaction with the length of the CAA process and the uncertainty of the resulting outcome. *See* 81 Fed. Reg. 83,019 ("Given the length of this [CAA] process and the uncertainty regarding the final outcomes, and in light of the BLM's independent statutory mandate to prevent waste from Federal and Indian oil and gas leases based on information currently available, the BLM has determined that it is necessary and prudent to update and finalize this regulation at this time.").

CO_2, if measured over a 20-year period" (AR 361, 81 Fed. Reg. at 83,009); benefits of the Rule measured as cost savings to industry and "the environmental benefits of reducing the amount of methane [] and other air pollutants released into the atmosphere" (*id.* at 366, 83,014); "the waste of natural gas also imposes public health and environmental costs, in the form of air pollution, such as . . . emissions of methane, a powerful contributor to global warming and a primary target for reduction under the President's Climate Action Plan" (*id.*); "[a]bsent stronger provisions to reduce natural gas waste on Federal lands, the avoidable loss of gas will continue to threaten climate stability and undermine respiratory and cardiovascular health" (*id.* at 366-67, 83,014-15). Nevertheless, at this point, the Court cannot conclude that the provisions of the Rule which overlap with EPA/state air quality regulations promulgated under CAA authority lack a legitimate, independent waste prevention purpose or are otherwise so inconsistent with the CAA as to exceed BLM's authority and usurp that of the EPA, states, and tribes. Thus, Petitioners have not shown a clear and unequivocal right to relief.

2. Whether the Rule is Arbitrary and Capricious

Because the process by which an agency reaches a result must be "logical and rational," agency action must rest "on a consideration of the relevant factors." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2706 (2015). Agency action may be arbitrary and capricious where it has relied on factors which Congress did not intend the agency to consider. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). Taking at face value BLM's assertion that the Rule "aims to reduce the waste of natural gas," the cost-benefit analysis should have been considered primarily in terms of waste

prevention and not air pollution. *See* AR 360, 366 (81 Fed. Reg. at 83,008, 83,014). Instead, the BLM appears to be propping up the benefits of the Rule in air quality terms.

The BLM estimates the net benefits of the Rule outweigh its costs by "a significant margin," producing net benefits ranging from $46 million to $204 million per year depending on the discount rate used. AR 365 (81 Fed. Reg. at 83,013). Again, depending on the discount rate used, BLM estimates costs (largely for engineering compliance) will range from $110 million to $279 million per year. *Id.* BLM estimates the Rule will result in monetized benefits of $209-$403 million per year. Of the total benefits, however, $189-$247 million is attributable to the environmental benefit of reducing the amount of methane released into the atmosphere, and the remainder of $20-$157 million to the costs savings that industry will receive from the recovery and sale of natural gas. AR 366 (81 Fed. Reg. 83,014). *See also* RIA at 5. BLM estimates the Rule will produce additional royalties of $3-$14 million per year (depending on the discount rate).[11] *Id.* Thus, the Rule only results in a "net benefit" if the "social cost of methane" is allowed to be factored into the analysis. RIA at 5-6.

The Court questions whether the "social cost of methane" is an appropriate factor for BLM to consider in promulgating a resource conservation rule pursuant to its MLA authority. Moreover, it appears the asserted cost benefits of the Rule are predominately based upon the emission reductions, which is outside of BLM's expertise, and not attributable to the purported waste prevention purpose of the Rule. The question then

[11] The total production of oil and gas in FY 2015 from federal and tribal leases generated over $2.3 billion in royalties. AR 361 (81 Fed. Reg. at 83,009).

becomes whether the Rule is arbitrary and capricious because it imposes significant costs to achieve *de minimus* benefits. *See Michigan v. EPA*, 135 S. Ct. at 2707 ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."). The BLM contends compliance costs are not the appropriate measure of the Rule's reasonableness, and it is appropriate to consider the environmental and related social benefits of the Rule. Again, though the Court has concerns in this regard, it cannot conclude at this point that the Rule is arbitrary and capricious and Petitioners have shown a clear and unequivocal right to relief. *See National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (under step two of *Chevron,* court required to accept agency's construction of statute even if agency's reading differs from what court believes is best interpretation).

B. Irreparable Harm

The irreparable harm factor requires a party "seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original). To satisfy the irreparable harm requirement, a movant must demonstrate "a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003)). A court must further assess "whether such harm is likely to occur before the district court rules on the merits." *Id*. (quoting *Greater Yellowstone Coal.*, 321 F.3d at 1260). "[T]he party

seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks and citation omitted).

The State Petitioners assert irreparable harm resulting from the Rule's infringement on their sovereign authority and interests in administering their own regulatory programs governing air emissions from oil and gas production. However, State regulations will continue to apply to oil and gas operations in tandem with the Rule, just as operators are currently subject to both States' rules and NTL-4A. Further, the Rule requires BLM to coordinate with States when BLM action to enforce the Rule could adversely affect production of state or private mineral interests. *See* 43 C.F.R. § 3179.12. While the overlapping and potentially conflicting regulations may interfere with the implementation and enforcement rights Congress gave to the states under the CAA, which would likely occur immediately upon the Rule becoming effective, the Court cannot say there is no legitimate, independent waste prevention purpose in those regulations, which is within the BLM's statutory authority to regulate. Unlike the situation in *State of Wyoming, et al. v. Dep't of Interior*, No. 15-CV-043-S (Sept. 30, 2015) (Order on Motions for Preliminary Injunction), there has been no express announcement by Congress that the activities in question are not subject to federal regulation. Because the overlapping regulations themselves appear consistent with the State Petitioners' own regulations, albeit with broader application to existing sources, the Court is not convinced the BLM's exercise of overlapping authority will interfere with

the States' sovereign interests in, and public policies related to, regulation of air emissions to the point of causing irreparable harm to the State Petitioners pending this Court's ruling on the merits.

The State Petitioners further contend irreparable harm through economic losses in the form of decreased tax revenue and lost jobs from delay in production and avoidance of development in states with significant federal land. To be sure, to the extent such losses would be permanent, they are irreparable because the States cannot recover money damages from the federal government. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (explaining that while economic loss is usually insufficient to constitute irreparable harm, "imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury"). However, the Court finds the States' assertion of economic loss to be speculative and unsupported by facts. "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189 (internal quotation and citation omitted).

Again, Petitioners have not shown BLM's overlapping "air quality" regulations to be inconsistent or significantly more onerous than the EPA's or the States' own regulations. Neither have Petitioners shown the Rule's application will hamper or delay oil and gas production to the extent of causing imminent irreparable harm to the States' economic interests. Moreover, the Rule provides for several economic exemptions where an operator shows, and BLM concurs, that compliance with the Rule's 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)).

The Industry Petitioners assert irreparable harm through: (1) costs of compliance; (2) disclosure of proprietary, confidential, and competitive information; and (3) payment of royalties on gas BLM has characterized as "avoidably lost." First, Industry Petitioners cannot demonstrate irreparable harm based on paying royalties on gas the Rule deems "avoidably lost" because, if Petitioners ultimately prevail on the merits and the Court sets aside the Rule's royalty requirements, any overpaid royalties can be recovered from the agency. *See* 30 U.S.C. § 1721a.

Additionally, though there are undoubtedly certain and significant compliance costs attached to the Rule, which are unrecoverable from the federal government, the Court is not convinced that these costs are of "such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Industry Petitioners point to a statement in the Regulatory Impact Analysis that the "requirements to replace existing equipment would necessitate *immediate* expenditures." RIA at 4 (emphasis added). However, many of the Rule's requirements, including equipment replacement, do not take effect for a year. *See, e.g.,* 43 C.F.R. § 3179.7 (gas capture); § 3179.201 (pneumatic controllers); § 3179.202 (pneumatic diaphragm pumps); § 3179.203 (storage

vessels). And any alleged expenses associated with "immediate action to begin Rule implementation and compliance planning" are simply too uncertain and speculative to constitute irreparable harm. (*See* Sgamma Dec. ¶ 8; Industry Pet'rs' Br. at 49, Ex. 5.)

Industry Petitioners further argue the Rule will cause irreparable harm because it requires their members to provide to BLM information they consider proprietary, confidential, and competitive without assurances BLM can or will protect this information from disclosure. "A trade secret once lost is, of course, lost forever." *FMC Corp. v. Taiwan Tainan Giant Indus. Co., Ltd.*, 730 F.2d 61, 63 (2nd Cir. 1984). The only specific example offered by Petitioners is the information required in the waste minimization plan that must accompany an APD, including anticipated production from a proposed well, the expected production decline curve of oil and gas from the well, and the expected Btu value for gas production from the proposed well. *See* 43 C.F.R. § 3162.3-1(j)(2)(i)-(iv). In response to a public comment requesting disclosure of waste minimization plans, BLM stated it will publicly post the waste minimization plans accompanying the APDs, "subject to any protections for confidential business information." AR 395 (81 Fed. Reg. at 83,043). The BLM further stated: "operators routinely provide information to the BLM that they consider confidential; if they indicate on the Sundry Notice that the information is considered confidential, the BLM will handle the information in accordance with applicable regulations." *Id.* at 403, 83,051. The Industry Petitioners have not shown that BLM's existing confidentiality protections are inadequate to protect the information required in the waste minimization plans. *See*

§§ 2.26-2.36. Thus, the Court finds Petitioners have failed to establish that irreparable injury is likely in the absence of an injunction.

C. Balance of Equities and Public Interest

Having concluded Petitioners have not clearly and unequivocally established a likelihood of success on the merits and irreparable harm, the Court need not address the remaining factors that must be shown to obtain a preliminary injunction. Still, the Court feels compelled to briefly touch upon these factors with a few observations.

The third preliminary injunction factor requires the Court to determine whether the threatened injury to the movants outweighs the injury to the opposing party under the injunction. *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012); *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 889 (10th Cir. 2013). The Court finds the balance of harms in this case does not tip decidedly in either side's favor. Though Petitioners have not shown a likelihood of irreparable harm justifying an injunction, neither have Respondents shown substantial harm if an injunction were granted. BLM has been regulating oil and gas waste pursuant to NTL-4A for 30 years. The asserted need to update BLM's rules to account for technological advances does not seem so pressing that appreciable harm will result to BLM if the Rule's effective date is delayed pending this Court's ruling on the merits. The asserted benefits of the Rule are found largely in the social benefits of reducing emissions of methane and other pollutants, which is already subject to EPA and state regulations.

Finally, public interest factors also support both sides of the issue. The public interest is served by preserving the status quo, particularly where the balance of harms

does not tip decidedly in either side's favor. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1001-02 (10th Cir. 2004) (en banc) (Seymour, J., concurring in part, dissenting in part). A preliminary injunction would not be adverse to the public interest in resource conservation because the BLM already has regulations in place to prevent waste and many of the Rule's provisions do not take effect for a year; nor would an injunction be adverse to the public interest in clean air because the EPA and State Petitioners already regulate emissions from oil and gas production, albeit not as broadly as the Rule contemplates. A preliminary injunction would also sidestep the costly implementation of duplicative and potentially unlawful regulations. So, while the Rule itself is arguably in the public's interest in resource conservation and air quality, a preliminary injunction would not necessarily be adverse to those interests.

CONCLUSION

Under the MLA, Congress has vested the Secretary with the authority to prescribe rules for the prevention of undue waste of mineral resources. Having done so, at this stage and applying the deference as required under *Chevron*, this Court cannot conclude the Rule enacted exceeds the Secretary's authority or is arbitrary and capricious. Petitioners have not established their right to relief is clear and unequivocal. Petitioners have failed to establish all four factors required for issuance of a preliminary injunction, so their respective motions must be denied. The Court will, however, entertain Respondents' suggestion of an expedited briefing schedule on the merits. THEREFORE, it is hereby

ORDERED that *Wyoming and Montana's Motion for Preliminary Injunction* (ECF No. 21), *North Dakota's Motion for Preliminary Injunction* (ECF No. 39), and the *Motion for Preliminary Injunction* filed by Petitioners Western Energy Alliance and the Independent Petroleum Association of America (ECF No. 12 in 16-CV-280) are **DENIED**; it is further

ORDERED that Respondents shall lodge the administrative record on or before **February 21, 2017**. Petitioners shall file their opening briefs within thirty (30) days after the date on which the record is lodged. Respondents shall file their briefs within twenty (2) days after service of the Petitioners' briefs. Reply briefs shall be filed within ten (10) days after service of the Respondents' briefs. The parties shall otherwise comply with U.S.D.C.L.R. 83.6.

DATED this 16th day of January, 2017.

Scott W. Skavdahl
United States District Judge

EXHIBIT 5

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and STATE OF MONTANA, Petitioners, and STATE OF NORTH DAKOTA and STATE OF TEXAS, Intervenor-Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Respondents, and WYOMING OUTDOOR COUNCIL, *et al.*, Intervenor-Respondents.	No. 16-cv-00285-SWS [Consolidated with 16-cv-00280-SWS] **FEDERAL RESPONDENTS' RESPONSE TO PETITIONERS' AND INTERVENOR-PETITIONERS' MOTIONS TO LIFT THE STAY AND FOR OTHER RELIEF**

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INTRODUCTION

In the face of concerns that the costs of the Waste Prevention Rule outweigh its conservation benefits—concerns that this Court highlighted just one year ago—the Bureau of Land Management ("BLM") published a proposed rule to revise the 2016 Waste Prevention Rule on February 22, 2018. As part of its notice-and-comment rulemaking, BLM is assessing whether: (1) the Waste Prevention Rule's economic analysis relied on unsupported assumptions; (2) the benefits of the Waste Prevention Rule justified its costs; (3) the Waste Prevention Rule exceeded BLM's statutory authority; and (4) the complexities of the Waste Prevention Rule rendered it infeasible. In the interim, BLM exercised its authority to temporarily suspend many of the provisions of the Waste Prevention Rule—after full notice and comment—and prevent those substantial costs while the agency completes its reconsideration of the Rule.

The question before this Court is whether the agency should be forced to litigate—and implement—the Waste Prevention Rule while the agency is actively reconsidering it, and which BLM promulgated a notice-and-comment rulemaking to suspend. All the original parties to these cases—Federal Respondents, Wyoming, Montana, and Industry Petitioners—agree that the answer to this question is *no*. Though Petitioners have proposed a range of different mechanisms by which this Court could provide relief from the Waste Prevention Rule, they all agree with this Court's assessment that "moving forward to address the merits" of this suit given BLM's efforts to revise the Waste Prevention Rule "would be a waste of resources." ECF No. 189 at 4.

The prudential ripeness and mootness concerns that motivated the Court to stay this litigation in December are amplified where, as here, the proposed revision is presently subject to notice-and-comment rulemaking on the very issues before the Court. *Id.* (citing *Wyoming v. Zinke*, 871 F.3d 1122, 1142 (10th Cir. 2017)). Moving forward to consider the merits now

would risk substantial interference in the administrative process. It would also force BLM prematurely to stake out positions on issues that are part of an ongoing rulemaking. Federal Respondents believe the Court should exercise its ample equitable authority to stay its hand and let the rulemaking process play out.

Federal Respondents recognize that the current burden imposed on the regulated community is significant. Operators are saddled with imminent, substantial, and unrecoverable costs to comply with a regulatory regime that may soon be replaced. Many are not poised to comply due to the flux and uncertainties over the past year caused by challenges to BLM's postponement and suspension of the Waste Prevention Rule. Because compliance requires equipment acquisition and the implementation of new protocols, operators cannot simply become compliant overnight. Indeed, these are amongst the reasons that BLM gave for implementing the Suspension Rule. Accordingly, Federal Respondents support the pending requests to stay the implementation deadlines in the Waste Prevention Rule until BLM completes its present rulemaking or until January 17, 2019, whichever is earlier.

In short, the most appropriate course now is for the Court to stay this litigation to allow for completion of the administrative process. And, by staying the Waste Prevention Rule's implementation deadlines at the same time, the Court will protect the regulated parties while avoiding entanglement with the administrative process.

FACTUAL BACKGROUND

I. The Waste Prevention Rule

On November 18, 2016, BLM issued the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Waste Prevention Rule"). 81 Fed. Reg. 83,008-01 (Nov. 18, 2016). The Waste Prevention Rule applies to the development of federal and Indian minerals nationwide. It prohibits the venting of natural gas by oil and gas operators, except in

certain limited situations, and requires that operators capture a certain percentage of the gas they produce each month. *Id.* at 83,023-24; 43 C.F.R. §§ 3179.6-3179.7. The Waste Prevention Rule also requires that operators inspect equipment for leaks and update equipment that contributes to the loss of natural gas during oil and gas production. 81 Fed. Reg. at 83,011, 83,022; 43 C.F.R. §§ 3179.301-3179.305, 3179.201-3179.204.

Many of the Waste Prevention Rule's requirements, including those related to gas capture, reporting on vented and flared gas volumes, pneumatic controller equipment, pneumatic diaphragm pumps, storage vessels, and leak detection and repair, were to be phased in over time to allow operators time to come into compliance. 81 Fed. Reg. at 83,023-24, 83,033; 43 C.F.R. §§ 3179.7, 3179.9, 3179.201, 3179.202, 3179.203, 3179.301-3179.305. These phased-in requirements were not to have become operative until January 17, 2018. *Id.*

II. BLM's Reconsideration of the Waste Prevention Rule

As Defendants have previously explained to this Court, President Donald J. Trump issued an Executive Order on March 28, 2017 requiring that the Secretary of the Interior "review" the Waste Prevention Rule and "if appropriate, . . . as soon as practicable, . . . publish for notice and comment proposed rules suspending, revising, or rescinding" it. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, § 7(b) (Mar. 28, 2017). As directed, BLM reviewed the Waste Prevention Rule and determined that it does not align with the policy set forth in Executive Order 13,783, which states that it is "in the national interest to promote the clean and safe development of our Nation's vast energy resources while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." 82 Fed. Reg. at 16,093; 82 Fed. Reg. 46,458, 46,459-60 (Oct. 5, 2017).

On February 22, 2018, BLM published a proposed rule to reconsider the Waste Prevention Rule entitled "Waste Prevention, Production Subject to Royalties, and Resource

Conservation; Rescission or Revision of Certain Requirements" ("Revision Rule"). 83 Fed. Reg. 7924 (Feb. 22, 2018). The proposed Revision Rule would rescind the provisions of the Waste Prevention Rule addressing waste minimization plans, well drilling, well completion, pneumatic controllers, pneumatic diaphragm pumps, storage vessels, and leak detection and repair. 83 Fed. Reg. at 7928. The proposed rule would also modify many of the remaining requirements of the Waste Prevention Rule, including gas capture, downhole well maintenance, and measurement and reporting of vented and flared gas, to bring them more in line with the requirements of Notice to Lessees-4A ("NTL-4A"), BLM's previous venting and flaring regulations. *Id.*

The proposed Revision Rule is subject to a 60-day comment period that ends April 23, 2018. *Id*. at 7924. BLM anticipates completing the final Revision Rule in August 2018. Decl. of James Tichenor ¶ 10, attached as Ex. A.

III. The Postponement Notice and Suspension Rule

On June 15, 2017, BLM postponed certain of the provisions of the Waste Prevention Rule pursuant to 5 U.S.C. § 705 in light of the "serious questions" raised by Petitioners in this litigation "concerning the validity" of the Waste Prevention Rule. 82 Fed. Reg. 27,430-01, 27,431 (June 15, 2017). The Intervenor-Respondents in this litigation—the States of California and New Mexico and a coalition of citizen and tribal organizations ("Citizen Groups")—challenged the postponement in the U.S. District Court for the Northern District of California. *California v. BLM*, No. 17-cv-3804-EDL (N.D. Cal. filed July 5, 2017); *Sierra Club v. Zinke*, No. 17-cv-3885-EDL (N.D. Cal. filed July 10, 2017). On October 4, 2017, that court held that BLM lacked authority to postpone future compliance dates under Section 705 and vacated the postponement. *California v. BLM*, Nos. 17-cv-03804-EDL, 17-cv-3885-EDL, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017).

To "avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future," on December 8, 2017, BLM issued a final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements" ("Suspension Rule"). 82 Fed. Reg. 58,050, 58,051 (Dec. 8, 2017). For provisions of the Waste Prevention Rule that were set to take effect in January 2018, the Suspension Rule "temporarily postpone[s] the implementation dates until January 17, 2019, or for 1 year." *Id.* For certain provisions of the Waste Prevention Rule that had already taken effect, the Suspension Rule "temporarily suspend[s] their effectiveness until January 17, 2019." *Id.*

On the basis of BLM's reconsideration of the Waste Prevention Rule and its issuance of the Suspension Rule, the Court stayed this litigation on December 29, 2017. ECF No. 189. The Court recognized in its order that BLM's ongoing reconsideration of the Waste Prevention Rule raises "prudential ripeness concerns," and found that "moving forward to address the merits" of the Waste Prevention Rule "would be a waste of resources." *Id.* at 4-5.

On December 19, 2017, Intervenor-Respondents California, New Mexico, and Citizen Groups brought suit challenging the Suspension Rule in the U.S. District Court for the Northern District of California. *California v. BLM*, No. 17-cv-7186 (N.D. Cal. filed Dec. 19, 2017); *Sierra Club v. Zinke*, No. 17-cv-7187 (N.D. Cal. filed Dec. 19, 2017). They moved for a preliminary injunction of the Suspension Rule, which was granted on February 22, 2018. *California v. BLM*, Nos. 17-cv-7186-WHO, 17-cv-7187-WHO, 2018 WL 1014644 (N.D. Cal. Feb. 22, 2018).

IV. The Instant Motions to Lift the Stay and for Other Relief

Petitioners States of Wyoming and Montana, Petitioners Western Energy Alliance and the Independent Petroleum Association of America (together, "Industry Petitioners"), and Intervenor-Petitioners North Dakota and Texas have moved to lift the stay in this litigation and for other relief. ECF Nos. 194, 195, 196. North Dakota and Texas have requested expedited briefing on the merits of the Waste Prevention Rule, while Wyoming, Montana, and Industry Petitioners have requested a stay or injunction of the Waste Prevention Rule pending the completion of BLM's reconsideration of that Rule. *Id.*

ARGUMENT

Recent events have put the parties in a difficult position: due to the California court's order granting a preliminary injunction against the Suspension Rule, the Waste Prevention Rule is arguably back in effect for the parties to these proceedings, despite BLM's suspension of much of the Rule and its active reconsideration of the Rule, which it hopes to complete by August 2018.[1] The circumstances that justified the Court's stay of this litigation in the first place have not changed. The doctrines of prudential ripeness and mootness continue to counsel the Court to stay its hand. Reviving litigation over a rule that the agency is actively reconsidering risks substantial interference in the administrative process and wastes judicial resources considering issues that may soon be moot. It would also put BLM in the difficult situation of litigating a rule that it is in the midst of reconsidering and of taking positions on issues that are currently subject to public comment.

[1] The United States is currently assessing whether to appeal the Northern District of California's order enjoining the Suspension Rule.

At the same time, Federal Respondents recognize that Petitioners, and the regulated community as a whole, are also in untenable positions due to the order enjoining the Suspension Rule. Operators now face imminent, substantial, and unrecoverable costs to comply with a regulatory regime that may be replaced by this fall. Many are unprepared to comply with the Waste Prevention Rule due to the postponement and suspension of much of that Rule for half of the past year, as well as the agency's active reconsideration of the Rule.

Because Petitioners now face imminent harm due to the reinstatement of the Waste Prevention Rule, Federal Respondents do not oppose a stay of the Rule's implementation deadlines. The Court need not decide whether vacatur is appropriate here, as the parties have provided the Court with alternative remedies that will achieve the same goals—relief from a rule that may change and stability of the regulatory regime during the reconsideration process.

I. The Court Should Continue the Stay of These Cases

The Court's continuing concerns regarding prudential ripeness and mootness justify a continuation of the stay. This Court's authority to stay proceedings flows from its inherent equitable authority to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997). Courts routinely exercise this authority when they have concerns regarding prudential ripeness and mootness. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006) (The "ripeness doctrine reflects not only limits on the jurisdiction of federal courts under Article III but 'important prudential limitations' that may 'require us to stay our hand until the issues in [the] case have become more fully developed.'" (quoting *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004))); *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 623 (10th Cir. 1983) (holding

a petition for review in abeyance for agency review of actions); *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387, 390 (D.C. Cir. 2012) (holding unripe case in abeyance).

As the Tenth Circuit has recently explained, "the prudential ripeness doctrine contemplates that there will be instances when the exercise of Article III jurisdiction is unwise." *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017). "[T]he doctrine of prudential ripeness ensures that Article III courts make decisions only when they have to, and then, only once." *Am. Petroleum Inst.*, 683 F.3d at 387. The ripeness doctrine is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977))); *see also Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1191-92 (10th Cir. 2008) (same); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 n.11 (1980) ("[O]ne of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review." (internal citation and quotation marks omitted)).

The related doctrine of prudential mootness is rooted in the court's equitable powers to fashion remedies and to withhold relief. The doctrine "counsel[s] the court to stay its hand, and to withhold relief it has the power to grant" in situations where "considerations of prudence and comity for coordinate branches of government" are at play. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010). Courts often invoke prudential mootness where "a defendant, usually the government, has already changed or is in the process

of changing its policies" and therefore "any repeat of the actions in question is . . . highly unlikely." *Bldg. & Const. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993); *see also A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961) (declaratory judgment is a discretionary remedy that may be withheld where challenged practice is undergoing significant change).

These two prudential doctrines counsel the Court to continue to stay its hand in these cases. The concerns regarding prudential ripeness and mootness that motivated the original stay in these cases remain. BLM is now midway through the process of reconsidering the Waste Prevention Rule, and expects to complete its reconsideration in August 2018. Ex. A ¶ 10. Once that rulemaking is complete and a new decision is reached, this case will become moot. *See S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (noting that the "central inquiry" for prudential mootness is whether "circumstances have changed since the beginning of litigation that forestall any occasion for *meaningful* relief" (emphasis added)).[2]

There is nothing to be gained in litigating the merits of a rule for which a substantive revision has been proposed and is expected to be completed within a period of months.

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[2] North Dakota's and Texas's claim that any further stay of the litigation is inappropriate relies on their conflation of two distinct doctrines: prudential mootness and Article III mootness. *See Rio Grande Silvery Minnow*, 601 F.3d at 1121-22 (describing differences between Article III mootness and prudential mootness). They rely on *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018), in which the Supreme Court, in a footnote, held that proposed rules to revise a rulemaking and to delay its effective date did not render the case moot because the rule remains in effect. *Id.* at 627 n.5. But Federal Respondents are not claiming that this litigation is now moot under Article III of the Constitution. Rather, they believe that concerns regarding prudential mootness—including the fact that the case is soon likely to become moot due to the ongoing revision rulemaking—weigh in favor of a continued stay. *See Bldg. & Constr. Dep't*, 7 F.3d at 1492 (finding court may decline to grant declaratory or injunctive relief if a government defendant "is in the process of changing its policies"). *National Association of Manufacturers* is of no relevance here as it did not address prudential mootness.

Proceeding with the merits forces BLM to take positions in litigation while it is simultaneously seeking public comment regarding whether and how to change its positions. The agency has expressed specific concerns with the Waste Prevention Rule—including concerns raised by this Court in last year's order denying Petitioners' request for a preliminary injunction—and proposed ways to address those concerns in the proposed Revision Rule. *See, e.g.*, 83 Fed. Reg. at 7925-26 ("[T]he 2016 final rule is more expensive to implement and generates fewer benefits than initially estimated."); *id.* at 7926 ("[M]any of the 2016 final rule's requirements would pose a particular compliance burden to operators of marginal or low-producing wells . . . ."); *id.* ("[T]he 2016 final rule has many requirements that overlap with the EPA's authority under the Clean Air Act."); *id.* ("[S]ome States with significant Federal oil and gas production have similar regulations addressing the loss of gas from these sources."); *id.* at 7927 ("BLM is not confident that all provisions of the 2016 final rule would survive judicial review."). Thus, the most judicious and efficient course is for BLM to obtain the benefits of public comment free from potential conflicts from litigating a rule that may be short-lived.

For example, in the proposed Revision Rule, BLM explains that it has concerns about the cost-benefit analysis supporting the Waste Prevention Rule. It notes that the Regulatory Impact Analysis ("RIA") for the Waste Prevention Rule likely "underestimated" compliance costs and "overestimated" the benefits of the rule. 83 Fed. Reg. at 7928. Given that the methodology for calculating the social cost of methane and the cost-benefit analysis underlying the Waste Prevention Rule have been specifically challenged in these cases, if merits litigation were to proceed, BLM might be forced to take positions on those issues, despite the fact that they are currently subject to public comment.

In short, there is simply no way for this Court to reach the merits of the Waste Prevention Rule without impacting the scope, content, and outcome of BLM's ongoing revision rulemaking. This is precisely the type of judicial interference in administrative proceedings that the Supreme Court and Tenth Circuit have repeatedly warned against. *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807-08; *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998) (noting "immediate judicial review directed at the lawfulness" of agency action "could hinder agency efforts to refine" that action); *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1254 (10th Cir. 2009) ("[F]lexibility in reconsidering and reforming of policy . . . is one of the signal attributes of the administrative process . . . and courts will not lightly interfere with it." (internal quotation marks and citations omitted)). As BLM is just months away from completing its reconsideration of the Waste Prevention Rule—and the proposed rule is currently out for public comment—a stay of the litigation pursuant to this Court's equitable authority continues to be the most appropriate path forward.

II. Federal Respondents Do Not Oppose a Stay of the Implementation Deadlines of the Waste Prevention Rule While BLM Completes Notice-and-Comment Rulemaking

Petitioners and Intervenor-Petitioners have put forth a range of options for how this Court could provide relief from the sudden and unexpected applicability of the Waste Prevention Rule in light of the developments in California. In recognition of the significant disruption caused by the injunction of the Suspension Rule and the immediate reinstatement of the Waste Prevention Rule, all while BLM nears completion of the Revision Rule, Federal Respondents do not oppose a stay of the Waste Prevention Rule's implementation deadlines. A stay will provide certainty and stability for the regulated community and the general public while BLM completes its rulemaking process, is consistent with the agency's own suspension of much of the Waste Prevention Rule after notice and comment, and would prevent the potentially unrecoverable

expenditure of millions of dollars in compliance costs. But Federal Respondents do oppose the request of the Intervenors—North Dakota, Texas, and the Citizen Groups—to proceed with merits briefing in light of the serious prudential concerns discussed above.

A. Federal Respondents Do Not Oppose a Stay of the Rule

Federal Respondents recognize that the California court's order enjoining the Suspension Rule has generated significant regulatory uncertainty for both Petitioners and the regulated community writ large. This has forced Petitioners to return to this Court for relief from the Waste Prevention Rule. While Federal Respondents firmly believe that this Court's adjudication of the merits of the Waste Prevention Rule is imprudent, they acknowledge that a stay of the litigation without a concomitant stay of the Rule would prejudice Petitioners. Thus, Federal Respondents do not oppose a stay of the implementation deadlines of the Waste Prevention Rule.[3] Given the availability of alternative means of providing the relief sought by Petitioners, the Court need not reach the question of whether vacatur of the Waste Prevention Rule without a merits decision is appropriate.

With the Suspension Rule subject to a preliminary injunction, the suspended and delayed provisions of the Waste Prevention Rule arguably now affect the interests of the parties here. Because the Waste Prevention Rule has been postponed or suspended for nearly half of the past year, many operators are not prepared to immediately comply with the Rule, especially the provisions that were set to take effect in January 2018, but were suspended before they became operative. *See* 82 Fed. Reg. at 58,052-56. Petitioners now face real and imminent harm if the Waste Prevention Rule is left in place, as they must immediately expend unrecoverable funds to

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[3] Federal Respondents take no position on the most appropriate authority under which the Court stays the Waste Prevention Rule.

comply with a rule that may be revised or rescinded within a matter of months. *See* 2016 RIA at 106 (VF_0000551-52) (estimating $110-$114 million in compliance costs in first year of Waste Prevention Rule); Ex. A ¶¶ 5-6 (describing unrecoverable costs of Waste Prevention Rule).

In addition, a stay of the Waste Prevention Rule's implementation deadlines pending BLM's reconsideration of the Rule is in the public interest, as it would provide regulatory certainty and stability to the nation's oil and gas industry. It would also allow BLM to focus its limited resources on completing the revision rulemaking rather than administering a rule that it is in the midst of reconsidering.

A stay of the Waste Prevention Rule would not be contrary to BLM's statutory obligations. In enacting the Waste Prevention Rule, BLM exercised its discretionary authority to manage waste under the Mineral Leasing Act ("MLA"). But nothing in the MLA requires BLM to manage waste in the specific manner envisioned by the Waste Prevention Rule. *See Wyoming v. U.S. Dep't of the Interior*, Nos. 16-cv-285-SWS, 16-cv-280-SWS, 2017 WL 161428, at *6 (D. Wyo. Jan. 16, 2017) (finding BLM has broad statutory authority "to regulate the development of federal and Indian oil and gas resources for the prevention of waste" and is "entitled to deference regarding the determination of how best to minimize losses of gas . . . and incentivize the capture and use of produced gas"); *California*, 2018 WL 1014644, at *12 ("I agree with BLM that given its range of statutorily-mandated duties and responsibilities, it is best suited to evaluate its competing options and choose a course of action."). Indeed, there was a lawful, albeit substantially different, regulatory regime in place for decades before the Waste Prevention Rule's enactment. This Court can therefore stay the implementation deadlines of the Rule without implicating any non-discretionary duty on the part of the agency. Such a stay, moreover,

would be consistent with BLM's own exercise of its authority and discretion in promulgating the Suspension Rule.

Federal Respondents recognize that this Court may have comity concerns given the California Court's recent injunction of the Suspension Rule. But a stay of the Waste Prevention Rule would not conflict with the California court's preliminary injunction order for three reasons. First, the California court expressly excluded consideration of the merits of the Waste Prevention Rule from its review of the Suspension Rule, recognizing that the Waste Prevention Rule was not before it. *California*, 2018 WL 1014644, at *4 ("I express no judgment whatsoever in this opinion on the merits of the Waste Prevention Rule."). It's notable that the California court was fully informed of the proceedings in this Court. Yet it declined to defer to this Court by transferring the challenge to the Suspension Rule here because it found the cases to be "substantively distinct, and the challenges to each [rulemaking] raise unique legal questions and require the evaluation of two separate rules promulgated for different reasons." *Id.* Likewise, any order issued by this Court would be in response to its evaluation of the discrete agency action before it, namely, the 2016 Waste Prevention Rule. While the practical effect of the California court's order is arguably to bring the Waste Prevention Rule back into effect as against certain parties, the California court did not find that the Waste Prevention Rule *must* remain in effect. It was explicit that the Waste Prevention Rule was not before it when it acted against the Suspension Rule. *Id.*

Second, in its injunction order, the California court acknowledged this Court's concerns with the Waste Prevention Rule and anticipated that a stay of portions of that Rule could be appropriate on that basis. *Id.* at *9 (noting that this Court's "reasoned skepticism" regarding the

"propriety of the Waste Prevention Rule" could "serve to justify a suspension or delay of specific provisions addressed by the court").

Third, the California court's assessment of the balance of harms in the context of the Suspension Rule is not controlling on this Court in deciding whether to stay the implementation deadlines of the Waste Prevention Rule. As discussed above, Petitioners here face real and imminent harm if the Waste Prevention Rule is left in place, as they must immediately expend unrecoverable funds to comply with a rule that may be revised or rescinded within a matter of months. Given the serious and pragmatic concerns presented by Petitioners, Federal Respondents do not oppose this Court's exercise of its independent authority, in light of the specific facts before it, to stay the implementation deadlines of the Waste Prevention Rule.

B. Proceeding to Merits Briefing Wastes Judicial Resources

Intervenor-Petitioners North Dakota and Texas and Intervenor-Respondent Citizen Groups seek to proceed to merits briefing on an expedited schedule, despite the significant prudential concerns outlined above.[4] ECF No. 194 at 3; ECF No. 198 ¶ 3. Federal Respondents oppose this proposal as it would be a waste of judicial resources to litigate a rule that is soon likely to change, and proceeding to the merits would put BLM in the difficult position of litigating a rule that is under reconsideration. *See* Part I, *supra*.

To the extent that North Dakota and Texas urge this Court to consider the merits on the grounds that the forthcoming Revision Rule will violate the law, they engage in improper speculation as to the outcome of the ongoing rulemaking process and invite the Court to issue an advisory opinion about an issue not before it and that is not yet ripe for consideration. *See* ECF

[4] Notably, none of the original parties to these cases (as opposed to the intervenors) believe that proceeding to the merits is the appropriate path forward. *See* ECF No. 195 ¶ 11; ECF No. 197.

No. 194 at 8; ECF No. 199 at 4. The proper forum for North Dakota and Texas to raise their concerns about the proposed Revision Rule is in comments on that rule. It is not the place for the parties or this Court to predict the contents of a future rule, or to predicate the proceedings in this litigation on speculative future challenges to a rule that has not yet been promulgated.

The Citizen Groups assert that a stay of the Waste Prevention Rule is improper here because a stay must be issued pending a merits decision. ECF No. 198 at 2 & n.1. The point is inapposite. As Federal Respondents have explained, prudential concerns counsel a continued stay of merits briefing. Any stay of the Waste Prevention Rule in the interim is done pending a future adjudication of the merits. The Citizen Groups point to no requirement that a court ultimately reach the merits of a stayed action. Indeed, such a finding would place nonsensically strict limits on a court's equitable authority to manage its docket and on the parties' right to reach an alternative resolution of a matter.

Finally, North Dakota, Texas, and the Citizen Groups assert that, if merits briefing proceeds, only reply briefs remain to be filed. This assertion ignores the fact that (1) circumstances have changed since the parties filed their initial merits briefs, including the order preliminarily enjoining the Suspension Rule and the issuance of the proposed Revision Rule; and (2) Federal Respondents moved for dismissal or a stay of these cases in lieu of responding on the merits in light of the ongoing revision rulemaking process and publication of the Suspension Rule. *See* ECF No. 176. If the Court decides to address the merits, Federal Respondents request leave to file a new response brief that would address these changed circumstances.

CONCLUSION

Because Petitioners' claims remain prudentially moot and prudentially unripe in light of BLM's reconsideration of the Waste Prevention Rule, this Court should continue the stay of the

litigation. Federal Respondents do not oppose a stay of the implementation deadlines of the Waste Prevention Rule in the interim.

Respectfully submitted this 14th day of March, 2018.

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/ *Clare Boronow*
MARISSA PIROPATO
CLARE BORONOW

/s/ *C. Levi Martin*
C. Levi Martin
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2018, a copy of the foregoing was served by filing a copy of that document with the Court's CM/ECF system, which will send notice of electronic filing to counsel of record.

/s/ *Clare Boronow*
Clare Boronow

EXHIBIT 6

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Attorneys for Petitioners Western Energy Alliance and Independent Petroleum Association of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al., Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Respondents.	)))))))))	Civil Case No. 2:16-cv-00285-SWS [Lead] Consolidated with: Case No. 2:16-cv-00280-SWS Assigned: Hon. Scott W. Skavdahl

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DECLARATION OF KATHLEEN SGAMMA

I, Kathleen M. Sgamma, do certify under penalty of perjury as follows:

1. I am the President of the Western Energy Alliance ("Alliance"). The Alliance's offices are located at 1775 Sherman Street, Suite 2700, Denver, Colorado 80203. My phone number is 303.623.0987, and my email address is ksgamma@westernenergyalliance.org.

2. I am over the age of twenty one, and I have personal knowledge of the facts stated herein. If called upon to testify as to the matters set forth herein, I would be competent to do so.

3. The Alliance's membership is comprised of over 300 companies involved in all aspects of environmentally responsible exploration and production of oil and natural gas on in the West. Our members have extensive leases and operations on federal and Indian lands. The majority of the Alliance's members are small businesses with an average of 15 employees.

4. I am familiar with and knowledgeable about the compliance requirements under the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, published at 81 Fed. Reg. 83,008 on November 18, 2016 (the "Waste Prevention Rule") as well as the types of activities and costs necessary for operators to comply with these requirements.

5. The Waste Prevention Rule imposes compliance requirements on Alliance members with operations subject to the Waste Prevention Rule, including those with onshore federal and Indian oil and gas leases, units, and communitized areas, and such leases on committed state or private tracts in a federally approved unit or communitization agreement defined by or established under 43 CFR subpart 3105 or 43 CFR part 3180.

6. The Waste Prevention Rule became effective on January 17, 2017. *See* 81 Fed. Reg. at 83,008. Notwithstanding this effective date, certain of the Waste Prevention Rule's provisions began imposing compliance obligations on operators beginning January 17, 2017, while other provisions were "phased-in," requiring compliance by January 17, 2018.

7. Compliance obligations for these "phased-in" provisions, along with several others, were delayed for a period of one year when BLM promulgated the Suspension Rule on December 8, 2017. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050 (Dec. 8 2017) ("Suspension Rule"). These compliance obligations, however, again became effective following a decision on February 22, 2018 by the Federal District Court for the Northern District of California to invalidate the Suspension Rule.

8. Alliance members have incurred and are incurring ongoing costs to comply with the Waste Prevention Rule's provisions that became effective again on February 22, 2018.

9. Alliance members have incurred and are immediately incurring costs to ensure compliance with the Waste Prevention Rule's provisions that were "phased-in." These include, but are not limited to, costs associated with:

a) Section 3179.201, which requires operators to replace pneumatic controllers "no later than 1 year after the effective date of this section" with only a limited exception;

b) Section 3179.202, which requires operators to replace the pneumatic diaphragm pump(s) or route the exhaust gas to capture or to a flare combustion device "no later than 1 year after the effective date of this section" with only a limited exception;

c) Section 3179.203, which requires operators to comply with control requirements for applicable storage tanks "no later than one year after the effective date of this section" with only a limited exception;

and

d) Section 3179.301, which requires operators to conduct initial Leak Detection and Repair inspections "within one year of January 17, 2017 for sites that have begun production prior to January 17, 2017" (i.e., "existing sites").

10. Compliance with the sections noted in Paragraphs 9(a)-(d) of this Declaration will impose significant, immediate, and irreparable harms to Alliance members. For example, in late October 2017, John Dunham & Associates estimated that the costs to comply with provisions that would take effect on January 17, 2018, were approximately $115 million, with the LDAR and storage tank provisions, alone, estimated to cost $85 million. John Dunham & Associates also estimated that compliance with the January 17, 2018, deadlines would have resulted in a reduction of 1,800 potential new oil wells, equating to approximately 16.9 million barrels of oil that would not be produced from federal and Indian leaseholds between October 2017 and January 2018. While these estimates may have changed slightly since then, due to the Suspension Rule having been in effect for the large majority of this period, they have not materially changed. Accordingly, immediate compliance with the Waste Prevention Rule will continue to have severe impacts on the Alliance's members.

11. Given the planning and lead time necessary to ensure compliance with the sections noted in Paragraphs 9(a)-(d) of this Declaration, and the fact that compliance dates were stayed for nearly six months during 2017, it is no longer possible in all circumstances for operators to fully and immediately comply. For example, it can take multiple months for larger operators to perform initial LDAR inspections, and it can take significant time to order and install equipment required to comply with the storage tank,

pneumatic controller, and pneumatic pump requirements. The BLM's stay of these provisions, which began on June 15, 2017, was invalidated by the Federal District Court for the Northern District of California on October 4, 2017. These provisions were again stayed on December 8, 2017, when BLM promulgated the Suspension Rule and as noted above invalidated on February 22, 2018. This nearly six month period caused operators to delay planning for compliance. It has now become impossible, especially given the imminent winter weather, for some operators to ensure immediate and full compliance with the requirements noted in Paragraphs 9(a)-(d). Substantial time will be needed for activities like assembling LDAR crews or hiring third-party contractors, travelling to each site for inspection, ordering necessary parts, installing those parts, and engineering and designing control systems where required.

12. BLM has also published in the Federal Register a proposal to substantively change the Rule. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (Feb. 22, 2018) ("the Revision Rule"). It does not make sense for companies to incur significant costs to comply with a rule that is being substantially changed and will likely be finalized in a matter of months.

13. If the relief being requested in this motion is granted, the Alliance's members would not be subject to some or all of the harms detailed in this Declaration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and was executed in Denver, Colorado, on this 27th day of February 2018.

Kathleen M. Sgamma

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2018, the foregoing **DECLARATION OF KATHLEEN SGAMMA** was filed electronically with the Court, using the CM/ECF system, which sent a notice of electronic filing to all counsel of record.

s/ Eric Waeckerlin
Holland & Hart LLP

EXHIBIT 7

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Attorneys for Petitioners Western Energy Alliance and Independent Petroleum Association of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al., Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Respondents.	)))))))))	Civil Case No. 2:16-cv-00285-SWS [Lead] Consolidated with: Case No. 2:16-cv-00280-SWS Assigned: Hon. Scott W. Skavdahl

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DECLARATION OF KATHLEEN SGAMMA

I, Kathleen M. Sgamma, do certify under penalty of perjury as follows:

1. I am the President of Western Energy Alliance ("Alliance"). The Alliance's offices are located at 1775 Sherman Street, Suite 2700, Denver, Colorado 80203. My phone number is 303.623.0987, and my email address is ksgamma@westernenergyalliance.org.

2. I am over the age of twenty one, and I have personal knowledge of the facts stated herein. If called upon to testify as to the matters set forth herein, I would be competent to do so.

3. The Alliance's membership is comprised of over 300 companies involved in all aspects of environmentally responsible exploration and production of oil and natural gas on in the West. Our members have extensive leases and operations on federal and Indian lands. The majority of the Alliance's members are small businesses with an average of 15 employees.

4. I am familiar with and knowledgeable about the compliance requirements under the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, published at 81 Fed. Reg. 83,008 on November 18, 2016 (the "Waste Prevention Rule") as well as the types of activities and costs necessary for operators to comply with these requirements.

5. The Waste Prevention Rule imposes compliance requirements on Alliance members with operations subject to the Waste Prevention Rule, including those with onshore federal and Indian oil and gas leases, units, and communitized areas, and such leases on committed state or private tracts in a federally approved unit or communitization agreement defined by or established under 43 CFR subpart 3105 or 43 CFR part 3180.

6. The Waste Prevention Rule became effective on January 17, 2017. *See* 81 Fed. Reg. at 83,008. Notwithstanding this effective date, certain of the Waste Prevention Rule's provisions began imposing compliance obligations on operators beginning January 17, 2017, while other provisions were "phased-in," requiring compliance by January 17, 2018.

7. Compliance obligations for these "phased-in" provisions, along with several others, were delayed for a period of one year when BLM promulgated the Suspension Rule on December 8, 2017. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050 (Dec. 8 2017) ("Suspension Rule"). These compliance obligations, however, again became effective following a decision on February 22, 2018 by the Federal District Court for the Northern District of California to invalidate the Suspension Rule.

8. Prior to the December 8, 2017 suspension, there had been a nearly six-month suspension of the rule, during which operators were relieved from compliance. This substantial off-again, on-again compliance period has meant that companies ceased the preparatory work necessary to meet the rule's original compliance deadlines. The sudden re-enactment of the rule on February 22nd means that Alliance members have been deprived of the lead time necessary to comply with the rule. They must now incur and are incurring costs to quickly comply with the obligations under the Waste Prevention Rule.

9. My prior Declaration dated February 27, 2018, provided specific examples of compliance costs Alliance members are currently incurring to ensure compliance with the Waste Prevention Rule. These costs remain accurate, continuing, and are hereby incorporated by reference into this Declaration.

10. In addition to the compliance costs, because of the liability associated with noncompliance with a rule that operators have not had time to adequately prepare for, some operators may have to shut in wells, either temporarily or permanently. However, oil and natural gas wells do not come with a convenient on/off switch.

Operators often cannot shut in wells simply to avoid compliance costs and later resume production without risking irreparable damage to the well and associated reservoir. Returning a well to production carries costs that could in some cases, particularly for marginal wells, make it uneconomic to bring the well back on line. Shut in will become permanent in those cases, resulting in a waste of federal and Indian mineral resources that would otherwise be produced. For those that are reinstated, the potential damage to the well and underlying reservoir will likely cause them to be less productive than they would be otherwise, also resulting in a waste of federal and Indian mineral resources.

11. Alliance members are incurring other immediate, irreparable harms associated with the Waste Prevention Rule being in effect. These include enforcement risk due to the fact it is not possible in all circumstances for operators to fully and immediately comply with the Waste Prevention Rule. Operators' inability to immediately comply has been exacerbated by the fact the Waste Prevention Rule was not in effect for nearly six months during 2017 and operators did not have sufficient time to plan for compliance, assemble inspection crews, order or install necessary equipment, or design control and other retrofit systems.

12. Compounding the problems of compliance, royalty reporting under the Waste Prevention Rule is currently not possible. BLM and the Office of Natural Resources Revenue (ONRR) have not coordinated or set up the necessary reporting systems (called Disposition Codes) to allow for new royalty reporting conventions under the Waste Prevention Rule. Without updated and accurate Disposition Codes, Alliance members are unable to submit royalty reports to ONRR that reflect new royalty payment calculations required under the Waste Prevention Rule. Alliance members have tried to report royalty payments using outdated Disposition Codes, but these reports are being

rejected.

13. Further difficulties for Alliance members arise from the fact BLM is wholly unprepared to implement the Waste Prevention Rule. This lack of preparation is creating widespread confusion and chaos and has made compliance with the rule impossible for many Alliance members. Alliance members have sought guidance from multiple BLM field offices regarding various compliance obligations associated with the Waste Prevention Rule. In some instances, BLM field offices have not been able to advise Alliance members on their expectations for compliance, instead referencing the fact that the Waste Prevention Rule is under reconsideration and requesting that operators comply with current, and outdated processes. In other circumstances, BLM field offices have provided conflicting or confusing information, or refused or have been unable to answer questions. BLM field offices have also indicated that there has been no staff training on rule implementation or formal written directives or other guidance from BLM headquarters. Alliance members have sought guidance on compliance questions including, but not limited to: how to address flaring of off-specification gas under Part 3179; how to determine gas capture percentage under § 3179.7; and how to define certain terms to allow for compliance with Leak Detection and Repair (LDAR) requirements under §§ 3179.301-305.

14. If the relief being requested in this motion is granted, the Alliance's members would not be subject to some or all of the harms detailed in this Declaration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and was executed in Denver, Colorado, on this 23rd day of March 2018.

Kathleen M. Sgamma

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2018, the foregoing **DECLARATION OF KATHLEEN SGAMMA** was filed electronically with the Court, using the CM/ECF system, which sent a notice of electronic filing to all counsel of record.

s/ Eric Waeckerlin
Holland & Hart LLP

EXHIBIT 8

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Attorneys for Petitioners Western Energy Alliance and the Independent Petroleum Association of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al.,	)	
	)	
Petitioners,	)	Civil Case No. 2:16-cv-00285-SWS [Lead]
	)	
v.	)	Consolidated with:
	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.	)	Case No. 2:16-cv-00280-SWS
	)	Assigned: Hon. Scott W. Skavdahl
Respondents.	)	

MOTION TO LIFT LITIGATION STAY AND
FOR PRELIMINARY INJUNCTION OR VACATUR OF CERTAIN PROVISIONS OF THE RULE PENDING ADMINISTRATIVE REVIEW

Petitioners Western Energy Alliance and the Independent Petroleum Association of America (collectively, "Industry Petitioners") respectfully submit this motion requesting the Court lift the stay of this litigation. The Court's December 29, 2017, Order Granting Joint

Motion to Stay authorized the parties to "seek lifting of the stay should circumstances change warranting such relief." Dkt. No. 189 at 5. Circumstances have changed that warrant lifting the stay—namely that Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016), VF_0000360, ("the Waste Prevention Rule") is now in effect. On February 22, 2018, the United States District Court for the Northern District of California invalidated the Bureau of Land Management's (BLM) Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Suspension Rule"), which had suspended certain provisions of the Waste Prevention Rule.

Industry Petitioners also request that the Court issue a nationwide preliminary injunction under Federal Rule of Civil Procedure 65(a) enjoining Respondent BLM from enforcing provisions of the Waste Prevention Rule with compliance deadlines of January 17, 2018, and certain requirements in the Waste Prevention Rule that went into effect on January 17, 2017, collectively referred to as the "Core Provisions."[1] The Industry Petitioners and their members are now suffering immediate, irrevocable, and irreparable harm because the Core Provisions recently sprung back into effect following the California court's invalidation of the Suspension Rule. Injunctive relief is necessary to prevent these harms and only available in this Court given the California court's express refusal to consider the merits of the Waste Prevention Rule. In the

[1] The provisions of the Waste Prevention Rule from which Industry Petitioners are requesting immediate relief through either a preliminary injunction or vacatur are: drilling applications and plans (43 C.F.R. § 3162.3-1(j)); gas capture requirements (§ 3179.7); measuring and reporting volumes of gas vented and flared from wells (§ 3179.9); determinations regarding royalty-free flaring (§ 3197.10); well drilling (§ 3179.101); well completion and related operations (§ 3179.102); equipment requirements for pneumatic controllers (§3179.201); requirements for pneumatic diaphragm pumps (§3179.202); requirements for storage vessels (§ 3179.203); downhole well maintenance and liquids unloading (§3179.204); and operator responsibility for leak detection, repair, and reporting requirements (§§ 3179.301-305).

alternative, Petitioners request that the Court exercise its inherent equitable powers to vacate the Core Provisions pending conclusion of BLM's process to revise the Waste Prevention Rule, but retain jurisdiction over the Waste Prevention Rule until it is no longer in controversy.

As further described in the memorandum supporting this motion, injunctive relief is necessary to prevent the ongoing irreparable harms to Industry Petitioners' members. Injunctive relief is also warranted because the Waste Prevention Rule represents unlawful and unconstitutional agency action, Industry Petitioners are likely to succeed on the merits, and, the balance of equities and public interest favor a preliminary injunction.

Industry Petitioners also recognize the Court's past positions about the wise use of judicial resources and prudential ripeness concerns raised by the circumstances in this case. Therefore, Industry Petitioners alternatively move to vacate the Core Provisions of the Waste Prevention Rule at issue pending BLM's finalization of a revision rule.

CERTIFICATE OF CONFERRAL

The undersigned counsel for Industry Petitioners certify that they conferred with the counsel for the parties via email on February 27 and 28, 2018. The parties' respective positions are as follows:

- Federal Respondents do not oppose, at this juncture, the delay of the rule. Federal Respondents intend to promptly file a response;
- Petitioners States of Wyoming and Montana do not oppose the motion;
- Petitioner-Intervenors States of North Dakota and Texas take no position on the proposed motion at this time and reserve the right to file a response after reviewing the motion;

- Defendant-Intervenor States of New Mexico and California oppose the motion; and
- Defendant-Intervenor Citizen Groups take no position on the motion to lift the litigation stay, but oppose the rest of the requested relief.

Respectfully submitted this 28th day of February 2018.

HOLLAND & HART LLP

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Attorneys for Petitioners Western Energy Alliance and the Independent Petroleum Association of America

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2018, the foregoing **MOTION TO LIFT LITIGATION STAY AND FOR PRELIMINARY INJUNCTION OR VACATUR OF CERTAIN PROVISIONS OF THE RULE PENDING ADMINISTRATIVE REVIEW** was filed electronically with the Court, using the CM/ECF system, which caused automatic electronic notice of such filing to be served upon all counsel of record.

/s/ *Eric Waeckerlin*_____________