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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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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR VACATUR OF CERTAIN PROVISIONS OF THE RULE PENDING ADMINISTRATIVE REVIEW

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Petitioners Western Energy Alliance (Alliance) and the Independent Petroleum Association of America (IPAA) (collectively, "Industry Petitioners') seek immediate relief from certain obligations of Respondent Bureau of Land Management's (BLM) rule related to the reduction of venting and flaring from oil and gas production on federal and Indian lands, 81 Fed. Reg. 83,008 (Nov. 18, 2016), VF_0000360 ("the Waste Prevention Rule"), which is currently in effect, including for the very first time its January 17, 2018 compliance deadlines.[1] Specifically, Industry Petitioners request the Court enjoin BLM's nationwide enforcement of the Core Provisions pending resolution of this litigation. Alternatively, Industry Petitioners request that the Court exercise its equitable powers to vacate the Core Provisions until BLM concludes its rulemaking process.

I. BACKGROUND

This Court has characterized this matter as a "roller coaster," *see* Order Granting Mot. for an Extension of the Merits Briefing Deadlines, Dkt. No. 163 at 4 (Oct. 30, 2017). Unfortunately, the ride has just gotten far worse. Industry Petitioners now face the very outcome they repeatedly

[1] As noted in Industry Petitioners accompanying motion, the provisions of the Waste Prevention Rule from which Industry Petitioners are requesting immediate, nationwide relief through either a preliminary injunction or vacatur are those with compliance deadlines of January 17, 2018, and certain provisions of the Waste Prevention Rule that went into effect on January 17, 2017. Specifically, these provisions 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). We refer to these collectively as the "Core Provisions" in this memorandum.

sought to avoid:[2] the Waste Prevention Rule has unexpectedly sprung back into effect, and oil and gas operators face immediate compliance obligations that cannot be met anytime soon following lengthy stays of the rule's key provisions, which total 186 days (roughly 6 months) since it took effect on January 17, 2017.[3]

Recognizing the Court is well aware of this case's history, Industry Petitioners will not detail it again but will pick up where the parties left off before the Court. In December 2017, the Federal Defendants, Industry Petitioners, and the Petitioner States of Wyoming and Montana moved to stay this case following BLM's publication of a rule suspending certain compliance deadlines contained in the Waste Prevention Rule, including deadlines of January 17, 2018 ("Suspension Rule"). 82 Fed. Reg. 58,050 (Dec. 8, 2017), attached as Ex. "A". The States of California and New Mexico and numerous Citizen and Tribal Groups then challenged the Suspension Rule in the United States District Court for the Northern District of California. *See* Complaint for Dec. & Inj. Relief, *California v. U.S. Bureau of Land Mgmt.*, No. 3:17-cv-07186 (N.D. Cal. Dec. 19, 2017); *Sierra Club v. Zinke*, No. 3:17-cv-07187 (N.D. Cal. Dec. 19, 2017)

[2] In both the California litigation and before this Court, Defendant-Intervenor Citizen Groups have disingenuously attempted to lay blame for the delay in resolution of this case at the feet of Industry Petitioners. *See e.g.*, Dkt. No. 175 at 5. As we have noted, however, following resolution of concerns about the administrative record and a filing of a complete administrative record, Industry Petitioners have repeatedly opposed further delay in obtaining relief in this case. *See e.g.*, Dkt No. 130. The need for such relief has now reached its apex.

[3] Although the Suspension Rule was published on December 8, 2017 but did not take effect until January 8, 2018, *see* 82 Fed. Reg. at 58,050, it was effectively stayed on December 8, 2017 because the Suspension Rule's publication put operators on notice that they were not obligated to take steps or begin spending resources to ensure compliance with the Core Provisions. *See e.g.*, *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 823 F.2d 608, 614-15 (D.C. Circ. 1987) (a final agency stay has the status of law); *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (a stay that marks the consummation of an agency's decision making process also affects regulated parties "rights or obligations."). Accordingly, many operators did not. Even before then, BLM announced to this Court that it was actively drafting the Suspension Rule. *See* Mot. for an Extension of the Merits Briefing Deadlines, Dkt. No. 155 (Oct. 20, 2017).

("California Litigation"). Both plaintiffs filed motions for preliminary injunction also on December 19, 2017. *See id*. at Dkt. No. 3; Dkt. No. 4.

On February 22, 2018, BLM published a proposed rule to revise the Waste Prevention Rule ("Proposed Revision Rule"). 83 Fed. Reg. 7924 (Feb. 22, 2018). That same day, the Northern District of California preliminarily enjoined the Suspension Rule. *See* Order Denying Motion to Transfer Venue and Granting Preliminary Injunction, California Litigation, Dkt. No. 89 (attached as Ex. "B"). In doing so the court expressly declined to address the merits of the Waste Prevention Rule. *Id*. at 8 ("I express no judgment whatsoever in this opinion on the merits of the Waste Prevention Rule."). As a result, the Waste Prevention Rule is in effect. Most importantly, this means the Core Provisions of the Waste Prevention Rule that would have taken effect on January 17, 2018, but for the Suspension Rule, suddenly and immediately require compliance.

The Northern District of California's ruling puts the legality of the Waste Prevention Rule squarely at issue and directly back in front of this Court. Notably, unlike when this Court issued its PI Order, BLM has questioned whether parts of the Waste Prevention Rule are within its statutory authority and is proposing to address those concerns. And it is now abundantly clear that oil and gas producers operating on federal and Indian leases are faced with concrete, immediate, and arguably overdue compliance obligations with all of the Waste Prevention Rule's requirements. Accordingly, Industry Petitioners ask this Court to preliminarily enjoin the Core Provisions pending resolution of this litigation, or alternatively, to vacate the Core Provisions until BLM concludes its ongoing rulemaking process.

II. INDUSTRY PETITIONERS HAVE DEMONSTRATED PRELIMINARY RELIEF IS WARRANTED

To prevail on a motion for preliminary injunction, a movant must demonstrate: (1) a likelihood of success on the merits; (2) that the movant is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in favor of an injunction; and (4) that an injunction is in the public interest. *Petrella v. Brownback*, 787 F.3d 1242, 1257 (10th Cir. 2015); *see also Winter v. Natural Res. Defense Counsel*, 555 U.S. 7, 20 (2008); *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012). The purpose of a preliminary injunction is to "preserve the relative position of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing[.]" *Id*. (citations omitted); *see also Attorney Gen. 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). 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). The Court also has wide latitude and discretion to issue a necessary and appropriate injunctive remedy. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (crafting a preliminary injunction is an exercise of discretion, dependent as much on the equities of a given case as the substance of the legal issues it presents); *Int'l Mfrs. Ass'n v. Norton*, 304 F.Supp.2d 1278, 1286 (D. Wyo. 2004); *Eaton Corp. v. Parker-Hannifin Corp*, 292 F.Supp.2d 555, 582 (D. Del. 2003) (courts are given wide latitude in framing injunctive relief).

A. **Compliance with the Waste Prevention Rule Will Irreparably Harm Industry Petitioners**

Petitioners will be immediately and irreparably harmed absent an injunction. To demonstrate irreparable harm, a petitioner "seeking preliminary relief [must] demonstrate that irreparable injury is likely in the absence of an injunction." *Winter* 555 U.S. at 22 (emphasis in original). The movant must show "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)). Although economic loss alone is generally insufficient, "imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Crowe Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (internal citations omitted). "Where a plaintiff cannot recover damages from the defendant due to the defendant's sovereign immunity, any economic loss suffered by a plaintiff is irreparable *per se*." *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, No. CIV. 08-633MV/RLP, 2008 WL 5586316, at *5 (D.N.M. Oct. 3, 2008) (citations omitted). Moreover, "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 200–21 (1994) (Scalia, J., concurring in part). Finally, the court must determine "whether such harm is likely to occur before the district court rules on the merits." *RoDa Drilling Co.*, 552 F.3d at 1210 (citation omitted).

The imminent, irreparable, and severe harms associated with the Core Provisions of the Waste Prevention Rule are inescapable following invalidation of the Suspension Rule. Industry Petitioners will continue to be harmed before this Court has an opportunity to rule on the merits or otherwise resolve this litigation.

Over one year ago, this Court recognized the "undoubtedly certain and significant compliance costs attached to the Rule, which are unrecoverable from the federal government." *See* PI Order at 25. At that time, however, the Court was not convinced these harms were of "such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id*. In arriving at this conclusion, the Court cited to the provisions of the Waste Prevention Rule, including equipment replacement, that did not take effect for a year. *Id*. The provisions the Court cited are the same Core Provisions that have abruptly sprung back into effect and which now present a clear and present need for injunctive relief.

Operators cannot comply with the Core Provisions by simply flipping a switch. Rather, compliance requires lengthy lead time, planning, and significant expenditures. For example, some companies with many sites or significant distances between sites require multiple months to complete the initial LDAR inspections alone. *See* Sgamma Declaration at ¶ 11, attached as Ex. "C". In addition to the LDAR requirements, the storage tank controls, pneumatic controller replacement, pneumatic pump control/replacement provisions each requires substantial advanced planning and organization in addition to time for implementation. *Id*.

The Core Provisions form the heart of the Waste Prevention Rule and comprise, by far, its most substantial costs. *See e.g.*, AR, VF_0000451 (estimating the LDAR, storage tank, pneumatic controller, and pneumatic pump requirements to constitute 86 percent of the estimated annual costs of the Waste Prevention Rule, excluding gas capture limit costs over time). Industry Petitioners estimated in late October 2017 that the cost to the industry of complying with just these four provisions between then and January 17, 2018 would have exceeded $115.0 million. *See* Sgamma Declaration at ¶ 10. The costs of conducting initial LDAR inspections and putting on storage tank controls, alone, would have exceeded $85.0 million. *Id*. In addition, these

estimated costs would have resulted in a reduction of 1,800 potential new (or capped) oil wells. *Id*. This reduction equates to approximately 16.9 million barrels of oil that would not be produced from the federal and Indian leaseholds over just the next several months. *Id*. Although four months have passed since those estimates, it is unlikely these estimates have changed in any material respect because the requirements were effectively suspended for most of this period—December 8, 2017 through February 22, 2018. *See id*. at ¶ 10. Accordingly, the immediate harms in terms of compliance costs remain substantial. By contrast, BLM estimated the Waste Prevention Rule would yield additional royalty of $3 million to $10 million per year. VF_0000563.

Moreover, these costs assumed for the sake of analysis that it was even possible to fully bring all facilities into compliance before January 17, 2018, but it was not. "It is arbitrary and capricious to require compliance with a regulation when compliance is impossible." *Messina v. U.S. Citizenship & Immigration Servs.*, No. Civ.A. 05-CV-73409-DT, 2006 WL 374564, at *6 (E.D. Mich. Feb. 16, 2006). The significant and most costly Core Provisions were not in effect for roughly six out of the past thirteen months. The Core Provisions with a January 17, 2018, compliance deadline were postponed between June 15, 2017, when BLM published a notice under section 705 of the Administrative Procedure Act (the "Postponement Notice"), 82 Fed. Reg. 27,430 (June 15, 2017), and October 4, 2015, when the United States District Court for the Northern District of California overturned the Postponement Notice and ordered BLM to "immediately reinstate the [Rule] in its entirety."[4] *Id*. The Core Provisions were again stayed between December 8, 2017, when BLM finalized the Suspension Rule, and February 22, 2018, when the Suspension Rule was enjoined. Because of this six-month suspension, it is now

[4] *See State of California v. U.S. BLM, et al.*, 3:17-cv-03804-EDL, Dkt. Nos. 95 and 96.

impossible for certain Alliance members to immediately and fully comply. *See* Sgamma Declaration at ¶ 11.

To the extent Industry Petitioners' members cannot comply with the Core Provisions, they are immediately harmed further because they are incurring a financial penalty in the form of additional royalty obligations when they have not been given a reasonable opportunity to comply and thus avoid the financial penalty. The Waste Prevention Rule imposes royalty on all "avoidably lost" gas, which is gas lost due to noncompliance with the Waste Prevention Rule. *See* 43 C.F.R. §§ 3179.4(a) (defining "unavoidably lost" and "avoidably lost" gas), 3179.5(a) (imposing royalty on "avoidably lost" gas). Accordingly, Industry Petitioners' members that cannot comply with the Core Provisions suffer additional federal royalty obligations in addition to unrecoverable compliance costs.

Although these irreparable harms are imminent and serious, their severity is not determinative of whether injunctive relief is warranted. Injunctive relief is appropriate when harms are imminent or ongoing. For example, the Tenth Circuit Court of Appeals found a likelihood of irreparable harm when members of a trade association alleged an annual cost of $1,000 or more per company to comply with a new law and sovereign immunity precluded recovery of these compliance costs. *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 756, 770–71 (10th Cir. 2010); *see also Direct Mktg. Ass'n v. Huber*, No. 10-CV-001546, 2011 WL 250556, at **6–7 (D. Colo. Jan. 26, 2011) (granting injunctive relief because a trade association's members would spend $3,100 to $7,000 per company to comply with new state requirements). The severe costs and stranded production demonstrated in this case, combined with the fact full and immediate compliance is not possible given the delays over the past year, more than meet applicable standards for the Court to grant the injunctive relief requested.

In sum, the nature and immanency of the harms has changed drastically since the Court's order of January 16, 2017. The Core Provisions require lengthy planning and substantial expenditures by operators. In many cases, because of the six-month delay of their effectiveness, operators cannot fully comply with the Core Provisions absent additional time and are, therefore, being uniquely and irreparably harmed. It was these exact serious and permanent harms that served as one of the key rationales for the Suspension Rule. *See* 82 Fed. Reg. at 58,050 ("[BLM] 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.") Accordingly, injunctive relief is necessary and appropriate.

B. **Industry Petitioners Are Likely to Succeed on the Merits of Their Claims**

Industry Petitioners are likely to succeed on the merits of their petition because the Waste Prevention Rule, and more specifically the Core Provisions, cannot survive judicial review. This Court already has recognized the Waste Prevention Rule's fundamental flaws. In its Order on Motions for Preliminary Injunction, this Court determined "[t]he Rule upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under the CAA to the Environmental Protection Agency (EPA), states, and tribes to manage air quality." Order on Motions for Preliminary Injunction, No. 2:16-cv-00280-SWS, at 17 (D. Wyo. Jan. 16, 2017) ("PI Order"). The Court also observed that the Waste Prevention Rule "conflicts with the statutory scheme under the CAA . . . particularly by extending its application of overlapping air quality provisions to existing facilities . . . ." *Id*. at 18. The Court described BLM as having "hijacked the EPA's authority under the guise of waste management" and stated that "BLM cannot use overlap to justify overreach." *Id*. at 19. The Court directed these statements largely at the Core Provisions.

Since the Court's PI Order, Federal Defendants have also expressed similar concerns about certain provisions of the Waste Prevention Rule not conforming to statutory authority. *See* 82 Fed. Reg. at 58,050 ("The BLM has concerns regarding the statutory authority . . . of the 2016 final rule"). The BLM noted in the Suspension Rule that "neither the MLA nor FLPMA provide statutory 'mandates' that the BLM maintain the regulatory provisions that are being suspended for a year in the [Suspension Rule]." *Id*. at 58,059. BLM appears to have suspended the Core Provisions partly out of concerns of statutory authority.

More recently, BLM stated in the Proposed Revision Rule it "is not confident that all the provisions of the 2016 final rule would survive judicial review," specifically citing state and industry comments "that the proposed rule, rather than preventing 'waste,' was actually intended to regulate air quality, a matter within the regulatory jurisdiction of EPA and the States under the Clean Air Act." 83 Fed. Reg. at 7,927. In short, the Core Provisions that Industry Petitioners now seek to enjoin, are the same provisions that the Federal Defendants both suspended and omitted from the Proposed Revision Rule over concerns about statutory authority. Thus, Industry Petitioners are likely to successfully demonstrate that at least considerable portions of the Waste Prevention Rule, and particularly the Core Provisions, exceed BLM's statutory authority.

To further establish their likelihood of success on the merits, Industry Petitioners incorporate by reference their Brief in Support of Western Energy Alliance and Independent Petroleum Association of America's Petition for Review of Final Agency Action, filed October 2, 2017 ("the Merits Brief"). (Dkt. No. 142.).[5] The Merits Brief, attached as Ex. "D" to this

[5] As with their October 27, 2017 Motion for Preliminary Injunction, Industry Petitioners are including their previously filed merits brief along with this request for preliminary injunction in support and demonstration of their likelihood of success on the merits. *See* Dkt. Nos. 160, 161, 162. When Industry Petitioners last filed this Motion for Preliminary Injunction, Industry

Memorandum, identifies numerous substantive and procedural flaws with the Waste Prevention Rule. Notably, the January 17, 2018 provisions at issue (LDAR, storage tank, pneumatic controllers, and pneumatic pumps air control requirements) most clearly and unlawfully impose air quality requirements on existing facilities in excess of BLM's statutory authority. Because of these flaws, Industry Petitioners are likely to succeed on the merits of their claims.

C. **The Equities Weigh in Favor of an Injunction**

The equities favor an injunction. For the reasons detailed in Section II.A, *supra*, Industry Petitioners' interests will be irreparably harmed absent an injunction because they face impending, unrecoverable compliance costs. Furthermore, the requirement that Industry Petitioners' members comply with the Core Provisions immediately is inequitable given the stay of the Core Provisions for nearly half of the last thirteen months. When it issued the Waste Prevention Rule, BLM determined that more than one year was necessary to allow operators to come into compliance. *See* VF_0000434–VF_0000440 (43 C.F.R. §§ 3179.7(b)(1), 3179.201(d), 3179.202(h), 3179.203(c), 3179.301(f)). Yet, of this essential preparatory period, compliance dates were postponed or suspended for 151 days, *see* 82 Fed. Reg. 27,430 (June 15, 2017); 82 Fed. Reg. 58,050 (Dec. 8, 2017). Thus, operators have had slightly more than half the time BLM initially determined was necessary to comply with the Waste Prevention Rule. The sudden resurrection of the Core Provisions has exponentially complicated this situation and forced operators into an untenable position, which carries substantial enforcement risk.

Petitioners also moved for leave to exceed page limits out of an abundance of caution. Dkt. No. 159. The Court, however, denied as moot Industry Petitioners' motion to exceed page limits. Dkt. No. 169. Accordingly, Industry Petitioners have not filed another motion to exceed page limits.

In contrast, BLM will suffer little if any harm from a preliminary injunction. BLM has now attempted to postpone or suspend compliance with the January 2018 compliance dates twice: once in June 2017 under Administrative Procedure Act section 705 and again in December 2017 with the Suspension Rule. These attempts have focused on the Core Provisions that Industry Petitioners seek to enjoin. Therefore, a preliminary injunction will be consistent with BLM's regulatory and administrative objectives. In addition, BLM has identified concerns with the factual and regulatory bases for the Waste Prevention Rule and has proposed to revise the rule to address its concerns. *See* 83 Fed. Reg. at 7,928.

In fact, a preliminary injunction may actually lessen the burdens of the Waste Prevention Rule on BLM. BLM is now required to administer the Waste Prevention Rule and, for the first time, the provisions of the Waste Prevention Rule with compliance deadlines of January 17, 2018. In particular, BLM must now consider individual requests for exemptions from various provisions of the Waste Prevention Rule that render compliance uneconomic. *See* 43 C.F.R. §§ 3179.102(d), 3179.201(c), 3179.202(f), 3179.203(d), 3179.303(c). Given that the Waste Prevention Rule regulates approximately 81,600 low-producing wells,[6] BLM will bear a significant administration burden. A preliminary injunction would reduce these administrative harms.

The harms to the Industry Petitioners also outweigh the harms, if any, to the other parties to this litigation. The states of Wyoming, Montana, North Dakota, and Texas all previously sought a preliminary injunction, so the Petitioners' requested relief will satisfy their prior requested relief. In part because immediate compliance presumably is impossible for oil and gas

[6] BLM estimates that 96,000 existing wells will be subject to the Rule, 85 percent of which are low production. *See* VF_0000361.

producers in New Mexico and California, a preliminary injunction also will not harm Defendant-Intervenors States of New Mexico and California and the Citizen Groups despite the injunction in the California Litigation. Furthermore, whereas the Core Provisions impose immediate and severe compliance costs on the Industry Petitioners, the harms alleged by the Defendant-Intervenors have thus far consisted of generalized concerns with lost royalty revenue (which is contradicted on the record) and global methane emissions, the significance of which has been drastically diminished through adjustments to the social cost of methane calculation. These speculative and generalized concerns conflict with and are outweighed by the overwhelming, substantial evidence on this record demonstrating the adverse economic consequences from curtailed or shut-in production and irrevocable costs.

D. **An Injunction is in the Public Interest**

Finally, a preliminary injunction "would not be adverse to the public interest." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012) (citation omitted). First and most significant, a preliminary injunction will avoid the substantial costs and other adverse economic impacts of implementing a rule that BLM has already proposed to revised. Second, enjoining the Core Provisions would not appreciably impact the public's interest in a healthy environment. As noted elsewhere, many operators cannot come into full compliance for many months. In addition, effective provisions of the Waste Prevention Rule and state and federal regulations governing venting and flaring will continue to mitigate any harm while BLM proposes to revise the Waste Prevention Rule. *See e.g.*, 82 Fed. Reg. 58,052 ("[The Suspension Rule] does not leave unregulated the venting and flaring of gas from Federal and Indian oil and gas leases."). Finally, injunctive relief would prevent the lost revenue associated with a decrease in or shut down production, including lost revenues from non-federal/non-Indian leases that are unitized or communitized with federal or Indian leases. The Waste Prevention Rule could render over 300

leases uneconomical, requiring production to be shut down and will strand significant production. *See* VF_0031676–77 ("Permanent shut-in of wells could have significant consequences on resource conservation, royalty revenue, job loss, and the economic viability of operators."); *see also*, Sgamma Declaration, *supra*.[7] These impacts would deliver a financial blow to western states at a time when many are still struggling to rebound from recent fluctuations in commodity prices.

In sum, injunctive relief would serve public interest goals while avoiding unnecessary and unrecoverable compliance costs that are real and concrete on this record. The Court's issuance of a nationwide preliminary injunction over BLM's enforcement of the Core Provisions would not harm the environment and would avoid the financial and administrative costs of temporarily implementing an unlawful, duplicative rule.

III. THE COURT SHOULD VACATE PROVISIONS OF THE RULE PENDING ADMINISTRATIVE REVISION

In the alternative, Industry Petitioners respectfully request that the Court invoke its equitable powers and vacate the Core Provisions pending conclusion of BLM's ongoing rulemaking process.

"Vacatur is an equitable remedy . . . and the decision whether to grant vacatur is entrusted to the district court's discretion." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1139 (10th Cir. 2010). This Court may vacate the Core Provisions even though the Court has not yet ruled on the Waste Prevention Rule's merits, particularly when doing so preserves the status quo that has existed since January 17, 2017. "[V]acation of an agency action without an express determination on the merits is well within the bounds of traditional equity jurisdiction."

[7] *See also* VF_0031676–77 (estimating that as many as 40 percent of wells could be permanently shut-in under the Rule because they would become uneconomical).

Ctr. for Native Ecosystems v. Salazar, 795 F. Supp.2d 1236, 1241–42 (D. Colo. 2011); accord *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp.3d 1059, 1063–65 (C.D. Cal. 2016); *Coal. of Ariz./N.M. Counties for Stable Economic Growth v. Salazar*, No. 07-CV-00876, 07-CV-00876, at *5 (D. N.M. May 4, 2009).

Industry Petitioners submit that this case presents the right circumstances for such relief and encourage this Court to apply a pragmatic, equitable approach similar to the District Court for the District of Colorado. In *Center for Native Ecosystems v. Salazar*, that court vacated an agency rule based on principles of equity without determining whether the rule was in error. Specifically, the court vacated a U.S. Fish and Wildlife Service ("USFWS") rule delisting a species under the Endangered Species Act ("ESA") without reaching the merits. 795 F. Supp.2d 1236, 1241–42 (D. Colo. 2011). The USFWS had based the delisting rule on an opinion of the Solicitor of the Interior interpreting the ESA that was rejected by federal courts and later withdrawn. *Id*. at 1238. Upon the USFWS's motion, the district court vacated the rule and remanded it back to the agency without evaluating the propriety of the agency's decision. *Id*. at 1243. Given this Court's PI Order questioning the legality of the Waste Prevention Rule and BLM's decision to reevaluate the Waste Prevention Rule, the equitable authority exercised in *Center for Native Ecosystems* is directly relevant here.

The District of Colorado court explained that "the decision to vacate an agency's decision without an express determination on the merits is achieved through a careful balancing of a variety of equitable considerations." *Ctr. for Native Ecosystems*, 795 F. Supp.2d at 1241 n.6. Specifically, the court evaluated: (1) "the seriousness of the deficiencies in the completed rulemaking and the doubts the deficiencies raise about whether the agency chose properly from the various alternatives open to it in light of statutory objectives"; and (2) "any harm that might arise from vacating the

existing rule, including the potential disruptive consequences of an interim change." *Id*. at 1242 (quoting *United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1993)); accord *Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp.2d 1269, 1286 (2012).

Both of these factors support vacatur here. This Court has already recognized the "seriousness of the deficiencies" with the Waste Prevention Rule in its PI Order. *See* PI Order at 17 ("[t]he Rule upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under the CAA to the Environmental Protection Agency (EPA), states, and tribes to manage air quality"), 18 (observing the Waste Prevention Rule "conflicts with the statutory scheme under the CAA . . . particularly by extending its application of overlapping air quality provisions to existing facilities . . . ."), 19 (describing BLM as having "hijacked the EPA's authority under the guise of waste management" and stating "BLM cannot use overlap to justify overreach"). These deficiencies are acutely present with respect to the Core Provisions.

With respect to the second factor, the Court is well aware of "the potential disruptive consequences" that will result without vacatur. Industry Petitioners' members will be forced to expend millions of dollars to comply with a fundamentally flawed Waste Prevention Rule of limited duration. In contrast, vacatur of the Waste Prevention Rule allows the regulatory status quo to remain intact and prevents the "disruptive consequences of an interim change" suddenly brought into effect by invalidation of the Suspension Rule.

Broader equitable considerations also support an exercise of the Court's equitable discretion to vacate the Core Provisions. Parts of the Waste Prevention Rule has been under some form of review, postponement, or suspension since March 28, 2017, when the President directed the Secretary of the Interior to review it. *See* Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar.

31, 2017); 82 Fed. Reg. 27,430 (June 15, 2017); 82 Fed. Reg. 46,458 (Oct. 5, 2017); 82 Fed. Reg. 58,050 (Dec. 8, 2017). In the Court's view, these administrative efforts rendered judicial review unwise and inefficient. In June 2017, this Court declined to proceed with this litigation because "the shifting sands" surrounding the Waste Prevention Rule rendered judicial review "inefficient and a waste of both the judiciary's and the parties' resources." Order Granting Mot. to Extend Briefing Deadlines, Dkt. No. 133 (June 27, 2017). The Court reached the same conclusion in October and again in December 2017. *See* Order Granting Mot. for an Extension of the Merits Briefing Deadlines, Dkt. No. 163, at 4 (Oct. 30, 2017); Order Granting Joint Mot. to Stay, Dkt. No. 189, at 4 (Dec. 29, 2017). Although Industry Petitioners respect these concerns, Industry Petitioners should not be obligated to comply with a rule so uncertain that, in the Court's view, it does not warrant judicial review.

Moreover, vacatur is consistent with the concerns of prudential ripeness this Court has previously articulated. This Court has expressed that its review of the Waste Prevention Rule while BLM is proposing to revise the same rule raises ripeness concerns and, particularly, a need for the Court to avoid "premature adjudication, from entangling [itself] in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized . . . ." *See* Order Granting Joint Mot. to Stay, Dkt. No. 189, at 4–5 (Dec. 29, 2017) (quoting *Wyoming v. Zinke*, 871 F.3d 1133, 1141 (10th Cir. 2017)). Although Industry Petitioners maintain that the Waste Prevention Rule is ripe for review, vacatur of the Core Provisions allows the Court to balance its ripeness concerns while simultaneously providing Industry Petitioners relief. A narrowly-tailored vacatur similarly allows BLM to freely reconsider the Waste Prevention Rule free from judicial intrusion, consistent with agencies' inherent rulemaking authority. *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."). Simply put, to the extent this Court seeks to avoid interfering with BLM's rulemaking process, vacatur of the Core Provisions allows it to do so.

Notably, an agency request for a voluntary remand for further rulemaking proceedings often causes a court to consider whether to vacate a rule (or portions thereof) without deciding its legality. *See, e.g.*, *Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp.2d 1236, 1241–42 (D. Colo. 2011). Here, even though BLM has not requested a remand, it has nonetheless expressed concerns with the factual and regulatory bases for the Waste Prevention Rule, *see* 83 Fed. Reg. at7928, and is proceeding to review the rule. Specifically, in its Proposed Revision Rule, BLM stated that emissions from oil and gas sources and operations "are more appropriately regulated by EPA under its Clean Air authority." *Id*. BLM also recognized that the "emissions-targeting provisions" of the Waste Prevention Rule—i.e., the Core Provisions—"create unnecessary regulatory overlap in light of EPA's Clean Air Act authority." *Id*. BLM's review of the Waste Prevention Rule would function as a remand, and the fact that BLM has not requested a remand of the Waste Prevention Rule does not preclude vacatur of the Core Provisions. Thus, the Court may use its broad equitable powers to vacate the problematic Core Provisions. Doing so would preserve the status quo and is the most narrowly tailored relief available to prevent the clear irreparable harm to Industry Petitioners.

For these reasons, Industry Petitioners alternatively request that the Court vacate the Core Provisions effective nationwide. Notably, if the Court grants this request, Industry Petitioners request that this Court retain jurisdiction over the matter until the Waste Prevention Rule is no longer the subject of controversy.

IV. CONCLUSION

Industry Petitioners request that the Court issue a nationwide injunction that prevents BLM from enforcing the Core Provisions of the Waste Prevention Rule until the resolution of this litigation for the reasons set forth herein. The currently effective compliance deadlines will cause the Industry Petitioners and Industry Petitioners' members irreparable harm. The Waste Prevention Rule represents unlawful and unconstitutional agency action, and the balance of equities and public interest favor a preliminary injunction. Accordingly, the Court should grant the Motion for Preliminary Injunction.

Alternatively, Industry Petitioners request that this Court exercise its equitable powers to vacate the Core Provisions of the Venting and Flaring Rule until BLM completes its administrative rulemaking efforts. If this Court vacates the Core Provisions, however, it should retain jurisdiction over the Waste Prevention Rule until it is no longer the subject of controversy.

Respectfully submitted this 28th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2018, the foregoing **MEMORANDUM IN SUPPORT OF MOTION 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

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3160 and 3170

[18X.LLWO310000.L13100000.PP0000]

RIN 1004–AE54

Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) is promulgating a final rule (2017 final delay rule) to temporarily suspend or delay certain requirements contained in the rule published in the **Federal Register** on November 18, 2016, entitled, ''Waste Prevention, Production Subject to Royalties, and Resource Conservation'' (2016 final rule) until January 17, 2019. The BLM has concerns regarding 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. 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.

DATES: This rule is effective on January 8, 2018.

FOR FURTHER INFORMATION CONTACT: Catherine Cook, Acting Division Chief, Fluid Minerals Division, 202–912–7145, or *ccook@blm.gov,* for information regarding the substance of today's final delay rule or information about the BLM's Fluid Minerals program. For questions relating to regulatory process issues, contact Faith Bremner, Regulatory Analyst, at 202–912–7441, or *fbremner@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

I. Background

The BLM's onshore oil and gas management program is a major contributor to our nation's oil and gas production. The BLM manages more than 245 million acres of Federal land and 700 million acres of subsurface estate, making up nearly a third of the nation's mineral estate. In fiscal year (FY) 2016, sales volumes from Federal onshore production lands accounted for 9 percent of domestic natural gas production, and 5 percent of total U.S. oil production. Over $1.9 billion in royalties were collected from all oil, natural gas, and natural gas liquids transactions in FY 2016 on Federal and Indian lands. Royalties from Federal lands are shared with States. Royalties from Indian lands are collected for the benefit of the Indian owners.

In response to oversight reviews and a recognition of increased flaring from Federal and Indian leases, the BLM developed the 2016 final rule entitled, ''Waste Prevention, Production Subject to Royalties, and Resource Conservation,'' which was published in the **Federal Register** on November 18, 2016. See 81 FR 83008 (Nov. 18, 2016). The rule replaced the BLM's existing policy at that time, Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL–4A). The 2016 final rule was intended to: Reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian leases; clarify when produced gas lost through venting, flaring, or leaks is subject to royalties; and clarify when oil and gas production may be used royalty free on-site. The 2016 final rule became effective on January 17, 2017. Many of the 2016 final rule's provisions are to be phased in over time, and are to become operative on January 17, 2018.

Since late January 2017, the President has issued several Executive Orders that necessitate a review of the 2016 final rule by the Department. On January 30, 2017, the President issued Executive Order 13771, entitled, ''Reducing Regulation and Controlling Regulatory Costs,'' which requires Federal agencies to take proactive measures to reduce the costs associated with complying with Federal regulations. In addition, on March 28, 2017, the President issued Executive Order 13783, entitled, ''Promoting Energy Independence and Economic Growth.'' Section 7(b) of Executive Order 13783 directs the Secretary of the Interior to review four specific rules, including the 2016 final rule, for consistency with the policy articulated in section 1 of the Order and, ''if appropriate,'' to publish proposed rules suspending, revising, or rescinding those rules. Among other things, section 1 of Executive Order 13783 states that ''[i]t is in the national interest to promote 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.''

To implement Executive Order 13783, on March 29, 2017, Secretary of the Interior Ryan Zinke issued Secretarial Order No. 3349, entitled, ''American Energy Independence,'' which, among other things, directs the BLM to review the 2016 final rule to determine whether it is fully consistent with the policy set forth in section 1 of Executive Order 13783. The BLM conducted an initial review of the 2016 final rule and found that it is inconsistent with the policy in section 1 of Executive Order 13783. The BLM found that some provisions of the 2016 final rule add considerable regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. For example, despite the rule's assertions, many of the 2016 final rule's requirements would pose a particular compliance burden to operators of marginal or low-producing wells. There is newfound concern that this additional burden would jeopardize the ability of operators to maintain or economically operate these wells.

Reexamination of the 2016 final rule is also needed because the BLM is not confident that all provisions of the 2016 final rule would survive judicial review. Immediately after the 2016 final rule was issued, petitions for judicial review of the rule were filed by industry groups and certain States with significant BLM-managed Federal and Indian minerals. See *Wyoming* v. *U.S. Dep't of the Interior,* Case No. 2:16–cv–00285–SWS (D. Wyo.). Although the court denied motions for a preliminary injunction, it did express concerns that the BLM may have usurped the authority of the Environmental Protection Agency (EPA) and the States under the Clean Air Act, and questioned whether it was appropriate for the 2016 final rule to be justified based on its environmental and societal benefits, rather than on its resource conservation benefits alone. Moreover, questions have been raised over to what extend Federal regulations should apply to leases in communitization agreements when Federal mineral ownership is very small. The BLM is evaluating these issues as part of its reexamination of the rule.

Reexamination of the 2016 final rule is warranted to reassess the rule's estimated costs and benefits. In the

Regulatory Impact Analysis (RIA) for the 2016 final rule (2016 RIA), the BLM estimated that the requirements of the 2016 final rule would impose compliance costs, not including potential cost savings for product recovery, of approximately $114 million to $279 million per year (2016 RIA at 4). Certain States, tribes, and many oil and gas companies and trade associations have argued, in comments and in the litigation following the issuance of the 2016 final rule, that the BLM underestimated the compliance costs of the 2016 final rule and that the costs would inhibit oil and gas development on Federal and Indian lands, thereby reducing royalties and harming State and tribal economies. The BLM is reexamining these issues to determine whether the 2016 RIA may have underestimated costs.

Apart from this concern over costs, the 2016 RIA also may have overestimated benefits by the use of a social cost of methane that attempts to account for global rather than domestic climate change impacts. Section 5 of Executive Order 13783, issued by the President on March 28, 2017, disbanded the earlier Interagency Working Group on Social Cost of Greenhouse Gases (IWG) and withdrew the Technical Support Documents upon which the RIA for the 2016 final rule relied for the valuation of changes in methane emissions. The Executive Order further directed agencies to ensure that estimates of the social cost of greenhouse gases used in regulatory analyses ''are based on the best available science and economics'' and are consistent with the guidance contained in Office of Management and Budget (OMB) Circular A–4, ''including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates'' (E.O. 13783, Section 5(c)). The BLM is reassessing its estimates of the rule's benefits taking into account the Executive Order's directives.

The BLM also believes that a number of specific assumptions underlying the analysis supporting the 2016 final rule warrant reconsideration. For example, the BLM is reconsidering whether it was appropriate to assume that all marginal wells would receive exemptions from the rule's requirements and whether this assumption might have masked adverse impacts of the 2016 final rule on production from marginal wells. The BLM is also reconsidering whether it was appropriate to assume that there would be no delay in the BLM's review of Applications for Permits to Drill (APDs) as a result of reviewing Sundry Notices requesting exemptions from the rule's requirements, and that there would be no impact on production due to operators waiting on the BLM to review and approve such requests for exemptions. The BLM is reconsidering whether it was appropriate to assume that there would be no reservoir damage if an operator uses temporary well shut-ins to comply with the 2016 final rule's capture percentage requirements, and whether it was correct to assume that the capture percentage requirements would not have a disproportionate impact on small operators, who might have fewer wells with which to average volumes of allowable flaring. Finally, the BLM has concerns that its cost-benefit analysis for the leak detection and repair (LDAR) requirements in the 2016 final rule—which used data from the EPA's OOOOa rule (40 CFR part 60, subpart OOOOa)—was not based on the best available information and science. The BLM is reviewing the effectiveness of LDAR requirements to determine whether more accurate data is available.

Following up on its initial review, the BLM is currently reviewing the 2016 final rule to develop an appropriate proposed revision—to be promulgated through notice-and-comment rulemaking—that would propose to align the 2016 final rule with the policies set forth in section 1 of Executive Order 13783. Today's final delay rule temporarily suspends or delays certain requirements contained in the 2016 final rule until January 17, 2019. As noted above, the BLM has concerns regarding the statutory authority, cost, complexity, feasibility, and other implications of the 2016 final rule, and therefore wants to avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future. The BLM also wishes to avoid expending scarce agency resources on implementation activities (internal training, operator outreach/education, developing clarifying guidance, etc.) for such potentially transitory requirements.

For certain requirements in the 2016 final rule that have yet to be implemented, this final delay rule will temporarily postpone the implementation dates until January 17, 2019, or for 1 year. For certain requirements in the 2016 final rule that are currently in effect, this final delay rule will temporarily suspend their effectiveness until January 17, 2019. A detailed discussion of the suspensions and delays is provided below. The BLM has attempted to tailor this final delay rule to target the requirements of the 2016 final rule for which immediate regulatory relief is particularly justified. Although the requirements of the 2016 final rule that are not suspended under this final delay rule may ultimately be revised in the near future, the BLM is not suspending them because it does not, at this time, believe that suspension is necessary, because the cost and other implications do not pose immediate concerns for operators. This final delay rule temporarily suspends or delays all of the requirements in the 2016 final rule that the BLM estimated would pose an immediate compliance burden to operators and generate benefits of gas savings or reductions in methane emissions. The 2017 final delay rule does not suspend or delay the requirements in subpart 3178 related to the royalty-free use of natural gas, but the only estimated compliance costs associated with those requirements are for minor and rarely occurring administrative burdens. In addition, for the most part, the 2017 final delay rule suspends or delays the administrative burdens associated with subpart 3179. Only four of the 24 information collection activities remain, and the burdens associated with these remaining items are not substantial.

The BLM promulgated the 2016 final rule, and now will suspend and delay certain provisions of that rule, pursuant to its authority under the following statutes: The Mineral Leasing Act of 1920 (30 U.S.C. 181–287), the Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. 351–360), the Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. 1701–1758), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701–1785), the Indian Mineral Leasing Act of 1938 (25 U.S.C. 396a–g), the Indian Mineral Development Act of 1982 (25 U.S.C. 2101–2108), and the Act of March 3, 1909 (25 U.S.C. 396). These statutes authorize the Secretary of the Interior to promulgate such rules and regulations as may be necessary to carry out the statutes' various purposes.[1]

Today's action temporarily suspending certain requirements of the 2016 final rule does not leave unregulated the venting and flaring of gas from Federal and Indian oil and gas leases. Indeed, regulations from the BLM, the EPA, and the States will operate to address venting and flaring during the period of the suspension. The BLM's venting and flaring

[1] See, *e.g.,* 30 U.S.C. 189 (MLA); 30 U.S.C. 359 (MLAAL); 30 U.S.C. 1751(a) (FOGRMA); 43 U.S.C. 1740 (FLPMA); 25 U.S.C. 396d (IMLA); 25 U.S.C. 2107 (IMDA); 25 U.S.C. 396. See also *Clean Air Council* v. *Pruitt,* 862 F.3d 1, 13 (D.C. Cir. 2017) (recognizing that ''[a]gencies obviously have broad discretion to reconsider a regulation at any time'' through notice and comment rulemaking).

regulations that will remain in effect during the 1-year suspension period include: Definitions clarifying when lost gas is ''avoidably lost,'' and therefore subject to royalties (§ 3179.4); restrictions on the practice of venting (§ 3179.6); limitations on royalty-free venting and flaring during initial production testing (§ 3179.103); limitations on royalty-free flaring during subsequent well tests (§ 3179.104); and restrictions on royalty-free venting and flaring during ''emergencies'' (§ 3179.105). The BLM also notes that States with significant Federal oil and gas production have regulations that restrict flaring and these regulations apply to Federal oil and gas operations in those States. See, *e.g.,* 20 Alaska Admin. Code § 25.235; Mont. Admin. R. 36.22.1220–.1221; New Mexico Administrative Code section 19.15.18.12; North Dakota Century Code section 38–08–06.4; North Dakota Industrial Commission Order 24665; 055–3 Wyo. Code R. § 39; Utah Administrative Code R649–3–20. Finally, as discussed elsewhere in this document, EPA regulations in 40 CFR 60 subparts OOOO and OOOOa address natural gas emissions from new, modified, and reconstructed equipment on oil and gas leases.

On October 5, 2017, the BLM published its proposed rule and sought comment on whether to suspend the implementation of certain requirements in the 2016 final rule until January 17, 2019 (82 FR 46458). Issues of particular interest to the BLM included the necessity of the proposed suspensions and delays, the costs and benefits associated with the proposed suspensions and delays, and whether suspension of other requirements of the 2016 final rule were warranted. The BLM was also interested in the appropriate length of the proposed suspension and delays and wanted to know whether the period should be longer or shorter (*e.g.,* 6 months, 18 months, or 2 years). The BLM allowed a 30-day comment period for the proposed delay rule to afford the public a meaningful opportunity to comment on its narrow proposal, involving a straightforward temporary suspension and delay of certain provisions of the 2016 final rule.

The BLM has engaged in stakeholder outreach in the course of developing this final delay rule. On October 16 and 17, 2017, the BLM sent correspondence to tribal governments to solicit their views to inform the development of this final delay rule. The BLM issued a proposed delay rule on September 28, 2017, which was published on October 5, 2017, and accepted public comments through November 6, 2017. The BLM received over 158,000 public comments on the proposed rule, including approximately 750 unique comments.

II. Discussion of the Final Rule

A. Section-by-Section Discussion

43 CFR 3162.3–1(j)—Drilling Applications and Plans

In the 2016 final rule, the BLM added a paragraph (j) to 43 CFR 3162.3–1, which presently requires that when submitting an APD for an oil well, an operator must also submit a waste-minimization plan. Submission of the plan is required for approval of the APD, but the plan is not itself part of the APD, and the terms of the plan are not enforceable against the operator. The purpose of the waste-minimization plan is for the operator to set forth a strategy for how the operator will comply with the requirements of 43 CFR subpart 3179 regarding the control of waste from venting and flaring from oil wells.

The waste-minimization plan must include information regarding: The anticipated completion date(s) of the proposed oil well(s); a description of anticipated production from the well(s); certification that the operator has provided one or more midstream processing companies with information about the operator's production plans, including the anticipated completion dates and gas production rates of the proposed well or wells; and identification of a gas pipeline to which the operator plans to connect. Additional information is required when an operator cannot identify a gas pipeline with sufficient capacity to accommodate the anticipated production from the proposed well, including: A gas pipeline system location map showing the proposed well(s); the name and location of the gas processing plant(s) closest to the proposed well(s); all existing gas trunklines within 20 miles of the well, and proposed routes for connection to a trunkline; the total volume of produced gas, and percentage of total produced gas, that the operator is currently venting or flaring from wells in the same field and any wells within a 20-mile radius of that field; and a detailed evaluation, including estimates of costs and returns, of potential on-site capture approaches.

In the 2016 RIA, the BLM estimated that the administrative burden of the waste-minimization plan requirements would be roughly $1 million per year for the industry and $180,000 per year for the BLM (2016 RIA at 96 and 100). The BLM is currently reviewing concerns raised by operators that the requirements of § 3162.3–1(j) may impose an unnecessary burden and can be reduced. The BLM is also evaluating concerns raised by the operators that § 3162.3–1(j) is infeasible because some of the required information is in the possession of a midstream company that is not in a position to share it with the operator prior to the operator's submission of an APD. The BLM is considering narrowing the required information and is considering whether submission of a State waste-minimization plan, such as those required by New Mexico and North Dakota, would serve the purpose of § 3162.3–1(j). The BLM is therefore suspending the waste minimization plan requirement of § 3162.3–1(j) until January 17, 2019.

This final delay rule revises § 3162.3–1 by adding ''Beginning January 17, 2019'' to the beginning of paragraph (j). The rest of this paragraph remains the same as in the 2016 final rule and the introductory paragraph is repeated in this final delay rule text only for context.

43 CFR 3179.7—Gas Capture Requirement

In the 2016 final rule, the BLM sought to constrain routine flaring through the imposition of a ''capture percentage'' requirement, requiring operators to capture a certain percentage of the gas they produce, after allowing for a certain volume of flaring per well. The capture-percentage requirement would become more stringent over a period of years, beginning with an 85 percent capture requirement (5,400 Mcf per well flaring allowable) in January 2018, and eventually reaching a 98 percent capture requirement (750 Mcf per well flaring allowable) in January 2026. An operator would choose whether to comply with the capture targets on each of the operator's leases, units or communitized areas, or on a county-wide or state-wide basis.

In the 2016 RIA, the BLM estimated that this requirement would impose costs of up to $162 million per year and generate cost savings from product recovery of up to $124 million per year, with both costs and cost savings increasing as the requirements increased in stringency (2016 RIA at 49).

The BLM is currently considering concerns raised by operators that the capture-percentage requirement of § 3179.7 is unnecessarily complex and infeasible in some regions because it may cause wells to be shut-in repeatedly (or otherwise cease production if the lease(s) does not allow for a shut in) until sufficient gas infrastructure is in place. The BLM is considering whether

the NTL–4A framework can be applied in a manner that addresses any inappropriate levels of flaring, and whether market-based incentives (*i.e.,* royalty obligations) could improve capture in a more straightforward and efficient manner. Finally, the BLM is considering whether the need for a complex capture-percentage requirement could be obviated through other BLM efforts to facilitate pipeline development.

Since meeting this requirement requires operators to incur significant costs rather than require operators to institute new processes and adjust their plans for development to meet a capture-percentage requirement that may be rescinded or revised as a result of the BLM's review, the BLM is delaying for 1 year the compliance dates for § 3179.7's capture requirements. This final delay rule will allow the BLM sufficient time to more thoroughly explore through notice-and-comment rulemaking whether the capture percentage requirements should be rescinded or revised and would prevent operators from being unnecessarily burdened by regulatory requirements that are subject to change. This final delay rule revises the compliance dates in paragraphs (b), (b)(1) through (b)(4), and (c)(2)(i) through (vii) of § 3179.7 to begin January 17, 2019. Paragraphs (c), (c)(1), and the introductory text of (c)(2) remain the same as in the 2016 final rule and are repeated in this final delay rule text only for context.

43 CFR 3179.9—Measuring and Reporting Volumes of Gas Vented and Flared From Wells

Section 3179.9 requires operators to estimate (using estimation protocols) or measure (using a metering device) all flared and vented gas, whether royalty-bearing or royalty-free. This section further provides that specific requirements apply when the operator is flaring 50 Mcf or more of gas per day from a high-pressure flare stack or manifold, based on estimated volumes from the previous 12 months, or based on estimated volumes over the life of the flare, whichever is shorter. Under the 2016 final rule, § 3179.9(b) would have required the operator, as of January 17, 2018, if the volume threshold is met, to measure the volume of the flared gas, or calculate the volume of the flared gas based on the results of a regularly performed gas-to-oil ratio test, so as to allow the BLM to independently verify the volume, rate, and heating value of the flared gas.

In the 2016 RIA, the BLM estimated that this requirement would impose costs of about $4 million to $7 million per year (2016 RIA at 52).

The BLM is presently reviewing concerns raised by operators that the additional accuracy associated with the measurement and estimation required by § 3179.9(b) does not justify the burden it would place on operators and that the requirement is infeasible because current technology does not reliably measure low pressure, low volume, fluctuating gas flow. The BLM is considering whether it would make more sense to allow the BLM to require measurement or estimation on a case-by-case basis, rather than imposing a blanket requirement on all operators. In order to avoid immediate and potentially unnecessary compliance costs on the part of operators, this final delay rule delays the compliance date in § 3179.9 until January 17, 2019.

This final delay rule revises the compliance date in § 3179.9(b)(1). The rest of paragraph (b)(1) remains the same as in the 2016 final rule and is repeated in this final delay rule text only for context.

43 CFR 3179.10—Determinations Regarding Royalty-Free Flaring

Section 3179.10(a) provides that approvals to flare royalty free that were in effect as of January 17, 2017, will continue in effect until January 17, 2018. The purpose of this provision was to provide a transition period for operators who were operating under existing approvals for royalty-free flaring. Because the BLM's review of the 2016 final rule could result in rescission or substantial revision of the rule, the BLM believes that terminating pre-existing flaring approvals in January 2018 would impose an immediate cost, be premature and disruptive, and would introduce needless regulatory uncertainty for operators with existing flaring approvals. The BLM therefore extends the end of the transition period provided for in § 3179.10(a) to January 17, 2019.

This final delay rule also revises the date in paragraph (a) and replaces ''as of the effective date of this rule'' with ''as of January 17, 2017,'' which is the effective date of the 2016 final rule, for clarity. Aside from these two changes, this final delay rule does not otherwise revise paragraph (a), but the rest of the paragraph remains the same as in the 2016 final rule and is repeated in this final delay rule text only for context.

43 CFR 3179.101—Well Drilling

Section 3179.101(a) requires that gas reaching the surface as a normal part of drilling operations be used or disposed of in one of four ways: (1) Captured and sold; (2) Directed to a flare pit or flare stack; (3) Used in the operations on the lease, unit, or communitized area; or (4) Injected. Section 3179.101(a) also specifies that gas may not be vented, except under the circumstances specified in § 3179.6(b) or when it is technically infeasible to use or dispose of the gas in one of the ways specified above. Section 3179.101(b) states that gas lost as a result of a loss of well control will be classified as avoidably lost if the BLM determines that the loss of well control was due to operator negligence.

The BLM is currently reviewing concerns raised by operators that § 3179.101 is unnecessary in light of existing BLM requirements, infeasible in the situations where flares may be used on drilling wells because of insufficient gas to burn, and creates a risk to safety. The BLM has existing regulations that require the operator to flare gas during drilling operations, see Onshore Oil and Gas Order No. 2—Drilling Operations, Section III.C.7. The requirements state that ''All flare systems shall be designed to gather and burn all gas. . . . The flare system shall have an effective method for ignition. Where noncombustible gas is likely or expected to be vented, the system shall be provided supplemental fuel for ignition and to maintain a continuous flare.''

Because § 3179.101 includes the primary method of gas disposition, which is also required by Onshore Oil and Gas Order No. 2—Drilling Operations, Section III.C.7, the primary effect of § 3179.101, therefore, may be to impose a regulatory constraint on operators in exceptional circumstances where the operator must make a case-specific judgment about how to safely and effectively dispose of the gas.

Further, in addition to the existing requirements regulating well drilling operations, the available data suggest that potential gas losses during a well-drilling operation is very small. According to EPA's Greenhouse Gas Inventory, drilling a well generates only small amounts of uncontrolled gas (2016 RIA at 149 and 151). These data indicate either that operators are already operating in a manner consistent with § 3179.101 or that the amount of potential gas losses from these operations is very small.

The BLM is therefore suspending the effectiveness of § 3179.101 until January 17, 2019, while the BLM completes its review of § 3179.101 and decides whether to propose permanently revising or rescinding it through notice-and-comment rulemaking.

This final delay rule adds a new paragraph (c) making it clear that the

operator must comply with § 3179.101 beginning January 17, 2019. This action does not impact the operator's compliance with Onshore Oil and Gas Order No. 2—Drilling Operations, Section III.C.7.

43 CFR 3179.102—Well Completion and Related Operations

Section 3179.102 addresses gas that reaches the surface during well-completion, post-completion, and fluid-recovery operations after a well has been hydraulically fractured or refractured. It requires the gas to be used or disposed of in one of four ways: (1) Captured and sold; (2) Directed to a flare pit or stack, subject to a volumetric limitation in § 3179.103; (3) Used in the lease operations; or (4) Injected. Section 3179.102 specifies that gas may not be vented, except under the narrow circumstances specified in § 3179.6(b) or when it is technically infeasible to use or dispose of the gas in one of the four ways specified above. Section 3179.102(b) provides that an operator will be deemed to be in compliance with its gas capture and disposition requirements if the operator is in compliance with the requirements for control of gas from well completions established under Environmental Protection Agency (EPA) regulations 40 CFR part 60, subparts OOOO or OOOOa regulations, or if the well is not a ''well affected facility'' under those regulations.

The BLM is concerned that § 3179.102 imposes an immediate cost on operators and is currently reviewing it to determine whether it is necessary, in light of current operator practices and the analogous EPA regulations. Operators dispose of gas during well completions and related operations consistent with § 3179.102(a) either to comply with EPA or State regulations.

EPA regulations at 40 CFR part 60, subparts OOOO and OOOOa, address the disposition of gas from oil and gas well completions using hydraulic fracturing, which are the vast majority of well completions occurring on Federal and Indian lands. The BLM believes that over 90 percent of wells on Federal and Indian lands are completed using hydraulic fracturing. Therefore, most of the well completions and related operations that would otherwise be covered by § 3179.102 would actually be exempted under § 3179.102(b).

The EPA regulations also exempt from its coverage a small portion of well completions that, according to EPA's Greenhouse Gas Inventory, generate only small amounts of uncontrolled gas (2016 RIA at 149 and 151). These data indicate either that operators are already operating in a manner consistent with § 3179.102(a) or that the amount of potential gas losses from these operations is very small.

Considering the overlap with EPA regulations (40 CFR part 60, subparts OOOO and OOOOa), the primary effect of § 3179.102 may be to generate confusion about regulatory compliance during well-drilling and related operations. The BLM is therefore suspending the effectiveness of § 3179.102 until January 17, 2019, while the BLM completes its review of § 3179.102 and decides whether to permanently revise or rescind it through notice-and-comment rulemaking.

This final delay rule adds a new paragraph (e) making it clear that operators must comply with § 3179.102 beginning January 17, 2019.

43 CFR 3179.201—Equipment Requirements for Pneumatic Controllers

Section 3179.201 addresses pneumatic controllers that use natural gas produced from a Federal or Indian lease, or from a unit or communitized area that includes a Federal or Indian lease. Section 3179.201 applies to such controllers if the controllers: (1) Have a continuous bleed rate greater than 6 standard cubic feet per hour (scf/hour) (''high-bleed'' controllers); and (2) Are not covered by EPA regulations that prohibit the new use of high-bleed pneumatic controllers (40 CFR part 60, subparts OOOO or OOOOa), but would be subject to those regulations if the controllers were new, modified, or reconstructed sources. Section 3179.201(b) requires the applicable pneumatic controllers to be replaced with controllers (including, but not limited to, continuous or intermittent pneumatic controllers) having a bleed rate of no more than 6 scf/hour, subject to certain exceptions. Section 3179.201(d) requires that this replacement occur no later than January 17, 2018, or within 3 years from the effective date of the rule if the well or facility served by the controller has an estimated remaining productive life of 3 years or less.

In the 2016 RIA, the BLM estimated that this requirement would impose costs of about $2 million per year and generate cost savings from product recovery of $3 million to $4 million per year (2016 RIA at 56).

The BLM is concerned that § 3179.201 imposes an immediate cost on operators and is currently reviewing it to determine whether it should be revised or rescinded. The BLM is considering whether § 3179.201 is necessary in light of the analogous EPA regulations (40 CFR part 60, subparts OOOO or OOOOa) and the fact that operators are likely to adopt more efficient equipment in cases where it makes economic sense for them to do so. The BLM does not believe that operators should be required to make expensive equipment upgrades to comply with § 3179.201 until the BLM has had an opportunity to review its requirements and, if appropriate, revise them through notice-and-comment rulemaking. The BLM is therefore delaying the compliance date stated in § 3179.201 until January 17, 2019.

This final delay rule revises the first sentence of paragraph (d) by replacing ''no later than 1 year after the effective date of this section'' with ''by January 17, 2019.'' This final delay rule also replaces ''the effective date of this section'' with ''January 17, 2017'' the two times that it appears in the second sentence of paragraph (d). This final delay rule does not otherwise revise paragraph (d), but the rest of the paragraph remains the same as in the 2016 final rule and is repeated in the final delay rule text only for context.

43 CFR 3179.202—Requirements for Pneumatic Diaphragm Pumps

Section 3179.202 establishes requirements for operators with pneumatic diaphragm pumps that use natural gas produced from a Federal or Indian lease, or from a unit or communitized area that includes a Federal or Indian lease. It applies to such pumps if they are not covered under EPA regulations at 40 CFR part 60, subpart OOOOa, but would be subject to that subpart if they were a new, modified, or reconstructed source. For covered pneumatic pumps, § 3179.202 requires that the operator either replace the pump with a zero-emissions pump or route the pump exhaust to processing equipment for capture and sale. Alternatively, an operator may route the exhaust to a flare or low-pressure combustion device if the operator makes a determination (and notifies the BLM through a Sundry Notice) that replacing the pneumatic diaphragm pump with a zero-emissions pump or capturing the pump exhaust is not viable because: (1) A pneumatic pump is necessary to perform the function required; and (2) Capturing the exhaust is technically infeasible or unduly costly. If an operator makes this determination and has no flare or low-pressure combustor on-site, or routing to such a device would be technically infeasible, the operator is not required to route the exhaust to a flare or low-pressure combustion device. Under § 3179.202(h), an operator must replace its covered pneumatic diaphragm pump

or route the exhaust gas to capture or flare beginning no later than January 17, 2018.

In the 2016 RIA, the BLM estimated that this requirement would impose costs of about $4 million per year and generate cost savings from product recovery of $2 million to $3 million per year (2016 RIA at 61).

The BLM is concerned that § 3179.202 imposes an immediate cost on operators and is currently reviewing it to determine whether it should be rescinded or revised. Analogous EPA regulations apply to new, modified, and reconstructed sources, therefore limiting the applicability of § 3179.202. See 40 CFR part 60, subpart OOOOa. In addition, the BLM is concerned that requiring zero-emissions pumps may not conserve gas in some cases. The volume of royalty-free gas used to generate electricity to provide the power necessary to operate a zero-emission pump could exceed the volume of gas necessary to operate the pneumatic pump that the zero-emission pump would replace. The BLM does not believe that operators should be required to make expensive equipment upgrades to comply with § 3179.202 until the BLM has had an opportunity to review its requirements and, if appropriate, revise them through notice-and-comment rulemaking. The BLM is therefore delaying the compliance date stated in § 3179.202 until January 17, 2019.

This final delay rule revises paragraph (h) by replacing ''no later than 1 year after the effective date of this section'' in the first sentence with ''by January 17, 2019'' and also replaces ''the effective date of this section'' with ''January 17, 2017'' the two times that it appears later in the same sentence. This final delay rule does not otherwise revise paragraph (h); the rest of the paragraph remains the same as in the 2016 final rule and is repeated in the final delay rule text only for context.

43 CFR 3179.203—Storage Vessels

Section 3179.203 applies to crude oil, condensate, intermediate hydrocarbon liquid, or produced-water storage vessels that contain production from a Federal or Indian lease, or from a unit or communitized area that includes a Federal or Indian lease, and that are not subject to 40 CFR part 60, subparts OOOO or OOOOa, but would be if they were new, modified, or reconstructed sources. If such storage vessels have the potential for volatile organic compound (VOC) emissions equal to or greater than 6 tons per year (tpy), § 3179.203 requires operators to route all gas vapor from the vessels to a sales line. Alternatively, the operator may route the vapor to a combustion device if it determines that routing the vapor to a sales line is technically infeasible or unduly costly. The operator also may submit a Sundry Notice to the BLM that demonstrates that compliance with the above options would cause the operator to cease production and abandon significant recoverable oil reserves under the lease due to the cost of compliance. Pursuant to § 3179.203(c), operators must meet these requirements for covered storage vessels by January 17, 2018 (unless the operator will replace the storage vessel in order to comply, in which case it has a longer time to comply).

In the 2016 RIA, the BLM estimated that this requirement would impose costs of about $7 million to $8 million per year and generate cost savings from product recovery of up to $200,000 per year (2016 RIA at 74).

The BLM is concerned that § 3179.203 imposes an immediate cost on operators and is currently reviewing it to determine whether it should be rescinded or revised. The BLM is considering whether § 3179.203 is necessary in light of analogous EPA regulations (40 CFR part 60, subparts OOOO or OOOOa) and whether the costs associated with compliance are justified. The BLM does not believe that operators should be required to make expensive upgrades to their storage vessels in order to comply with § 3179.203 until the BLM has had an opportunity to review its requirements and, if appropriate, revise them through notice-and-comment rulemaking. The BLM is therefore delaying the January 17, 2018, compliance date in § 3179.203 until January 17, 2019.

This final delay rule revises the first sentence of paragraph (b) by replacing ''Within 60 days after the effective date of this section'' with ''Beginning January 17, 2019'' and by adding ''after January 17, 2019'' between the words ''vessel'' and ''the operator.'' This final delay rule also revises the introductory text of paragraph (c) by replacing ''no later than one year after the effective date of this section'' with ''by January 17, 2019'' and by changing ''or three years if'' to ''or by January 17, 2020, if '' to account for removing the reference to ''the effective date of this section.'' This final delay rule does not otherwise revise paragraphs (b) and (c), and the rest of these paragraphs remain the same as in the 2016 final rule and are repeated in this final delay rule text only for context.

43 CFR 3179.204—Downhole Well Maintenance and Liquids Unloading

Section 3179.204 establishes requirements for venting and flaring during downhole well maintenance and liquids unloading. It requires the operator to use practices for such operations that minimize vented gas and the need for well venting, unless the practices are necessary for safety. Section 3179.204 also requires that for wells equipped with a plunger lift system or an automated well-control system, the operator must optimize the operation of the system to minimize gas losses. Under § 3179.204, before an operator manually purges a well for the first time, the operator must document in a Sundry Notice that other methods for liquids unloading are technically infeasible or unduly costly. In addition, during any liquids unloading by manual well purging, the person conducting the well purging is required to be present on-site to minimize, to the maximum extent practicable, any venting to the atmosphere. This section also requires the operator to maintain records of the cause, date, time, duration and estimated volume of each venting event associated with manual well purging, and to make those records available to the BLM upon request. Additionally, operators are required to notify the BLM by Sundry Notice within 30 days after the following conditions are met: (1) The cumulative duration of manual well-purging events for a well exceeds 24 hours during any production month; or (2) The estimated volume of gas vented in the process of conducting liquids unloading by manual well purging for a well exceeds 75 Mcf during any production month.

In the 2016 RIA, the BLM estimated that these requirements would impose costs of about $6 million per year and generate cost savings from product recovery of about $5 million to $9 million per year (2016 RIA at 66). In addition, there would be estimated administrative burdens associated with these requirements of $323,000 per year for the industry and $37,000 per year for the BLM (2016 RIA at 98 and 101).

The BLM is concerned that § 3179.204 imposes immediate costs on operators and is currently reviewing it to determine whether it should be rescinded or revised. The BLM does not believe that operators should be burdened with the operational and reporting requirements imposed by § 3179.204 until the BLM has had an opportunity to review them and, if appropriate, revise them through notice-and-comment rulemaking. In addition, as part of this review, the BLM would

want to review how these data could be reported in a consistent manner among operators. The BLM is therefore suspending the effectiveness of § 3179.204 until January 17, 2019.

This final delay rule adds a new paragraph (i), making it clear that operators must comply with § 3179.204 beginning January 17, 2019.

43 CFR 3179.301—Operator Responsibility

Sections 3179.301 through 3179.305 establish leak detection, repair, and reporting requirements for: (1) Sites and equipment used to produce, process, treat, store, or measure natural gas from or allocable to a Federal or Indian lease, unit, or communitization agreement; and (2) Sites and equipment used to store, measure, or dispose of produced water on a Federal or Indian lease. Section 3179.302 prescribes the instruments and methods that may be used for leak detection. Section 3179.303 prescribes the frequency for inspections and § 3179.304 prescribes the time frames for repairing leaks found during inspections. Finally, § 3179.305 requires operators to maintain records of their LDAR activities and submit an annual report to the BLM. Pursuant to § 3179.301(f), operators must begin to comply with the LDAR requirements of §§ 3179.301 through 3179.305 before: (1) January 17, 2018, for sites in production prior to January 17, 2017; (2) 60 days after beginning production for sites that began production after January 17, 2017; and (3) 60 days after a site that was out of service is brought back into service and re-pressurized.

In the 2016 RIA, the BLM estimated that these requirements would impose costs of about $83 million to $84 million per year and generate cost savings from product recovery of about $12 million to $21 million per year (2016 RIA at 91). In addition, there would be estimated administrative burdens associated with these requirements of $3.9 million per year for the industry and over $1 million per year for the BLM (2016 RIA at 98 and 102).

The BLM is concerned that §§ 3179.301 through 3179.305 impose an immediate cost on operators and is currently reviewing them to determine whether they should be revised or rescinded. The analysis of the 2016 rule may have significantly overestimated the benefits of captured gas and therefore not justified the estimated costs. The BLM is also considering whether these requirements are necessary in light of comparable EPA (40 CFR part 60, subpart OOOOa.) and State LDAR regulations. The 2017 RIA includes a discussion of State regulations (2017 RIA at 17). The BLM is considering whether the reporting burdens imposed by these sections are justified and whether the substantial compliance costs could be mitigated by allowing for less frequent and/or non-instrument-based inspections or by exempting wells that have low potential to leak natural gas. The BLM does not believe that operators should be burdened with the significant compliance costs imposed by these sections until the BLM has had an opportunity to review them and, if appropriate, revise them through notice-and-comment rulemaking. The BLM is therefore delaying the effective dates for these sections until January 17, 2019, by revising § 3179.301(f).

This final delay rule revises paragraph (f)(1) by replacing ''Within one year of January 17, 2017 for sites that have begun production prior to January 17, 2017;'' with ''By January 17, 2019, for all existing sites.'' This final delay rule also revises paragraph (f)(2) by adding ''new'' between the words ''for'' and ''sites'' and by replacing the existing date with ''January 17, 2019.'' Finally, this final delay rule revises paragraph (f)(3) by adding ''an existing'' between the words ''when'' and ''site'' and by adding ''after January 17, 2019'' to the end of the sentence. This final delay rule does not otherwise revise paragraph (f), and the rest of the paragraph remains the same as in the 2016 final rule and is repeated in this final delay rule text only for context.

B. Summary of Estimated Economic Impacts

The BLM reviewed the final delay rule and conducted an RIA and Environmental Assessment (EA) that examine the impacts of the final delay rule's requirements. The following discussion is a summary of the final delay rule's economic impacts. The RIA and EA that we prepared have been posted in the docket for the final delay rule on the *Federal eRulemaking Portal: https://www.regulations.gov.* In the Searchbox, enter ''RIN 1004–AE54'' and click the ''Search'' button. Follow the instructions at this Web site.

The suspension or delay in the implementation of certain requirements in the 2016 final rule postpones the economic impacts estimated previously to the near-term future. That is to say, impacts that we previously estimated would occur in 2017 will now occur in 2018, impacts that we previously estimated would occur in 2018 will now occur in 2019, and so on. In the RIA for this final delay rule, we track this shift in impacts over the 10-year period following the delay. A 10-year period of analysis was also used in the 2016 RIA. Except for some notable changes, the 2017 RIA uses the impacts estimated and underlying assumptions used by the BLM for the 2016 RIA, published in November 2016. The BLM's final delay rule temporarily suspends or delays almost all of the requirements in the 2016 final rule that we estimated would pose a compliance burden to operators and generate benefits of gas savings or reductions in methane emissions.

Estimated Reductions in Compliance Costs (Excluding Cost Savings)

First, we examine the reductions in compliance costs excluding the savings that would have been realized from product recovery. This final delay rule temporarily suspends or delays almost all of the requirements in the 2016 final rule that we estimated would pose a compliance burden to operators. We estimate that suspending or delaying the targeted requirements of the 2016 final rule until January 17, 2019, will substantially reduce compliance costs during the period of the suspension or delay (2017 RIA at 29).

Impacts in Year 1:

- A delay in compliance costs of $114 million (using a 7 percent discount rate to annualize capital costs) or $110 million (using a 3 percent discount rate to annualize capital costs).

Impacts from 2017–2027:

- Total reduction in compliance costs ranging from $73 million to $91 million (net present value (NPV) using a 7 percent discount rate) or $40 million to $50 million (NPV using a 3 percent discount rate).

Estimated Reduction in Benefits

This final delay rule temporarily suspends or delays almost all of the requirements in the 2016 final rule that were estimated to generate benefits of gas savings or reductions in methane emissions. We estimate that this final delay rule will result in forgone benefits, since estimated cost savings that would have come from product recovery will be deferred and the emissions reductions will also be deferred (2017 RIA at 32).

Impacts in Year 1:

- A reduction in cost savings of $19 million.

Impacts from 2017–2027:

- Total reduction in cost savings of $36 million (NPV using a 7 percent discount rate) or $21 million (NPV using a 3 percent discount rate).

We estimate that this final delay rule will also result in additional methane and VOC emissions of 175,000 and

250,000 tons, respectively, in Year 1 (2017 RIA at 32).

These estimated emissions are measured as the change from the baseline environment, which is the 2016 final rule's requirements being implemented per the 2016 final rule schedule. Since the final delay rule delays the implementation of those requirements, the estimated benefits of the 2016 final rule will be forgone during the temporary suspension or delay.

The BLM used interim domestic values of the carbon dioxide and methane to value the forgone emissions reductions resulting from the delay (see the discussion of social cost of greenhouse gases in the 2017 RIA at Section 3.2 and Appendix).

Impact in Year 1:

- Forgone methane emissions reductions valued at $8 million (using interim domestic SC–CH_4 [2] based on a 7 percent discount rate) or $26 million (using interim domestic SC–CH_4 based on a 3 percent discount rate).

Impacts from 2017–2027:

- Forgone methane emissions reductions valued at $1.9 million (NPV [3] and interim domestic SC–CH_4 using a 7 percent discount rate); or
- Forgone methane emissions reductions valued at $300,000 (NPV and interim domestic SC–CH_4 using a 3 percent discount rate).

Estimated Net Benefits

This final delay rule is estimated to result in positive net benefits, meaning that the reduction of compliance costs would exceed the reduction in cost savings and the cost of emissions additions (2017 RIA at 36).

Impact in Year 1:

- Net benefits of $83—86 million (using interim domestic SC–CH_4 based on a 7 percent discount rate) or $64—68 million (using interim domestic SC–CH_4 based on a 3 percent discount rate).

Impacts from 2017–2027:

- Total net benefits ranging from $35—52 million (NPV and interim domestic SC–CH_4 using a 7 percent discount rate); or
- Total net benefits ranging from $19—29 million (NPV and interim domestic SC–CH_4 using a 3 percent discount rate).

Energy Systems

This final delay rule is expected to influence the production of natural gas, natural gas liquids, and crude oil from onshore Federal and Indian oil and gas leases, particularly in the short-term and on a regional basis. However, since the relative changes in production compared to global levels are expected to be small, we do not expect that this final delay rule will significantly impact the price, supply, or distribution of energy.

Noting that the assumptions in the 2016 RIA are under review and subject to change, we estimate the following incremental changes in production. Also note the representative share of the total U.S. production in 2015 for context (2017 RIA at 41).

Annual Impacts:

- A decrease in natural gas production of 9.0 billion cubic feet (Bcf) in Year 1 (0.03 percent of the total U.S. production).
- An increase in crude oil production of 91,000 barrels in Year 2 (0.003 percent of the total U.S. production). There is no estimated change in crude oil production in Year 1.

Royalty Impacts

Based on the assumptions in the 2016 RIA, which are currently under review, in the short-term the final 2017 delay rule is expected to decrease natural gas production from Federal and Indian leases, and likewise, is expected to reduce annual royalties to the Federal Government, tribal governments, States, and private landowners. From 2017–2027, however, we expect a small increase in total royalties, likely due to production slightly shifting into the future where commodity prices are expected to be higher.

Royalty payments are recurring income to Federal or tribal governments and costs to the operator or lessee. As such, they are transfer payments that do not affect the total resources available to society. An important but sometimes difficult problem in cost estimation is to distinguish between real costs and transfer payments. While transfers should not be included in the economic analysis estimates of the benefits and costs of a regulation, they may be important for describing the distributional effects of a regulation.

We estimate a reduction in royalties of $2.6 million in Year 1 (2017 RIA at 43). This amount represents about 0.2 percent of the total royalties received from oil and gas production on Federal lands in FY 2016. However, from 2017–2027, we estimate an increase in total royalties of $1.26 million (NPV using a 7 percent discount rate) or $380,000 (NPV using a 3 percent discount rate).

Consideration of Alternative Approaches

In developing this final delay rule, the BLM considered alternative timeframes for which it could suspend or delay the requirements (*e.g.,* 6 months and 2 years). Ultimately, the BLM decided on a suspension or delay for 1 year, which it believes to be the minimum length of time practicable within which to review the 2016 final rule and complete a notice-and-comment rulemaking to revise that regulation.

Employment Impacts

This final delay rule temporarily suspends or delays certain requirements of the BLM's 2016 final rule on waste prevention and is a temporary deregulatory action. As such, we estimate that it will result in a reduction of compliance costs for operators of oil and gas leases on Federal and Indian lands. Therefore, it is likely that the impact, if any, on the employment will be positive.

In the 2016 RIA, the BLM concluded that the requirements were not expected to impact the employment within the oil and gas extraction, drilling oil and gas wells, and support activities industries, in any material way. This determination was based on several reasons. First, the estimated incremental gas production represented only a small fraction of the U.S. natural gas production volumes. Second, the estimated compliance costs represented only a small fraction of the annual net incomes of companies likely to be impacted. Third, for those operations that would have been impacted to the extent that the compliance costs would force the operator to shut in production, the 2016 final rule had provisions that would exempt these operations from compliance. Based on these factors, the BLM determined that the 2016 final rule would not alter the investment or employment decisions of firms or significantly adversely impact employment. The RIA also noted that the 2016 final rule would require the one-time installation or replacement of equipment and the ongoing implementation of an LDAR program, both of which would require labor to comply.

As discussed more thoroughly above, the assumptions upon which the determination of the 2016 rule was based upon are under review. Based on the 2016 RIA, this final delay rule will not substantially alter the investment or employment decisions of firms for two reasons. First, the 2016 RIA determined that that rule would not substantially alter the investment or employment decisions of firms, and so therefore delaying the 2016 final rule would likewise not be expected to impact those decisions. We also recognize that while there might be a small positive impact

[2] Social cost of methane.

[3] Net present value.

on investment and employment due to the reduction in compliance burdens, the magnitude of the reductions are relatively small.

Small Business Impacts

The BLM reviewed the Small Business Administration (SBA) size standards for small businesses and the number of entities fitting those size standards as reported by the U.S. Census Bureau. We conclude that small entities represent the overwhelming majority of entities operating in the onshore crude oil and natural gas extraction industry and, therefore, this final delay rule will impact a significant number of small entities.

To examine the economic impact of the rule on small entities, the BLM performed a screening analysis on a sample of potentially affected small entities, comparing the reduction of compliance costs to entity profit margins.

The BLM identified up to 1,828 entities that operate on Federal and Indian leases and recognizes that the overwhelming majority of these entities are small business, as defined by the SBA. We estimated the potential reduction in compliance costs to be about $60,000 per entity during the initial year when the requirements would be suspended or delayed. This represents the average maximum amount by which the operators would be positively impacted by this final delay rule.

We used existing BLM information and research concerning firms that have recently completed Federal and Indian wells and the financial and employment information on a sample of these firms, as available in company annual report filings with the Securities and Exchange Commission (SEC). From the original list of companies, we identified 55 company filings. Of those companies, 33 were small businesses.

From data in the companies' 10–K filings to the SEC, the BLM was able to calculate the companies' profit margins for the years 2012, 2013, and 2014. We then calculated a profit margin figure for each company when subject to the average annual reduction in compliance costs associated with this final delay rule. For these 26 small companies, the estimated per-entity reduction in compliance costs will result in an average increase in profit margin of 0.17 percentage points (based on the 2014 company data) (2017 RIA at 46).

Impacts Associated With Oil and Gas Operations on Tribal Lands

This final delay rule applies to oil and gas operations on both Federal and Indian leases. In the 2017 RIA, the BLM estimates the impacts associated with operations on Indian leases, as well as royalty implications for tribal governments. We estimate these impacts by scaling down the total impacts by the share of oil wells on Indian lands and the share of gas wells on Indian lands. The BLM expects the impacts on Tribal Lands to be between 11 percent and 15 percent of those levels described in sections 4.1 to 4.4.4 of the 2017 RIA. Please reference the 2017 RIA at sections 4.1 to 4.4.5 for a full explanation of the estimated impacts.

C. Comments and Responses

The BLM has engaged in stakeholder outreach in the course of developing this 2017 final delay rule to the degree it believes is appropriate given that the final delay rule extends the compliance dates of the 2016 final rule, but does not change the policies of that rule. The BLM published a proposed rule on October 5, 2017 (82 FR 46458), and accepted public comments through November 6, 2017.

The BLM sent correspondence to tribal governments to solicit their views to inform the development of this 2017 final delay rule on October 16 and 17, 2017, and requested feedback and comment through the respective BLM State Office Directors. In addition, BLM State and Field Offices informed the tribes of the BLM delay rule notification letters via phone, and offered to conduct tribal consultation if the tribes chose to do so. More detailed information is found below in the subsection titled ''Consultation and Coordination with Indian Tribal Governments (Executive Order 13175 and Departmental Policy).''

The BLM received over 158,000 comments on the proposed rule, including approximately 750 unique comments, which are available for viewing on the *Federal eRulemaking Portal* (*http://www.regulations.gov*) In the Searchbox, enter ''RIN 1004–AE54'' and click the ''Search'' button. Follow the instructions at this Web site. The BLM has reviewed all public comments, and has made changes, as appropriate, to the final delay rule and supporting documents based on those comments and internal review. Those changes are described in detail below in this final delay rule. In addition, the ''comments and responses'' discussion in this final delay rule provides a summary of issues raised most frequently in public comments and the BLM's response. A more comprehensive account of public comments and detailed responses to these comments are available to the public in a supporting document in the docket for this rulemaking at the *Federal eRulemaking Portal* referenced above. The final delay rule reflects the very extensive input that the BLM gathered from the public comment process.

The comments revolved around several main issues, which are categorized as the following: (1) Industry impacts; (2) Royalty Provisions, (3) Legal authority; (4) Lost gas volumes; (5) Rule net benefits; (6) National impacts, including energy security; (7) Climate change; (8) Air quality and public health; (9) Rule process; and (10) Technical issues, including parts of the rule that were not delayed.

Industry Impacts

The BLM received numerous comments on the BLM's analysis of costs and benefits. Many comments addressed the cost to the operators of complying with the 2017 final delay rule. Some commenters stated that the long-term prevention of energy waste outweighs the additional burden that smaller companies may face from the cost of complying with the 2016 final rule, and others asserted that there is continued stability in the oil and gas industry and jobs despite promulgation of the 2016 final rule so that a delay was unnecessary. Another commenter saw compliance as a cost of doing business and another as a cost to access public lands, while another said they would take a reduction in royalties to pay for reductions in methane emissions. One commenter noted the broad negative impacts of the rule on public welfare through ''wasted gas, diminished royalties, and harmful impacts for public health and the environment.'' One commenter asserted a disparity between the alleged broad negative impacts of the proposed 2017 delay rule on public welfare through ''wasted gas, diminished royalties, and harmful impacts for public health and the environment'' with the BLM's own conclusion that the 2017 delay rule would not ''substantially alter the investment or employment decisions of firms.''

The BLM did not revise the proposed rule in response to these comments. Most of the comments on these cost/benefit issues asserted a policy preference for immediately implementing the rule but did not assert that the BLM had relied on improper data analysis. Operators have raised concerns regarding the cost, complexity, and other implications of the 2016 rule. Moreover, the 2016 final rule analysis is under review and the BLM is concerned that certain assumptions that justified the rule's costs may be unsupported. The BLM does not believe that operators

should be required to make expensive equipment upgrades to comply with the 2016 rule until it has had an opportunity to review the requirements and, if appropriate, revise them through notice-and-comment rulemaking.

Many commenters supported issuing the delay rule and stated that a final delay rule would avoid imposing immediate compliance costs for requirements that might be rescinded or significantly revised in the near future. The BLM agrees. This final rule will also allow the BLM to avoid expending agency resources on implementation of activities for potentially transitory requirements. The BLM acknowledges that some operators have upgraded their equipment in the interim, and delaying the 2016 rule does not preclude operators from upgrading their equipment voluntarily, but the BLM does not see the delay as penalizing operators who have adopted the 2016 final rule requirements early, as mentioned in one comment. The intent of the delay rule is to prevent the incurrence of compliance costs and potential unnecessary shutting in of wells while the aforementioned provisions are being reviewed due to the concerns raised in this rulemaking.

As mentioned above, the BLM shows in the 2017 RIA that the avoided costs of delaying the rule exceed the forgone benefits. Over the 11-year evaluation period (2017–2027), the BLM estimates total net benefits ranging from $35–52 million (NPV and interim social cost of methane using a 7 percent discount rate) or $19–29 million (NPV and interim domestic social cost of methane using a 3 percent discount rate) (2017 RIA at 1). Thus, the RIA for the 2017 final delay rule concludes that the benefits of the 2017 final delay rule (avoided compliance costs) exceed the costs (forgone savings and environmental improvements). In accordance with E.O. 13783, the BLM is committed to furthering the national interest by promoting ''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.'' Thus, the policy set forth in E.O. 13783 is aimed at ensuring the ''clean'' and ''prudent'' (*i.e.,* not wasteful) development of energy resources. As the BLM reconsiders the 2016 final rule in accordance with E.O. 13783, it will continue to analyze the rule's costs and benefits.

Royalty Provisions

Several commenters stated that the 2016 final rule's gas capture provisions would be commercially valuable and economically beneficial to the government through additional royalties. The commenters argued that delaying the 2016 final rule would result in wasted gas and a reduction in the royalties flowing to the States, tribes, and Federal Government.

The BLM did not change its proposal in response to these comments. The BLM's analysis of the delay rule, which is based on potentially tenuous assumptions made in the 2016 final analysis, shows that it might forgo royalties in the short-term, but that there would be a negligible change from the baseline over the entire period of analysis. See Section 4.4 of the 2017 final delay rule RIA. As the BLM reconsiders the final 2016 rule in accordance with E.O. 13783, it will continue to assess impacts on royalty revenues.

Some commenters were concerned that the 2016 rule would impact oil and gas development on tribal reservations and royalties to tribes. Some tribes are located in known shale play areas and contain large amounts of undeveloped or underdeveloped areas. In particular, the commenters suggested that the 2016 final rule could delay drilling on or drive industry away from tribal lands, reducing income flowing to Indian mineral owners and tribal economies. The BLM agrees that this is an important issue and is assessing it in developing a proposal to revise or rescind the 2016 final rule. The BLM evaluated the royalty impacts of the delay rule on Indian lands and determined that these impacts were minimal (2017 RIA at 40). Following its initial review, the BLM is reviewing the 2016 final rule to develop an appropriate proposed revision of the 2016 final rule that is intended to align the 2016 final rule with section 1 of E.O. 13783. The BLM invites the commenters to provide comment on its proposal to revise the 2016 final rule, when that proposal is available.

The BLM received comments on other royalty-related issues. One commenter believes royalties should not be treated as transfer payments in the 2017 RIA. The BLM disagrees with the commenter. Based on widely-accepted economic principles and OMB Circular A–4, royalties are, by definition, transfer payments.

Legal Authority

Multiple commenters stated that the BLM lacks either implicit or explicit legal authority to suspend certain requirements of the 2016 final rule for the purpose of reconsidering them. They stated that the 2017 final delay rule is arbitrary and capricious under the Administrative Procedure Act (APA) section 706(2)(A), and the reasoning behind the rule is outside the scope of the Federal Land Policy and Management Act. Commenters stated that promulgation of the 2017 delay rule would put the BLM in violation of both the MLA and FLPMA. Commenters also asserted that, since the 2017 delay rule was proposed shortly after the U.S. District Court for the District of Wyoming denied industry petitioners a preliminary injunction to stay the 2016 final rule until the case was decided on the merits, the BLM is using rulemaking to mirror a judicial function.

The BLM has not modified the rule in light of these comments. The BLM has ample legal authority to modify or otherwise revise the existing regulation in response to substantive concerns regarding cost and feasibility under the authority granted by the MLA, the MLAAL, FOGRMA, FLPMA, the IMLA, the IMDA, and the Act of March 3, 1909. These statutes authorize the Secretary of the Interior to promulgate such rules and regulations as may be necessary to carry out the statutes' various purposes. (See, *e.g.,* 30 U.S.C. 189 (MLA); 30 U.S.C. 359 (MLAAL); 30 U.S.C. 1751(a) (FOGRMA); 43 U.S.C. 1740 (FLPMA); 25 U.S.C. 396d (IMLA); 25 U.S.C. 2107 (IMDA); 25 U.S.C. 396).

Moreover, neither the MLA nor FLPMA provide statutory ''mandates'' that the BLM maintain the regulatory provisions that are being suspended for a year in this final rule. Furthermore, the BLM is not acting arbitrarily and capriciously in promulgating today's final rule; the preamble, RIA, responses to comments, and other associated documents collectively and adequately explain the rationales and factual bases for each provision in the rule, the relevant factors that the BLM considered, and the reasons why the BLM did not consider certain other factors.

Commenters addressed the importance of government-to-government consultation and stated that, in contrast to the 2016 rule, the BLM only provided a few opportunities for tribes and individual mineral owners to consult about the 2017 delay rule.

The BLM engaged in stakeholder outreach in the course of developing this 2017 final delay rule, and believes its degree of outreach was appropriate given that the final delay rule extends the compliance dates of the 2016 final rule, but does not change the policies of that rule. The BLM sent correspondence to all tribal governments with major oil and gas interests, as well as individual Indian mineral owners that have

expressed to the BLM in the past that they want to be notified of such actions. Such correspondence solicited their views to inform the development of this 2017 final delay rule and requested feedback and comment through the respective BLM State Office Directors. Several tribal governments have provided feedback on today's action.

Commenters were also concerned about delaying the 2016 final rule, which they viewed as helping the Secretary meet his statutory trust responsibilities with respect to development of Indian oil and gas interests, because it ensured extraction that increased royalties rather than waste of resources.

The BLM believes that the 2017 final rule helps the Secretary fulfill his trust responsibility with respect to the development of Indian oil and gas interests. As detailed in the RIA accompanying today's action, although there is expected a short-term reduction in annual royalties to tribes (and other lessors) from the 1-year delay, overall the economic impact of this final delay rule is positive. The delay also provides the BLM an opportunity to reconsider and ensure appropriate compliance requirements are imposed on tribal lands, which may help to avoid having operators forego development of tribal lands due to burdensome and unnecessary compliance requirements.

Commenters stated that the 2017 delay rule would leave the oil and gas operations on Federal and Indian leases unregulated with respect to the activities governed by the provisions being suspended or delayed.

The BLM believes this is not the case. The development and production of oil and gas are regulated under a framework of Federal and State laws and regulations. Several Federal agencies implement Federal laws and requirements, while each State in which oil and gas is produced has one or more regulatory agencies that administer State laws and regulations. As discussed more thoroughly above, the requirements of the 2016 final rule that are not being suspended or delayed, various State laws and regulations, and EPA regulations will operate together to limit venting and flaring during the period of the 1-year suspension. See the 2017 final delay rule RIA for a summary of selected Federal and State regulations and policies that have the effect of limiting the waste of gas from production operations in the States where the production of oil and gas from Federal and Indian leases is most prevalent (2017 RIA at 17).

Lost Gas Volumes

Many commenters stated that the 2017 final delay rule will result in waste of natural gas through venting, flaring, and leaking of natural gas from oil and gas operators. The commenters stated that the valuable energy resources being wasted could otherwise be productively used, which would subsequently increase revenues for taxpayers in the form of royalty and tax collection. Some commenters also expressed concern that the rule impedes U.S. progress towards energy independence. The BLM acknowledges that delaying implementation of compliance requirements for certain provisions of the 2016 final rule could result in incremental flaring of gas during the 1-year interim period when compared to the baseline. However, over 11 years of implementation (2017–2027), the BLM expects an overall small increase in production (and subsequent royalties) when commodity prices are projected to be higher. In addition, the BLM found positive net benefits of the 2017 delay rule due to the reduction in compliance costs exceeding the foregone benefits of the 2016 rule. The BLM also notes that the assumptions of the final analysis of the 2016 rule are under review and may be revised.

Some commenters expressed concern about the uncertainty underlying the estimates of lost gas volumes in the final RIA. The BLM acknowledges that there is uncertainty regarding the quantity and value of gas that is vented or flared on Federal or tribal lands. The BLM reviewed data from the Office of Natural Resources Revenue (ONRR) and 2016 greenhouse gas (GHG) Inventory to develop estimates of the average volume of gas vented and flared. See the 2016 RIA for a complete discussion of the methodology and data used to estimate lost gas volumes (2016 RIA at 15).

Rule Net Benefits

Multiple commenters took issue with the approach the BLM used to calculate the forgone benefits of methane emissions reductions in terms of the social cost of methane in the 2017 delay rule analysis. In particular, commenters suggested that the RIA for the delay rule: (a) Should rely on estimates of the global value of the social cost of methane and not the ''domestic-only'' value and; (b) That a 7 percent discount rate is not justifiable for use in discounting these benefits and a 3 percent discount rate would be appropriate and consistent with OMB Circular A–4. Multiple commenters also suggested that the BLM continue to use the analysis conducted by the IWG in regard to these issues. Since publication of the 2016 RIA, several documents upon which the 2016 final rule RIA relied upon have been rescinded. In particular, Section 5 of E.O. 13783, issued by the President on March 28, 2017, disbanded the earlier IWG and withdrew the Technical Support Documents upon which the 2016 RIA relied for the valuation of changes in methane emissions. It further directed agencies to ensure that estimates of the social cost of greenhouse gases used in regulatory analyses ''are based on the best available science and economics'' and are consistent with the guidance contained in OMB Circular A–4, ''including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates'' (E.O. 13783, Section 5(c)). The social cost of methane (SC–CH4) estimates used for the 2017 final delay rule analysis are interim values for use in regulatory analyses while estimates of the impacts of climate change to the U.S. are being developed.

Multiple commenters cited specific issues regarding the use of 7 percent discount rate, stating that by applying a 7 percent discount rate, the BLM is ignoring the welfare of future generations of Americans. Commenters further suggested that the use of the 3 percent discount rate is consistent with OMB Circular A–4. The BLM disagrees. The analysis presented in the RIA for the 2017 final delay rule uses both a 3 percent and a 7 percent discount rate in the above analysis. The 7 percent rate is intended to represent the average before-tax rate of return to private capital in the U.S. economy. The 3 percent rate is intended to reflect the rate at which society discounts future consumption. The use of both discount rates is consistent with the guidance contained in OMB Circular A–4.

One commenter opposed the use of the social cost of methane to analyze this rulemaking given the uncertainty and the lack of accuracy surrounding these estimates, noting that its use goes against the need to produce an analysis that is ''based on the best available science and economics.'' The commenter requested that the BLM omit benefits related to the social cost of methane. Pursuant to E.O. 12866, and in an effort to provide full transparency to the public regarding the impacts of its actions, the BLM has estimated all of the significant costs and benefits of this 2017 final delay rule to the extent that data and available methodologies permit, consistent with the best science currently available. The SC–CH4 estimates presented here are interim

values for use in regulatory analyses until an improved estimate of the impacts of climate change to the U.S. can be developed.

Several commenters stated the BLM neglected to analyze the loss of public health and safety benefits generated by the implementation of the 2016 final rule, citing OMB Circular A–4 guidance as evidence. Commenters also stated that the BLM neglected to analyze the impacts of the proposed suspension on worker safety, which was one of the purposes of the 2016 final rule. Pursuant to E.O. 12866, and in an effort to provide full transparency to the public regarding the impacts of its actions, the BLM has estimated all of the significant costs and benefits of this 2017 final delay rule to the extent that data and available methodologies permit, consistent with the best science currently available. Commenters incorrectly stated that the BLM failed to analyze non-monetized impacts. The EA, which accompanies today's action, analyzes the No-Action and Proposed Action effects on climate change, air quality, noise and light impacts, wildlife resources (threatened and endangered species and critical habitat), and socioeconomics. The EA, where appropriate, incorporates by reference the 2016 final rule EA analysis. Circular A–4 recommends approaches the agencies may take in its NEPA documents, but it does not require them.

One commenter stated that the BLM's description of impacts for the 11-year period (2017–2027) of analysis in the RIA for the 2017 final delay rule is misleading, as the reduction in the estimated compliance costs is solely due to the delay in compliance. Another commenter stated that some operators have begun compliance before the 2017 proposed delay rule will be finalized, and therefore the net cost savings of deferral will be lower than those outlined in the 2017 proposed delay rule RIA. The BLM adjusted the language in the RIA to reflect the first comment. The BLM disagrees with the second comment. For this 2017 final delay rule, the BLM tracks the shift in impacts over the first 10 years of implementation (after the delay) and compares it against the baseline. The original period of analysis in the RIA prepared for the 2016 final rule was 10 years. We note that certain impacts, such as cost savings and royalty, are different when shifted to the future. The BLM also notes that the estimated impacts attributed to a suspension or delay may be imprecise for several reasons (See RIA section 3.4). Also, while compliance with the requirements suspended or delayed by this 2017 final delay rule will not be required until January 17, 2019, BLM anticipates that operators will start undertaking compliance activities in advance of the compliance date. Although the BLM is currently considering revisions to the 2016 final rule, it cannot definitively determine what form those revisions will take until it completes the notice-and-comment rulemaking process. Therefore, for the purposes of this analysis, the BLM assumes that the 2016 final rule will be fully implemented starting in January 2019 after the suspension period ends.

Some commenters called the decision to limit the analysis timespan to 10 years arbitrary and too short and expressed concerns that other aspects of the net benefit analysis, such as the definition of the baseline and the benefits of the delay rule, result in undercounting of forgone benefits. The comment specifically stated that the BLM counted beneficial effects in year 2027 as benefits of its proposed delay even though these benefits would have occurred under the 2016 rule as methane reductions would continue. The BLM disagrees. The 10-year timeframe was not arbitrarily chosen. The BLM originally used a 10-year period of analysis in the 2016 final rule to reflect the limited life of the equipment that the rule was requiring and that the additional installations would be covered by the overlapping EPA regulations (see 40 CFR part 60, subparts OOOO or OOOOa). When comparing the 2017 final delay rule impacts to the 2016 rule, it is necessary to look at the equivalent 10 year estimated lifespan of the equipment in addition to the 1-year delay. If, instead, the impacts of the delay rule were constrained to the 10-year span used in the 2016 rule, the rule would be undervalued. If companies are still incurring costs for the delay rule in year 2027, then it is appropriate to count the social benefits that result from those costs. The omission of baseline impacts in the final year of the delay rule analysis is a result of the EPA rule taking effect (see 40 CFR part 60, subparts OOOO or OOOOa). Ascribing emission reduction benefits from the EPA rule to the BLM's 2016 final rule would be inappropriate.

Multiple commenters stated in a joint comment letter that the BLM did not consider information indicating that the costs of the 2016 final rule are actually lower than estimated in the 2016 RIA or that the benefits are actually higher than estimated in the 2016 RIA. The BLM recognizes that, despite the status of the 2016 final rule, operators are taking and will continue to take voluntary action to reduce the waste of natural gas, especially when taking action is in their best financial interest. Relying solely on a voluntary approach may not achieve the same results in a primarily oil-producing area, for oil wells, for marginal oil wells, or for marginal gas wells. The BLM also recognizes that the experiences of ''major'' operators may not be the same as small operators.

Multiple commenters disagreed with an alternative net-benefit analysis presented in the 2017 proposed-delay-rule RIA that omits monetized estimates of forgone climate benefits. In response to this and other related comments, the BLM removed the referenced alternative in the Appendix to the RIA that omitted monetized benefits.

National Impacts, Including Energy Security

Commenters stated that while the BLM acknowledges that the delay rule is expected to reduce annual royalties to the Federal Government, tribal governments, States, and private landowners, it fails to address the impacts of reduced royalty revenues to State, local and tribal governments. Another commenter noted that suspension of the 2016 final rule could indirectly impact other industries like those in the outdoor recreation and tourism sectors. Pursuant to Executive Order 12866 and NEPA, and in an effort to provide full transparency to the public regarding the impacts of its actions, the BLM has presented all of the foreseeable impacts that this 2017 final delay rule would have, based on the final analysis of the 2016 rule and to the extent that data and available methodologies permit and consistent with the best science currently available. See Section 4.4.2 of the 2017 RIA for a discussion on royalty impacts. The BLM's EA (at section 4.2.3) discusses the impacts that the 2017 final delay rule would have on recreation.

One commenter stated that the 2016 final rule promotes domestic natural gas production, which in turn supports energy security, national security, and economic productivity. Additionally, commenters stated that the 2016 final rule allows for the creation of cutting-edge technologies and field jobs that would reduce waste and increase income. The 2017 final delay rule does not substantively change the 2016 final rule, it merely postpones implementation of the compliance requirements for certain provisions of the 2016 final rule for 1 year. These comments are therefore outside the scope of this rule.

Climate Change

Several commenters cited concerns over climate change in their opposition to the BLM's proposal to delay implementation of the 2016 final rule. The commenters stated that methane is a potent GHG that contributes to global warming and that oil and gas operators should not allow methane to escape into the atmosphere. The commenters stated that climate change has been linked to negative consequences, like more severe droughts and wildfires. The commenters argued that this rule is an example of the U.S. Government taking actions that cause climate change, and that methane pollution has increased from onshore Federal leases in recent years. The commenters argued that the need to reduce methane emissions is an urgent matter and cannot be delayed.

The BLM did not change its proposal in response to these comments. The BLM estimates that the 2017 final rule will result in additional methane emissions of 175,000 tons in Year 1, but no change from the baseline for the 11-year period following the delay. We also estimate additional VOC emissions of 250,000 tons in Year 1, but no change from the baseline for the 11-year period following the delay. See section 4.2 of the 2017 RIA for a full description of the estimated reduction in benefits. As the BLM develops a proposed revision of the 2016 final rule, it will continue to evaluate and address potential environmental impacts. The BLM notes that the 2017 final delay rule will only temporarily delay the 2016 final rule's requirements. In response to concerns that methane emissions may be higher than those disclosed, the BLM notes that, while there is uncertainty in estimating the volumes of gas vented or flared, it has estimated the impacts of this 2017 final delay rule in a manner that is consistent with statute and executive orders and based on the best available information.

Air Quality and Public Health

Many commenters stated that the 2016 final rule will reduce air pollution from oil and gas production, and that subsequently delaying the implementation of the 2016 final rule poses a public health challenge, particularly to the most vulnerable populations and communities, and impacts the environment. Commenters described that the implementation of the 2016 final rule not only results in the capture of methane, but also the capture of VOC emissions, such as benzene, a known carcinogen. The commenters stated that VOC releases degrade our ambient air quality, with long-term health impacts related to the exposure of low levels of VOC emissions. The BLM acknowledges that there will be a short-term increase in the amount of methane and VOCs emitted during the 1-year delay, relative to the baseline, but there will be essentially no increase over the 11-year evaluation period (See EA Section 4.2.1 and 4.2.2 and 2017 RIA Section 4.2). While the BLM did not monetize the forgone benefits from VOC emissions reductions, it notes that the impact is transitory. The BLM will analyze the costs and benefits, which may result from any changes it proposes, in an upcoming rulemaking, to the 2016 final rule in accordance with Executive Order 13783.

One commenter stated that methane release can trigger life-threatening asthma attacks, worsen respiratory conditions, and cause cancer, which disproportionately affects Hispanic communities. The comment cited the EPA as reporting that Hispanics are among those facing the greatest risk of exposure to air pollutants and are three times more likely to die from asthma than any other racial or ethnic group. The BLM notes that the 2017 final delay rule delays or suspends implementation of the compliance requirements for certain provisions of the 2016 final rule by 1 year and is not expected to materially affect methane emissions as compared to the baseline data analyzed in the 2017 final delay rule RIA. The BLM concluded that the 2016 final rule did not lead to any significant or adverse differential environmental justice impacts (see 2016 final EA section 4.2.7). As the BLM reconsiders the 2016 final rule, in accordance with Executive Order 13783, it will continue to analyze the rule's costs and benefits, including any potential environmental justice impacts.

Rule Process

Several commenters raised concerns about lack of sufficient public engagement throughout this rulemaking process. They asked the BLM to extend the 2017 delay rule comment period to 60 days and to hold one or more public hearings, stating that the 30-day comment period was inadequate given the fundamental, highly technical, and extremely controversial changes to the benefits estimates included in the 2017 proposed delay rule.

The BLM did not change its proposal in response to these comments. The BLM believes it provided adequate public engagement throughout the process through outreach to stakeholders and a 30-day comment period. Given the narrow scope of the proposal, short delay, and recent comments on the 2016 final rule, the BLM determined a 30-day comment period to be appropriate and public meetings to be unnecessary. The 2017 final delay rule merely suspends and delays regulatory provisions that were very recently the object of public comment procedures. The public was engaged throughout this rulemaking process. The BLM received over 158,000 comments, including approximately 750 unique comments. The BLM is not required to hold public meetings for this rulemaking process.

Commenters stated that, given the lengthy 2016 final rule rulemaking process, a 2-year delay is needed to avoid unnecessary compliance costs and creating regulatory uncertainty for industry. The BLM did not change this rule in response to these comments. To reduce uncertainty, the BLM limited this 2017 final delay rule to the minimum necessary to achieve revision to the 2016 final rule, which it determined to be 1 year. The BLM has already made significant progress in developing a proposed revision of the 2016 rule and the BLM therefore fully expects that the revision will be completed and finalized before January 17, 2019.

Commenters stated that the BLM and the Secretary predetermined the outcome of this rulemaking with statements made and documents filed in Federal court. The BLM disagrees. The BLM is conducting the rulemaking process for the delay rule in accordance with the APA, and the BLM will be revising, as appropriate, the 2016 rule in accordance with the APA. Public statements about the BLM's plan to reconsider the 2016 rule and its intentions behind the proposed delay rule do not amount to final decisions made prior to conducting NEPA.

Commenters stated that the 2017 delay rule is a significant action that warrants an environmental impact statement (EIS), instead of an EA. Commenters state that the EA erroneously includes the 2016 rule implementation in the baseline, failed to analyze the impacts of the proposed action in a meaningful way, and did not include a reasonable range of alternatives. The commenters also believe that the BLM should have published a draft Finding of No Significant Impact (FONSI) for public comment, and that the FONSI does not consider both the context and intensity of the 2017 delay rule, resulting in the failure to take a hard look at localized impacts.

The BLM did not change its proposal in response to these comments. Based

upon a review of the EA and the associated documents referenced in the EA, and considering the criteria for significance provided by the Council on Environmental Quality regulations implementing the NEPA and the comments submitted on the EA, the BLM determined and detailed in the FONSI that the Proposed Action (Alternative B in the EA) will not have a significant effect on the quality of the human environment, individually or cumulatively with other actions in the potentially affected areas. Therefore, an EIS is not required. For the detailed analysis of the criteria for significance, see the FONSI accompanying today's action. NEPA and its implementing regulations do not require a public review period for the FONSI.

The fact that the BLM chose to include the expected effects of the 2016 final rule in the ''baseline'' environment does not mean that the BLM's analysis of the environmental impacts of the proposed action was inadequate. In fact, the incorporation of the 2016 final rule into the baseline environment has exactly the opposite effect. Were the BLM not to include the not-yet effective requirements of the 2016 final rule in the baseline, then the BLM's analysis of the proposed suspension action relative to the baseline would necessarily find fewer (and possibly no) impacts, as the suspension action would essentially maintain the environmental status quo.

The EA analyzed Alternative A (No Action) and Alternative B (BLM Proposed Action), which are the reasonable alternatives that would meet the purpose and need of today's action. See Section 2 of the EA for a description of each alternative. Section 2.4 of the EA describes the alternatives considered, but eliminated from further analysis. The 2017 RIA analyzed the impacts for a 6-month and 2-year delay, but they were both found to be not technically or financially feasible, therefore they were not carried forward for analysis.

Commenters stated that the 2017 delay rule is a dramatic substantive change from the 2016 final rule, and that the BLM did not follow proper procedures to make the substantive revision to the 2016 final rule prescribed in *FCC* v. *Fox Television Stations, Inc.* 556 U.S. 502, 514–16 (2009). The BLM disagrees with the commenters' characterization of the legal standard for amending regulations. As stated above, the BLM has a reasoned explanation for reconsidering the 2016 final rule and delaying implementation of certain provisions of the 2016 rule.

Commenters stated the BLM failed to meets it review/consultation requirements under the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA). The BLM disagrees. The BLM has met its review and consultation requirements for both the ESA and NHPA. As stated in section 4.1 of the EA, the BLM informally consulted with the FWS and the FWS concurred with the BLM's determination that the 2017 delay rule may affect, but is not likely to adversely affect, listed species or their associated designated critical habitat. This rulemaking is not a ''Federal undertaking'' for which the NHPA requires an analysis of effects on historic property. See 54 U.S.C. 306108 and 300320.

Technical Issues

Commenters supported the inclusion of the following provisions of the 2016 final rule in the 2017 delay rule: Section 3162.3, because the requirement is duplicative, conflicting, and/or unnecessary given existing state requirements; Section 3179.6, but the commenter provided no explanation; Section 3179.7, because it is unnecessarily complex and the gas capture percentage requirements could be obviated through other BLM efforts to facilitate pipeline development; Section 3179.9 because the requirement on operators to estimate (using estimation protocols) or measure (using a metering device) all flared and vented gas will impose significant costs; Section 3179.101, because the BLM has failed to consider the technical feasibility of the requirements; Section 3179.102, because it is technically infeasible and duplicative of EPA regulations; Section 3179.204, but the commenter provided no explanation; and Sections 3179.301–305 because the BLM overestimated the benefits and underestimated costs.

Other commenters asserted that the following provisions should not be included in the delay rule: Section 3179.102, because the provision would not require any action from most operators and therefore imposes no burden; section 3179.7, because the 2016 RIA found that the direct quantified benefits to operators that would result from capturing gas that would otherwise have been wasted outweighed the costs of the capture targets in the first 2 years that those targets apply; section 3179.10, because the delay rule provides no information on the effect of such an extension, and specifically, how much royalty revenue would be lost; sections 3179.101 and 3179.102, because the 2017 RIA does not estimate any capital costs to operators associated with these provisions; section 3179.201, because the BLM repeats the 2016 RIA findings that the cost savings to operators from compliance with the pneumatic controller requirements would substantially exceed the costs of compliance so its motives are unclear; section 3179.204, because the BLM's proposal repeats the 2016 RIA findings that the burden on the operators would be small or nonexistent; and section 3179.202 because the BLM's justification for suspension is inaccurate when describing analogous EPA regulations.

The BLM did not revise its proposal in response to these comments. This final delay rule temporarily suspends or delays almost all of the requirements in the 2016 final rule that the BLM estimated would pose a compliance burden to operators and are being reconsidered due to the cost, complexity, and other implications. The BLM has tailored the final delay rule to target the requirements of the 2016 rule for which immediate regulatory relief is particularly justified. The 2017 final delay rule does not suspend or delay the requirements in subpart 3178 related to the royalty-free use of natural gas, but the only estimated compliance costs associated with those requirements are for minor and rarely occurring administrative burdens. In addition, for the most part, the 2017 final delay rule suspends or delays the administrative burdens associated with subpart 3179. Only four of the 24 information collection activities remain, and the burdens associated with these remaining items are not substantial. See the section-by-section analysis for the BLM's specific justification for delay with regard to each provision.

One commenter stated that the 2017 RIA incorrectly assumes that suspension of the 2016 final rule will result in a return to NTL–4A. The BLM disagrees. The 2017 final rule RIA does not state nor imply an assumption that the suspension of the 2016 final rule will result in a return to NTL–4A. Several States have published regulations and policies that have the effect of limiting the waste of gas from production operations in the States where the production of oil and gas from Federal and Indian leases is most prevalent. See the 2017 RIA at 17 for a summary of these State regulations.

One commenter disagrees with the BLM's description of the requirements at 43 CFR 3179.9 as ''imposing a blanket requirement on all operators.'' The commenter notes that the 2016 final rule differentiates between flares of different volumes by establishing the threshold. The commenter's criticism of terminology does not alter the BLM's underlying point that the requirement

applies to all operators, each of whom has the duty to estimate volumes and measure the volumes if the threshold is met. Thus, the BLM disagrees with the commenter's assertion that the measurement requirements of 43 CFR 3179.9 cannot be characterized as a ''blanket'' requirement. The BLM believes that a 1-year suspension of 43 CFR 3179.9 is justified as the requirements impose immediate costs and the BLM is considering revising or rescinding the requirements of 43 CFR 3179.9. Also, the commenter refers to meters being inexpensive to install, but does not take into account all the other equipment that would be required under the 2016 final rule. See the 2016 RIA at 2 for an estimate of total costs for the 2016 final rule.

Commenters state that the reference to analogous EPA regulations as the reason for reconsidering requirements at 43 CFR 3179.201 and 43 CFR 3179.203 is inaccurate because the EPA and 2016 final rules regulate different operations. The BLM disagrees. Although 43 CFR 3179.201 and 3179.203 were designed to avoid imposing requirements that conflict with EPA's requirements, this does not mean that overlap with EPA regulations is not important to the BLM's reconsideration of the regulatory necessity of §§ 3179.201 and 3179.203. Because EPA's regulations apply to new, modified, and reconstructed pneumatic controllers and storage vessels, EPA's existing regulations will address the losses of gas from these sources as pneumatic controllers and storage vessels are installed, modified, or replaced over time and become subject to EPA's regulations. In addition, the BLM will reconsider, in an upcoming rulemaking, whether the volumes of gas that would be captured for sale under §§ 3179.201 and 3179.203 actually justify the compliance costs associated with those provisions.

III. Procedural Matters

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) will review all significant rules.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas.

This final delay rule temporarily suspends or delays portions of the BLM's 2016 final rule while the BLM reviews those requirements. We have developed this final delay rule in a manner consistent with the requirements in Executive Order 12866 and Executive Order 13563.

After reviewing the requirements of the final delay rule, the OMB has determined that the final delay rule is not an economically significant action according to the criteria of Executive Order 12866. The BLM reviewed the requirements of this final delay rule and determined that it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. For more detailed information, see the RIA prepared for this final delay rule. The RIA has been posted in the docket for the final rule on the *Federal eRulemaking Portal: https://www.regulations.gov*. In the Searchbox, enter ''RIN 1004–AE54'' and click the ''Search'' button. Follow the instructions at this Web site.

Regulatory Flexibility Act

This final delay rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The RFA generally requires that Federal agencies prepare a regulatory flexibility analysis for rules subject to the notice-and-comment rulemaking requirements under the APA (5 U.S.C. 500 *et seq.*), if the rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. *See* 5 U.S.C. 601–612. Congress enacted the RFA to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises.

The BLM reviewed the Small Business Administration (SBA) size standards for small businesses and the number of entities fitting those size standards as reported by the U.S. Census Bureau in the Economic Census. The BLM concludes that the vast majority of entities operating in the relevant sectors are small businesses as defined by the SBA. As such, this final delay rule will likely affect a substantial number of small entities.

However, the BLM believes that this final delay rule will not have a significant economic impact on a substantial number of small entities. Although the rule will affect a substantial number of small entities, the BLM does not believe that these effects will be economically significant. This final delay rule temporarily suspends or delays certain requirements placed on operators by the 2016 final rule. Operators will not have to undertake the associated compliance activities, either operational or administrative, that are outlined in the 2016 final rule until January 17, 2019, except to the extent the activities are required by State or tribal law, or by other pre-existing BLM regulations. The screening analysis conducted by the BLM estimates that the average reduction in compliance costs associated with this final delay rule will be a small fraction of a percent of the profit margin for small companies, which is not a large enough impact to be considered significant.

Small Business Regulatory Enforcement Fairness Act

This final delay rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This final delay rule:

(a) Will not have an annual effect on the economy of $100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (UMRA)

This final delay rule will not impose an unfunded mandate on State, local, or tribal governments, or the private sector of $100 million or more per year. The final delay rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. This final delay rule contains no requirements that apply to State, local, or tribal governments. It temporarily suspends or delays requirements that otherwise apply to the private sector. A statement containing the information required by the Unfunded Mandates Reform Act

(UMRA) (2 U.S.C. 1531 *et seq.*) is not required for this final delay rule. This final delay rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments, because it contains no requirements that apply to such governments, nor does it impose obligations upon them.

Governmental Actions and Interference With Constitutionally Protected Property Right—Takings (Executive Order 12630)

This final delay rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required. This final delay rule temporarily suspends or delays many of the requirements placed on operators by the 2016 final rule. Operators will not have to undertake the associated compliance activities, either operational or administrative, that are outlined in the 2016 final rule until January 17, 2019. All such operations are subject to lease terms, which expressly require that subsequent lease activities must be conducted in compliance with subsequently adopted Federal laws and regulations. This final delay rule conforms to the terms of those leases and applicable statutes and, as such, the rule is not a government action capable of interfering with constitutionally protected property rights. Therefore, the BLM has determined that this final delay rule will not cause a taking of private property or require further discussion of takings implications under Executive Order 12630.

Federalism (Executive Order 13132)

Under the criteria in section 1 of Executive Order 13132, this final delay rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism impact statement is not required.

This final delay rule will not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the levels of government. It will not apply to States or local governments or State or local governmental entities. The rule will affect the relationship between operators, lessees, and the BLM, but it does not directly impact the States. Therefore, in accordance with Executive Order 13132, the BLM has determined that this final delay rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform (Executive Order 12988)

This final delay rule complies with the requirements of Executive Order 12988. More specifically, this final delay rule meets the criteria of section 3(a), which requires agencies to review all regulations to eliminate errors and ambiguity and to write all regulations to minimize litigation. This final delay rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

Consultation and Coordination With Indian Tribal Governments (Executive Order 13175 and Departmental Policy)

The Department strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this final delay rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have identified direct effects on federally recognized Indian tribes that will result from this final delay rule. Under this final delay rule, oil and gas operations on tribal and allotted lands will not be subject to many of the requirements placed on operators by the 2016 final rule until January 17, 2019.

The BLM has conducted an appropriate degree of tribal outreach in the course of developing this final delay rule given that the rule extends the compliance dates of the 2016 final rule, but does not change the policies of that rule. On October 16 and 17, 2017, the BLM sent out 264 rule notification letters with an enclosure to tribes and tribal organizations with oil and gas interests in Alaska (27), Arizona (38), California (5), Colorado (3), District of Columbia (1), Eastern States (2), Idaho (2), Montana/Dakotas (36), New Mexico/Oklahoma/Texas (139), Nevada (1), Utah (7), and Wyoming (3). The BLM then sent 16 follow-up letters to tribes that the letters were returned with the mark ''Return to Sender'' or, during consultation, BLM was informed that the tribes had not received letters.

The BLM State Directors, as delegated, personally contacted some of the tribes by phone with significant oil and gas interests, including six tribes in Colorado, two tribes in Wyoming, five tribes in the Montanas/Dakotas and two tribes in Arizona.

Through *regulations.gov*, the BLM heard from the Ojo Encino Chapter of the Navajo Nation, the Mandan, Hidatsa, and Arakara Nation of the Fort Berthold Reservation, the Muscogee (Creek) Nation, the Navajo Nation, Counselor Chapter House, the Fort Berthold Protectors of Water and Earth, the Turtle Mountain Band of Chippewa Indians, Southwest Native Cultures, and the Thloppthlocco Tribal Town Tribal Historic Preservation Office.

The tribes raised several issues, including: Insufficient consultation; loss of royalties from not implementing the 2016 rule; the DOI Secretary, but not the BLM, has a right to regulate Indian land; and, the environmental effects to the Native populations. The tribal comments were summarized and responded to in the supplemental comments and response document and are also referenced above in the ''Comments and Responses'' section of this 2017 final delay rule.

Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3521) provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid control number. 44 U.S.C. 3512. Collections of information include requests and requirements that an individual, partnership, or corporation obtain information, and report it to a Federal agency. See 44 U.S.C. 3502(3); 5 CFR 1320.3(c) and (k).

OMB has approved the 24 information collection activities in the 2016 final rule and has assigned control number 1004–0211 to those activities. In the Notice of Action approving the 24 information collection activities in the 2016 final rule, OMB announced that the control number will expire on January 31, 2018. The Notice of Action also included terms of clearance.

The BLM requests the extension of control number 1004–0021 until January 31, 2019. The BLM also requests revisions to the burden estimates as described below.

The information collection activities in this final delay rule are described below along with estimates of the annual burdens. Included in the burden estimates are the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each component of the proposed information collection.

2. Summary of Information Collection Activities

Title: Waste Prevention, Production Subject to Royalties, and Resource

Conservation (43 CFR parts 3160 and 3170). Form 3160–5, Sundry Notices and Reports on Wells. OMB Control Number: 1004–0211.

Forms: Form 3160–3, Application for Permit to Drill or Re-enter; and Form 3160–5, Sundry Notices and Reports on Wells.

Description of Respondents: Holders of Federal and Indian (except Osage Tribe) oil and gas leases, those who belong to Federally approved units or communitized areas, and those who are parties to oil and gas agreements under the Indian Mineral Development Act, 25 U.S.C. 2101–2108.

Respondents' Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Abstract: The BLM requests the extension of control number 1004–0021 until January 31, 2019. The BLM requests no changes to the control number except this extension.

Estimated Number of Responses: 64,200.

Estimated Total Annual Burden Hours: 90,170.

Estimated Total Non-Hour Cost: None.

3. Information Collection Request

The BLM requests extension of OMB control number 1004–0211 until January 31, 2019. This extension would continue OMB's approval of the following information collection activities, with the revised burden estimates described below.

Plan To Minimize Waste of Natural Gas (43 CFR 3162.3–1)

The 2016 final rule added a new provision to 43 CFR 3162.3–1 that requires a plan to minimize waste of natural gas when submitting an Application for Permit to Drill or Re-enter (APD) for a development oil well. This information is in addition to the APD information that the BLM already collects under OMB Control Number 1004–0137. The required elements of the waste minimization plan are listed at paragraphs (j)(1) through (j)(7).

The BLM is revising the estimated burdens to operators. The BLM recently included the following annual burden estimates for APDs in a notice announcing its intention to seek renewal of control number 1004–0137, Onshore Oil and gas Operations and Production (expires January 31, 2018): 3,000 responses, 8 hours per response, and 24,000 total hours. 82 FR 42832, R 42833 (Sept. 12, 2017). The BLM will increase the estimated annual number of responses for waste minimization plans from 2,000 to 3,000, to match the estimates for APDs in control number 1004–0137, and will increase the total burden hours for APDs from 16,000 to 24,000.

Request for Approval for Royalty-Free Uses On-Lease or Off-Lease (43 CFR 3178.5, 3178.7, 3178.8, and 3178.9)

Section 3178.5 requires submission of a Sundry Notice (Form 3160–5) to request prior written BLM approval for use of gas royalty-free for the following operations and production purposes on the lease, unit or communitized area:

- Using oil or gas that an operator removes from the pipeline at a location downstream of the facility measurement point (FMP);
- Removal of gas initially from a lease, unit PA, or communitized area for treatment or processing because of particular physical characteristics of the gas, prior to use on the lease, unit PA or communitized area; and
- Any other type of use of produced oil or gas for operations and production purposes pursuant to § 3178.3 that is not identified in § 3178.4. Section 3178.7 requires submission of a Sundry Notice (Form 3160–5) to request prior written BLM approval for off-lease royalty-free uses in the following circumstances:
- The equipment or facility in which the operation is conducted is located off the lease, unit, or communitized area for engineering, economic, resource-protection, or physical-accessibility reasons; and
- The operations are conducted upstream of the FMP. Section 3178.8 requires that an operator measure or estimate the volume of royalty-free gas used in operations upstream of the FMP. In general, the operator is free to choose whether to measure or estimate, with the exception that the operator must in all cases measure the following volumes:
- Royalty-free gas removed downstream of the FMP and used pursuant to §§ 3178.4 through 3178.7; and
- Royalty-free oil used pursuant to §§ 3178.4 through 3178.7.

If oil is used on the lease, unit or communitized area, it is most likely to be removed from a storage tank on the lease, unit or communitized area. Thus, this regulation also requires the operator to document the removal of the oil from the tank or pipeline.

Section 3178.8(e) requires that operators use best available information to estimate gas volumes, where estimation is allowed. For both oil and gas, the operator must report the volumes measured or estimated, as applicable, under ONRR reporting requirements. As revisions to Onshore Oil and Gas Orders No. 4 and 5 have now been finalized as 43 CFR subparts 3174 and 3175, respectively, the final delay rule text now references § 3173.12, as well as §§ 3178.4 through 3178.7 to clarify that royalty-free use must adhere to the provisions in those sections.

Section 3178.9 requires the following additional information in a request for prior approval of royalty-free use under § 3178.5, or for prior approval of off-lease royalty-free use under § 3178.7:

- A complete description of the operation to be conducted, including the location of all facilities and equipment involved in the operation and the location of the FMP;
- The volume of oil or gas that the operator expects will be used in the operation and the method of measuring or estimating that volume;
- If the volume expected to be used will be estimated, the basis for the estimate (*e.g.,* equipment manufacturer's published consumption or usage rates); and
- The proposed disposition of the oil or gas used (*e.g.,* whether gas used would be consumed as fuel, vented through use of a gas-activated pneumatic controller, returned to the reservoir, or disposed by some other method).

Request for Approval of Alternative Capture Requirement (43 CFR 3179.8)

Section 3179.8 applies only to leases issued before the effective date of the 2016 final rule and to operators choosing to comply with the capture requirement in § 3179.7 on a lease-by-lease, unit-by-unit, or communitized area-by-communitized area basis. The regulation provides that operators who meet those parameters may seek BLM approval of a capture percentage other than that which is applicable under 43 CFR 3179.7. The operator must submit a Sundry Notice (Form 3160–5) that includes the following information:

- The name, number, and location of each of the operator's wells, and the number of the lease, unit, or communitized area with which it is associated; and
- The oil and gas production levels of each of the operator's wells on the lease, unit, or communitized area for the most recent production month for which information is available and the volumes being vented and flared from each well. In addition, the request must include map(s) showing:
- The entire lease, unit, or communitized area, and the surrounding lands to a distance and on a scale that shows the field in which the well is or will be located (if applicable),

and all pipelines that could transport the gas from the well;

• All of the operator's producing oil and gas wells, which are producing from Federal or Indian leases, (both on Federal or Indian leases and on other properties) within the map area;

• Identification of all of the operator's wells within the lease from which gas is flared or vented, and the location and distance of the nearest gas pipeline(s) to each such well, with an identification of those pipelines that are or could be available for connection and use; and

• Identification of all of the operator's wells within the lease from which gas is captured;

The following information is also required:

• Data that show pipeline capacity and the operator's projections of the cost associated with installation and operation of gas capture infrastructure, to the extent that the operator is able to obtain this information, as well as cost projections for alternative methods of transportation that do not require pipelines; and

• Projected costs of and the combined stream of revenues from both gas and oil production, including: (1) The operator's projections of gas prices, gas production volumes, gas quality (*i.e.,* heating value and H_2S content), revenues derived from gas production, and royalty payments on gas production over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less; and (2) The operator's projections of oil prices, oil production volumes, costs, revenues, and royalty payments from the operator's oil and gas operations within the lease over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less.

Notification of Choice To Comply on County- or State-Wide Basis (43 CFR 3179.7(c)(3)(ii))

Section 3179.7 requires operators flaring gas from development oil wells to capture a specified percentage of the operator's adjusted volume of gas produced over the relevant area. The ''relevant area'' is each of the operator's leases, units, or communitized areas, unless the operator chooses to comply on a county- or State-wide basis and the operator notifies the BLM of its choice by Sundry Notice (Form 3160–5) by January 1 of the relevant year.

Request for Exemption From Well Completion Requirements (43 CFR 3179.102(c) and (d))

Section 3179.102 lists several requirements pertaining to gas that reaches the surface during well completion and related operations. An operator may seek an exemption from these requirements by submitting a Sundry Notice (Form 3160–5) that includes the following information:

(1) The name, number, and location of each of the operator's wells, and the number of the lease, unit, or communitized area with which it is associated;

(2) The oil and gas production levels of each of the operator's wells on the lease, unit or communitized area for the most recent production month for which information is available;

(3) Data that show the costs of compliance; and

(4) Projected costs of and the combined stream of revenues from both gas and oil production, including: the operator's projections of oil and gas prices, production volumes, quality (*i.e.,* heating value and H_2S content), revenues derived from production, and royalty payments on production over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less.

The rule also provides that an operator that is in compliance with the EPA regulations for well completions under 40 CFR part 60, subpart OOOO or subpart OOOOa is deemed in compliance with the requirements of this section. As a practical matter, all hydraulically fractured or refractured wells are now subject to the EPA requirements, so the BLM does not believe that the requirements of this section would have any independent effect, or that any operator would request an exemption from the requirements of this section, as long as the EPA requirements remain in effect. For this reason, the BLM is not estimating any PRA burdens for § 3179.102.

Request for Extension of Royalty-Free Flaring During Initial Production Testing (43 CFR 3179.103)

Section 3179.103 allows gas to be flared royalty-free during initial production testing. The regulation lists specific volume and time limits for such testing. An operator may seek an extension of those limits on royalty-free flaring by submitting a Sundry Notice (Form 3160–5) to the BLM.

Request for Extension of Royalty-Free Flaring During Subsequent Well Testing (43 CFR 3179.104)

Section 3179.104 allows gas to be flared royalty-free for no more than 24 hours during well tests subsequent to the initial production test. The operator may seek authorization to flare royalty-free for a longer period by submitting a Sundry Notice (Form 3160–5) to the BLM.

Reporting of Venting or Flaring (43 CFR 3179.105)

Section 3179.105 allows an operator to flare gas royalty-free during a temporary, short-term, infrequent, and unavoidable emergency. Venting gas is permissible if flaring is not feasible during an emergency. The regulation defines limited circumstances that constitute an emergency, and other circumstances that do not constitute an emergency. The operator must estimate and report to the BLM on a Sundry Notice (Form 3160–5) volumes flared or vented in circumstances that, as provided by 43 CFR 3179.105, do not constitute emergencies for the purposes of royalty assessment:

(1) More than 3 failures of the same component within a single piece of equipment within any 365-day period;

(2) The operator's failure to install appropriate equipment of a sufficient capacity to accommodate the production conditions;

(3) Failure to limit production when the production rate exceeds the capacity of the related equipment, pipeline, or gas plant, or exceeds sales contract volumes of oil or gas;

(4) Scheduled maintenance;

(5) A situation caused by operator negligence; or

(6) A situation on a lease, unit, or communitized area that has already experienced three or more emergencies within the past 30 days, unless the BLM determines that the occurrence of more than three emergencies within the 30 day period could not have been anticipated and was beyond the operator's control.

Pneumatic Controllers—Introduction

Section 3179.201 pertains to any pneumatic controller that: (1) Is not subject to EPA regulations at 40 CFR 60.5360 through 60.5390, but would be subject to those regulations if it were a new or modified source; and (2) Has a continuous bleed rate greater than 6 scf per hour. Section 3179.201(b) requires operators to replace each high-bleed pneumatic controller with a controller with a bleed rate lower than 6 scf per hour, with the following exceptions: (1) The pneumatic controller exhaust is routed to processing equipment; (2) The pneumatic controller exhaust was and continues to be routed to a flare device or low pressure combustor; (3) The pneumatic controller exhaust is routed to processing equipment; or (4) The operator notifies the BLM through a Sundry Notice and demonstrates, and the BLM agrees, that such would impose

such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease.

Notification of Functional Needs for a Pneumatic Controller (43 CFR 3179.201(b)(1)–(3))

An operator may invoke one of the first three exceptions described above by notifying the BLM through a Sundry Notice (Form 3160–5) that use of the pneumatic controller is required based on functional needs that may include, but are not limited to, response time, safety, and positive actuation, and the Sundry Notice (Form 3160–5) describes those functional needs.

Showing That Cost of Compliance Would Cause Cessation of Production and Abandonment of Oil Reserves (Pneumatic Controller) (43 CFR 3179.201(b)(4) and 3179.201(c))

An operator may invoke the fourth exception described above by demonstrating to the BLM through a Sundry Notice (Form 3160–5), and by obtaining the BLM's agreement, that replacement of a pneumatic controller would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease. The Sundry Notice (Form 3160–5) must include the following information:

(1) The name, number, and location of each of the operator's wells, and the number of the lease, unit, or communitized area with which it is associated;

(2) The oil and gas production levels of each of the operator's wells on the lease, unit or communitized area for the most recent production month for which information is available;

(3) Data that show the costs of compliance;

(4) Projected costs of and the combined stream of revenues from both gas and oil production, including: The operator's projections of gas prices, gas production volumes, gas quality (*i.e.,* heating value and H_2S content), revenues derived from gas production, and royalty payments on gas production over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less; and the operator's projections of oil prices, oil production volumes, costs, revenues, and royalty payments from the operator's oil and gas operations within the lease over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less.

Showing in Support of Replacement of Pneumatic Controller Within 3 Years (43 CFR 3179.201(d))

The operator may replace a high-bleed pneumatic controller if the operator notifies the BLM through a Sundry Notice (Form 3160–5) that the well or facility that the pneumatic controller serves has an estimated remaining productive life of 3 years or less.

Pneumatic Diaphragm Pumps—Introduction

With some exceptions, § 3179.202 pertains to any pneumatic diaphragm pump that: (1) Uses natural gas produced from a Federal or Indian lease, or from a unit or communitized area that includes a Federal or Indian lease; and (2) Is not subject to EPA regulations at 40 CFR 60.5360 through 60.5390, but would be subject to those regulations if it were a new or modified source. This regulation generally requires replacement of such a pump with a zero-emissions pump or routing of the pump's exhaust gas to processing equipment for capture and sale.

This requirement does not apply to pneumatic diaphragm pumps that do not vent exhaust gas to the atmosphere. In addition, this requirement does not apply if the operator submits a Sundry Notice to the BLM documenting that the pump(s) operated on less than 90 individual days in the prior calendar year.

Showing That a Pneumatic Diaphragm Pump Was Operated on Fewer Than 90 Individual Days in the Prior Calendar Year (43 CFR 3179.202(b)(2))

A pneumatic diaphragm pump is not subject to section 3179.202 if the operator documents in a Sundry Notice (Form 3160–5) that the pump was operated fewer than 90 days in the prior calendar year.

Notification of Functional Needs for a Pneumatic Diaphragm Pump (43 CFR 3179.202(d))

In lieu of replacing a pneumatic diaphragm pump or routing the pump exhaust gas to processing equipment, an operator may submit a Sundry Notice (Form 3160–5) to the BLM showing that replacing the pump with a zero emissions pump is not viable because a pneumatic pump is necessary to perform the function required, and that routing the pump exhaust gas to processing equipment for capture and sale is technically infeasible or unduly costly.

Showing That Cost of Compliance Would Cause Cessation of Production and Abandonment of Oil Reserves (Pneumatic Diaphragm Pump) (43 CFR 3179.202(f) and (g))

An operator may seek an exemption from the replacement requirement by submitting a Sundry Notice (Form 3160–5) to the BLM that provides an economic analysis that demonstrates that compliance with these requirements would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease. The Sundry Notice (Form 3160–5) must include the following information:

(1) Well information that must include: (i) The name, number, and location of each well, and the number of the lease, unit, or communitized area with which it is associated; and (ii) The oil and gas production levels of each of the operator's wells on the lease, unit or communitized area for the most recent production month for which information is available;

(2) Data that show the costs of compliance with paragraphs (c) through (e) of § 3179.202; and

(3) The operator's estimate of the costs and revenues of the combined stream of revenues from both the gas and oil components, including: (i) The operator's projections of gas prices, gas production volumes, gas quality (*i.e.,* heating value and H_2S content), revenues derived from gas production, and royalty payments on gas production over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less; and (ii) the operator's projections of oil prices, oil production volumes, costs, revenues, and royalty payments from the operator's oil and gas operations within the lease over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less.

Showing in Support of Replacement of Pneumatic Diaphragm Pump Within 3 Years (43 CFR 3179.202(h))

The operator may replace a pneumatic diaphragm pump if the operator notifies the BLM through a Sundry Notice (Form 3160–5) that the well or facility that the pneumatic controller serves has an estimated remaining productive life of 3 years or less.

Storage Vessels (43 CFR 3179.203(c) and (d))

A storage vessel is subject to 43 CFR 3179.203(c) if the vessel: (1) Contains production from a Federal or Indian lease, or from a unit or communitized area that includes a Federal or Indian

lease; and (2) Is not subject to any of the requirements of EPA regulations at 40 CFR part 60, subpart OOOO, but would be subject to that subpart if it were a new or modified source.

The operator must determine, record, and make available to the BLM upon request, whether the storage vessel has the potential for VOC emissions equal to or greater than 6 tpy based on the maximum average daily throughput for a 30-day period of production. The determination may take into account requirements under a legally and practically enforceable limit in an operating permit or other requirement established under a Federal, State, local or tribal authority that limit the VOC emissions to less than 6 tpy.

If a storage vessel has the potential for VOC emissions equal to or greater than 6 tpy, the operator must replace the storage vessel at issue in order to comply with the requirements of this section, and the operator must

(1) Route all tank vapor gas from the storage vessel to a sales line;

(2) If the operator determines that compliance with paragraph (c)(1) of this section is technically infeasible or unduly costly, route all tank vapor gas from the storage vessel to a device or method that ensures continuous combustion of the tank vapor gas; or

(3) Submit an economic analysis to the BLM through a Sundry Notice (Form 3160–5) that demonstrates, and the BLM agrees, based on the information identified in paragraph (d) of this section, that compliance with paragraph (c)(2) of this section would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease.

To support the demonstration described above, the operator must submit a Sundry Notice (Form 3160–5) that includes the following information:

(1) The name, number, and location of each well, and the number of the lease, unit, or communitized area with which it is associated;

(2) The oil and gas production levels of each of the operator's wells on the lease, unit or communitized area for the most recent production month for which information is available;

(3) Data that show the costs of compliance with paragraph (c)(1) or (c)(2) of this section on the lease; and

(4) The operator must consider the costs and revenues of the combined stream of revenues from both the gas and oil components, including: The operator's projections of oil and gas prices, production volumes, quality (*i.e.,* heating value and H_2S content), revenues derived from production, and royalty payments on production over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less.

Downhole Well Maintenance and Liquids Unloading—Documentation and Reporting (43 CFR 3179.204(c) and (e))

The operator must minimize vented gas and the need for well venting associated with downhole well maintenance and liquids unloading, consistent with safe operations. Before the operator manually purges a well for liquids unloading for the first time after the effective date of this section, the operator must consider other methods for liquids unloading and determine that they are technically infeasible or unduly costly. The operator must provide information supporting that determination as part of a Sundry Notice (Form 3160–5). This requirement applies to each well the operator operates.

For any liquids unloading by manual well purging, the operator must:

(1) Ensure that the person conducting the well purging remains present on-site throughout the event to minimize to the maximum extent practicable any venting to the atmosphere;

(2) Record the cause, date, time, duration, and estimated volume of each venting event; and

(3) Maintain the records for the period required under § 3162.4–1 and make them available to the BLM, upon request.

Downhole Well Maintenance and Liquids Unloading—Notification of Excessive Duration or Volume (43 CFR 3179.204(f))

The operator must notify the BLM by Sundry Notice (Form 3160–5), within 30 calendar days, if:

(1) The cumulative duration of manual well purging events for a well exceeds 24 hours during any production month; or

(2) The estimated volume of gas vented in liquids unloading by manual well purging operations for a well exceeds 75 Mcf during any production month.

Leak Detection—Compliance With EPA Regulations (43 CFR 3179.301(j))

Sections 3179.301 through 3179.305 include information collection activities pertaining to the detection and repair of gas leaks during production operations. These regulations require operators to inspect all equipment covered under § 3179.301(a) for gas leaks.

Section 3179.301(j) allows an operator to satisfy the requirements of §§ 3179.301 through 3179.305 for some or all of the equipment or facilities on a given lease by notifying the BLM in a Sundry Notice (Form 3160–5) that the operator is complying with EPA requirements established pursuant to 40 CFR part 60 with respect to such equipment or facilities.

Leak Detection—Request To Use an Alternative Monitoring Device and Protocol (43 CFR 3179.302(c))

Section 3179.302 specifies the instruments and methods that an operator may use to detect leaks. Section 3179.302(d) allows the BLM to approve an alternative monitoring device and associated inspection protocol if the BLM finds that the alternative would achieve equal or greater reduction of gas lost through leaks compared with the approach specified in § 3179.302(a)(1) when used according to § 3179.303(a).

Any person may request approval of an alternative monitoring device and protocol by submitting a Sundry Notice (Form 3160–5) to the BLM that includes the following information: (1) Specifications of the proposed monitoring device, including a detection limit capable of supporting the desired function; (2) The proposed monitoring protocol using the proposed monitoring device, including how results will be recorded; (3) Records and data from laboratory and field testing, including but not limited to performance testing; (4) A demonstration that the proposed monitoring device and protocol will achieve equal or greater reduction of gas lost through leaks compared with the approach specified in the regulations; (5) Tracking and documentation procedures; and (6) Proposed limitations on the types of sites or other conditions on deploying the device and the protocol to achieve the demonstrated results.

Leak Detection—Operator Request To Use an Alternative Leak Detection Program (43 CFR 3179.303(b))

Section 3179.303(b) allows an operator to submit a Sundry Notice (Form 3160–5) requesting authorization to detect gas leaks using an alternative instrument-based leak detection program, different from the specified requirement to inspect each site semi-annually using an approved monitoring device.

To obtain approval for an alternative leak detection program, the operator must submit a Sundry Notice (Form 3160–5) that includes the following information:

(1) A detailed description of the alternative leak detection program,

including how it will use one or more of the instruments specified in or approved under § 3179.302(a) and an identification of the specific instruments, methods and/or practices that would substitute for specific elements of the approach specified in §§ 3179.302(a) and 3179.303(a);

(2) The proposed monitoring protocol;

(3) Records and data from laboratory and field testing, including, but not limited to, performance testing, to the extent relevant;

(4) A demonstration that the proposed alternative leak detection program will achieve equal or greater reduction of gas lost through leaks compared to compliance with the requirements specified in §§ 3179.302(a) and 3179.303(a);

(5) A detailed description of how the operator will track and document its procedures, leaks found, and leaks repaired; and

(6) Proposed limitations on types of sites or other conditions on deployment of the alternative leak detection program.

Leak Detection—Operator Request for Exemption Allowing Use of an Alternative Leak-Detection Program That Does Not Meet Specified Criteria (43 CFR 3179.303(d))

An operator may seek authorization for an alternative leak detection program that does not achieve equal or greater reduction of gas lost through leaks compared to the required approach, if the operator demonstrates that compliance with the leak-detection regulations (including the option for an alternative program under 43 CFR 3179.303(b)) would impose such costs as to cause the operator to cease production and abandon significant recoverable oil or gas reserves under the lease. The BLM may approve an alternative leak detection program that does not achieve equal or greater reduction of gas lost through leaks, but is as effective as possible consistent with not causing the operator to cease production and abandon significant recoverable oil or gas reserves under the lease.

To obtain approval for an alternative program under this provision, the operator must submit a Sundry Notice (Form 3160–5) that includes the following information:

(1) The name, number, and location of each well, and the number of the lease, unit, or communitized area with which it is associated;

(2) The oil and gas production levels of each of the operator's wells on the lease, unit or communitized area for the most recent production month for which information is available;

(3) Data that show the costs of compliance on the lease with the requirements of §§ 3179.301 through 305 and with an alternative leak detection program that meets the requirements of § 3179.303(b);

(4) The operator must consider the costs and revenues of the combined stream of revenues from both the gas and oil components and provide the operator's projections of oil and gas prices, production volumes, quality (*i.e.,* heating value and H_2S content), revenues derived from production, and royalty payments on production over the next 15 years or the life of the operator's lease, unit, or communitized area, whichever is less;

(5) The information required to obtain approval of an alternative program under § 3179.303(b), except that the estimated volume of gas that will be lost through leaks under the alternative program must be compared to the volume of gas lost under the required program, but does not have to be shown to be at least equivalent.

Leak Detection—Notification of Delay in Repairing Leaks (43 CFR 3179.304(b))

Section 3179.304(a) requires an operator to repair any leak no later than 30 calendar days after discovery of the leak, unless there is good cause for delay in repair. If there is good cause for a delay beyond 30 calendar days, § 3179.304(b) requires the operator to submit a Sundry Notice (Form 3160–5) notifying the BLM of the cause.

Leak Detection—Inspection Recordkeeping and Reporting (43 CFR 3179.305)

Section 3179.305 requires operators to maintain the following records and make them available to the BLM upon request: (1) For each inspection required under § 3179.303, documentation of the date of the inspection and the site where the inspection was conducted; (2) The monitoring method(s) used to determine the presence of leaks; (3) A list of leak components on which leaks were found; (4) The date each leak was repaired; and (5) The date and result of the follow-up inspection(s) required under § 3179.304. By March 31 of each calendar year, the operator must provide to the BLM an annual summary report on the previous year's inspection activities that includes: (1) The number of sites inspected; (2) The total number of leaks identified, categorized by the type of component; (3) The total number of leaks repaired; (4) The total number of leaks that were not repaired as of December 31 of the previous calendar year due to good cause and an estimated date of repair for each leak; and (5) A certification by a responsible officer that the information in the report is true and accurate.

Leak Detection—Annual Reporting of Inspections (43 CFR 3179.305(b))

By March 31 of each calendar year, the operator must provide to the BLM an annual summary report on the previous year's inspection activities that includes:

(1) The number of sites inspected;

(2) The total number of leaks identified, categorized by the type of component;

(3) The total number of leaks repaired;

(4) The total number leaks that were not repaired as of December 31 of the previous calendar year due to good cause and an estimated date of repair for each leak; and

(5) A certification by a responsible officer that the information in the report is true and accurate to the best of the officer's knowledge.

4. Burden Estimates

The following table details the annual estimated hour burdens on operators for the information activities described above. The table thus estimates the hour burdens which will not be incurred in the 1-year period from January 17, 2018, to January 17, 2019.

Type of response	Number of responses	Hours per response	Total hours (column B × column C)
A.	B.	C.	D.
Plan to Minimize Waste of Natural Gas, 43 CFR 3162.3–1, Form 3160–3	3,000	8	24,000
Request for Approval for Royalty-Free Uses On-Lease or Off-Lease, 43 CFR 3178.5, 3178.7, 3178.8, and 3178.9, Form 3160–5	50	4	200
Notification of Choice to Comply on County- or State-wide Basis, 43 CFR 3179.7(c)(3)(iii)	200	1	200
Request for Approval of Alternative Capture Requirement, 43 CFR 3179.8(b), Form 3160–5	50	16	800

Type of response	Number of responses	Hours per response	Total hours (column B × column C)
A.	B.	C.	D.
Request for Exemption from Well Completion Requirements, 43 CFR 3179.102(c) and (d), Form 3160–5	0	0	0
Request for Extension of Royalty-Free Flaring During Initial Production Testing, 43 CFR 3179.103, Form 3160–5	500	2	1,000
Request for Extension of Royalty-Free Flaring During Subsequent Well Testing, 43 CFR 3179.104, Form 3160–5	5	2	10
Reporting of Venting or Flaring, 43 CFR 3179.105, Form 3160–5	250	2	500
Notification of Functional Needs for a Pneumatic Controller, 43 CFR 3179.201(b)(1)–(3), Form 3160–5	10	2	20
Showing that Cost of Compliance Would Cause Cessation of Production and Abandonment of Oil Reserves, 43 CFR 3179.201(b)(4) and 3179.201(c) (Pneumatic Controller), Form 3160–5	50	4	200
Showing in Support of Replacement of Pneumatic Controller within 3 Years, 43 CFR 3179.201(d), Form 3160–5	100	1	100
Showing that a Pneumatic Diaphragm Pump was Operated on Fewer than 90 Individual Days in the Prior Calendar Year, 43 CFR 3179.202(b)(2), Form 3160–5	100	1	100
Notification of Functional Needs for a Pneumatic Diaphragm Pump, 43 CFR 3179.202(d), Form 3160–5	150	1	150
Showing that Cost of Compliance Would Cause Cessation of Production and Abandonment of Oil Reserves (Pneumatic Diaphragm Pump), 43 CFR 3179.202(f) and (g), Form 3160–5	10	4	40
Showing in Support of Replacement of Pneumatic Diaphragm Pump within 3 Years, 43 CFR 3179.202(h), Form 3160–5	100	1	100
Storage Vessels, 43 CFR 3179.203(c), Form 3160–5	50	4	200
Downhole Well Maintenance and Liquids Unloading Documentation and Reporting, 43 CFR 3179.204(c) and (e), Form 3160–5	5,000	1	5,000
Downhole Well Maintenance and Liquids Unloading—Notification of Excessive Duration or Volume, 43 CFR 3179.204(f), Form 3160–5	250	1	250
Leak Detection Compliance with EPA Regulations, 43 CFR 3179.301(j), Form 3160–5	50	4	200
Leak Detection Request to Use an Alternative Monitoring Device and Protocol, 43 CFR 3179.302(c), Form 3160–5	5	40	200
Leak Detection Operator Request to Use an Alternative Leak Detection Program, 43 CFR 3179.303(b), Form 3160–5	20	40	800
Leak Detection Operator Request for Exemption Allowing Use of an Alternative Leak-Detection Program that Does Not Meet Specified 43 CFR 3179.303(d), Form 3160–5	150	20	3,000
Leak Detection Notification of Delay in Repairing Leaks, 43 CFR 3179.304(a), Form 3160–5	100	1	100
Leak Detection Inspection Recordkeeping and Reporting, 43 CFR 3179.305	52,000	.25	13,000
Leak Detection Annual Reporting of Inspections, 43 CFR 3179.305(b), Form 3160–5	2,000	20	40,000
Totals	64,200		90,170

National Environmental Policy Act

The BLM prepared an environmental assessment (EA) to determine whether this final delay rule will have a significant impact on the quality of the human environment under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). The BLM has determined that this final delay rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under NEPA is not required because the BLM reached a FONSI.

The EA and FONSI have been placed in the file for the BLM's Administrative Record for the rule. The EA and FONSI have also been posted in the docket for the rule on the *Federal eRulemaking Portal: https://www.regulations.gov.* In the Searchbox, enter ''RIN 1004–AE54'' and click the ''Search'' button. Follow the instructions at this Web site.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

This final delay rule is not a significant energy action under the definition in Executive Order 13211. A statement of Energy Effects is not required.

Section 4(b) of Executive Order 13211 defines a ''significant energy action'' as ''any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of rulemaking, and notices of rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) Is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) That is designated by the Administrator of (OIRA) as a significant energy action.''

This final delay rule temporarily suspends or delays certain requirements in the 2016 final rule and reduces compliance costs in the short-term. The BLM determined that the 2016 final rule will not impact the supply, distribution, or use of energy and so the suspension or delay of many of the 2016 final rule's requirements until January 17, 2019, will likewise not have an impact on the supply, distribution, or use of energy. As such, we do not consider this final delay rule to be a ''significant energy action'' as defined in Executive Order 13211.

Authors

The principal authors of this final delay rule are: James Tichenor and Erica Pionke of the BLM Washington Office; Adam Stern of the DOI's Office of Policy and Analysis; assisted by Faith Bremner, Jean Sonneman, and Charles Yudson of the BLM's Division of Regulatory Affairs and by the

Department of the Interior's Office of the Solicitor.

List of Subjects

43 CFR Part 3160

Administrative practice and procedure; Government contracts; Indians—lands; Mineral royalties; Oil and gas exploration; Penalties; Public lands—mineral resources; Reporting and recordkeeping requirements.

43 CFR Part 3170

Administrative practice and procedure; Flaring; Government contracts; Incorporation by reference; Indians—lands; Mineral royalties; Immediate assessments; Oil and gas exploration; Oil and gas measurement; Public lands—mineral resources; Reporting and recordkeeping requirements; Royalty-free use; Venting.

Dated: December 4, 2017.

Katharine S. MacGregor,

Deputy Assistant Secretary—Land and Minerals Management, Exercising the Authority of the Assistant Secretary—Land and Minerals Management.

43 CFR Chapter II

For the reasons set out in the preamble, the Bureau of Land Management amends 43 CFR parts 3160 and 3170 as follows:

PART 3160—ONSHORE OIL AND GAS OPERATIONS

■ 1. The authority citation for part 3160 continues to read as follows:

Authority: 25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; and 43 U.S.C. 1732(b), 1733, and 1740.

■ 2. Amend § 3162.3–1 by revising paragraph (j) introductory text to read as follows:

§ 3162.3–1 Drilling applications and plans.

* * * * *

(j) Beginning January 17, 2019, when submitting an Application for Permit to Drill an oil well, the operator must also submit a plan to minimize waste of natural gas from that well. The waste minimization plan must accompany, but would not be part of, the Application for Permit to Drill. The waste minimization plan must set forth a strategy for how the operator will comply with the requirements of 43 CFR subpart 3179 regarding control of waste from venting and flaring, and must explain how the operator plans to capture associated gas upon the start of oil production, or as soon thereafter as reasonably possible, including an explanation of why any delay in capture of the associated gas would be required. Failure to submit a complete and adequate waste minimization plan is grounds for denying or disapproving an Application for Permit to Drill. The waste minimization plan must include the following information:

* * * * *

PART 3170—ONSHORE OIL AND GAS PRODUCTION

■ 3. The authority citation for part 3170 continues to read as follows:

Authority: 25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; and 43 U.S.C. 1732(b), 1733, and 1740.

■ 4. Amend § 3179.7 by revising paragraphs (b) and (c) to read as follows:

§ 3179.7 Gas capture requirement.

* * * * *

(b) Beginning January 17, 2019, the operator's capture percentage must equal:

(1) For each month during the period from January 17, 2019, to December 31, 2020: 85 percent;

(2) For each month during the period from January 1, 2021, to December 31, 2023: 90 percent;

(3) For each month during the period from January 1, 2024, to December 31, 2026: 95 percent; and

(4) For each month beginning January 1, 2027: 98 percent.

(c) The term ''capture percentage'' in this section means the ''total volume of gas captured'' over the ''relevant area'' divided by the ''adjusted total volume of gas produced'' over the ''relevant area.''

(1) The term ''total volume of gas captured'' in this section means: For each month, the volume of gas sold from all of the operator's development oil wells in the relevant area plus the volume of gas from such wells used on lease, unit, or communitized area in the relevant area.

(2) The term ''adjusted total volume of gas produced'' in this section means: The total volume of gas captured over the month *plus* the total volume of gas flared over the month from high pressure flares from all of the operator's development oil wells that are in production in the relevant area, *minus:*

(i) For each month from January 17, 2019, to December 31, 2019: 5,400 Mcf times the total number of development oil wells ''in production'' in the relevant area;

(ii) For each month from January 1, 2020, to December 31, 2020: 3,600 Mcf times the total number of development oil wells in production in the relevant area;

(iii) For each month from January 1, 2021, to December 31, 2021: 1,800 Mcf times the total number of development oil wells in production in the relevant area; and

(iv) For each month from January 1, 2022, to December 31, 2022: 1,500 Mcf times the total number of development oil wells in production in the relevant area;

(v) For each month from January 1, 2023, to December 31, 2024: 1,200 Mcf times the total number of development oil wells in production in the relevant area;

(vi) For each month from January 1, 2025, to December 31, 2025: 900 Mcf times the total number of development oil wells in production in the relevant area; and

(vii) For each month after January 1, 2026: 750 Mcf times the total number of development.

* * * * *

■ 5. Amend § 3179.9 by revising paragraph (b)(1) introductory text to read as follows:

§ 3179.9 Measuring and reporting volumes of gas vented and flared.

* * * * *

(b) * * *

(1) If the operator estimates that the volume of gas flared from a high pressure flare stack or manifold equals or exceeds an average of 50 Mcf per day for the life of the flare, or the previous 12 months, whichever is shorter, then, beginning January 17, 2019, the operator must either:

* * * * *

■ 6. Amend § 3179.10 by revising paragraph (a) to read as follows:

§ 3179.10 Determinations regarding royalty-free flaring.

(a) Approvals to flare royalty free, which are in effect as of January 17, 2017, will continue in effect until January 17, 2019.

* * * * *

■ 7. Amend § 3179.101 by adding paragraph (c) to read as follows:

§ 3179.101 Well drilling.

* * * * *

(c) The operator must comply with this section beginning January 17, 2019.

■ 8. Amend § 3179.102 by adding paragraph (e) to read as follows:

§ 3179.102 Well completion and related operations.

* * * * *

(e) The operator must comply with this section beginning January 17, 2019.

■ 9. Amend § 3179.201 by revising paragraph (d) to read as follows:

§ 3179.201 Equipment requirements for pneumatic controllers.

* * * * *

(d) The operator must replace the pneumatic controller(s) by January 17, 2019, as required under paragraph (b) of this section. If, however, the well or facility that the pneumatic controller serves has an estimated remaining productive life of 3 years or less from January 17, 2017, then the operator may notify the BLM through a Sundry Notice and replace the pneumatic controller no later than 3 years from January 17, 2017.

* * * * *

■ 10. Amend § 3179.202 by revising paragraph (h) to read as follows:

§ 3179.202 Requirements for pneumatic diaphragm pumps.

* * * * *

(h) The operator must replace the pneumatic diaphragm pump(s) or route the exhaust gas to capture or to a flare or combustion device by January 17, 2019, except that if the operator will comply with paragraph (c) of this section by replacing the pneumatic diaphragm pump with a zero-emission pump and the well or facility that the pneumatic diaphragm pump serves has an estimated remaining productive life of 3 years or less from January 17, 2017, the operator must notify the BLM through a Sundry Notice and replace the pneumatic diaphragm pump no later than 3 years from January 17, 2017.

* * * * *

■ 11. Amend § 3179.203 by revising paragraph (b) and paragraph (c) introductory text to read as follows:

§ 3179.203 Storage vessels.

* * * * *

(b) Beginning January 17, 2019, and within 30 days after any new source of production is added to the storage vessel after January 17, 2019, the operator must determine, record, and make available to the BLM upon request, whether the storage vessel has the potential for VOC emissions equal to or greater than 6 tpy based on the maximum average daily throughput for a 30-day period of production. The determination may take into account requirements under a legally and practically enforceable limit in an operating permit or other requirement established under a Federal, State, local or tribal authority that limit the VOC emissions to less than 6 tpy.

(c) If a storage vessel has the potential for VOC emissions equal to or greater than 6 tpy under paragraph (b) of this section, by January 17, 2019, or by January 17, 2020, if the operator must and will replace the storage vessel at issue in order to comply with the requirements of this section, the operator must:

* * * * *

■ 12. Amend § 3179.204 by adding paragraph (i) to read as follows:

§ 3179.204 Downhole well maintenance and liquids unloading.

* * * * *

(i) The operator must comply with this section beginning January 17, 2019.

■ 13. Amend § 3179.301 by revising paragraph (f) to read as follows:

§ 3179.301 Operator responsibility.

* * * * *

(f) The operator must make the first inspection of each site:

(1) By January 17, 2019, for all existing sites;

(2) Within 60 days of beginning production for new sites that begin production after January 17, 2019; and

(3) Within 60 days of the date when an existing site that was out of service is brought back into service and re-pressurized after January 17, 2019.

* * * * *

[FR Doc. 2017–26389 Filed 12–7–17; 8:45 a.m.]

BILLING CODE 4310–84–P

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants.

SIERRA CLUB, et al.,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as Secretary of the Interior, et al.,

Defendants.

Case Nos. 17-cv-07186-WHO; 17-cv-07187-WHO

ORDER DENYING MOTION TO TRANSFER VENUE AND GRANTING PRELIMINARY INJUNCTION

United States District Court
Northern District of California

INTRODUCTION

This case addresses the burden a federal agency bears when it seeks to suspend a federal regulation for further analysis. Plaintiffs, the States of California and New Mexico, bring this action for a preliminary injunction enjoining the United States Bureau of Land Management ("BLM"), Katherine S. Macgregor, Acting Assistant Secretary for Land and Minerals Management, and Ryan Zinke, Secretary of the Interior, from instituting a rule suspending or delaying the requirements of the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule. A coalition of 17 conservation and tribal citizen groups separately brought

suit for a preliminary injunction against Zinke, the BLM, and the United States Department of the Interior seeking the same preliminary injunction. These two cases have been consolidated for review.

The States of North Dakota and Texas, along with three industry groups, the Western Energy Alliance ("WEA"), Independent Petroleum Association of America ("IPAA"), and American Petroleum Institute ("API"), have moved to intervene in these consolidated actions in opposition to the preliminary injunction. The BLM and the States of North Dakota and Texas have also moved to transfer venue of this case to the District of Wyoming, where a case challenging the underlying rule is pending.[1]

First, I deny the motion to change venue. As discussed below, the legal issues concerning the Waste Prevention Rule in the District of Wyoming go to the substance of that regulation; this lawsuit addresses the BLM's alleged procedural failure to justify a different rule, the Suspension Rule. The legal issues are distinct. In light of plaintiffs' choice of forum, venue is appropriate here.

Second, I grant Plaintiffs' motion for a preliminary injunction. The BLM's reasoning behind the Suspension Rule is untethered to evidence contradicting the reasons for implementing the Waste Prevention Rule, and so plaintiffs are likely to prevail on the merits. They have shown irreparable injury caused by the waste of publicly owned natural gas, increased air pollution and associated health impacts, and exacerbated climate impacts. Plaintiffs are entitled to a preliminary injunction on this record.

BACKGROUND

On November 18, 2016, after three years of development, the BLM published the final version of its regulations intended "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

[1] "Plaintiffs" refers to the States of California and New Mexico as well as all 17 conservation and tribal citizen groups collectively. "BLM" refers to the named government defendants in both actions. "Defendants" refers to the named defendants in both actions as well as the proposed intervenors collectively.

Conservation: Final Rule," 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Waste Prevention Rule"). The Waste Prevention Rule became effective on January 17, 2017, with many of its requirements to be phased in over time up until January 17, 2018.

In November of 2016, two industry groups, the Western Energy Alliance and the Independent Petroleum Association of America, as well as the states of Wyoming and Montana, separately filed lawsuits challenging the Waste Prevention Rule and seeking a preliminary injunction in the U.S. District Court for the District of Wyoming. *See W. Energy All. v. Zinke*, No. 16-cv-0280 (D. Wyo. filed Nov. 15, 2016); *Wyoming v. U.S. Dep't of Interior*, No. 16-cv-0285 (D. Wyo. filed Nov. 18, 2016). The two cases were consolidated, and the states of California and New Mexico, as well as a coalition of environmental groups, including all but one of the plaintiffs in this action, intervened in the lawsuits on the side of the government. The States of North Dakota and Texas intervened on the side of the petitioners. On January 16, 2017, the court denied the motions for preliminary injunction. *See Wyoming v. U.S. Dep't of Interior*, Nos. 16-cv-0285, 16-cv-0280, 2017 WL 161428 (D. Wyo. Jan. 16, 2017).

On March 28, 2017, President Trump issued an Executive Order requiring the Secretary of the Interior to review the Waste Prevention Rule. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, § 7(b) (Mar. 28, 2017). BLM reviewed the rule and drafted a proposed Revision Rule rescinding certain provisions of the Waste Prevention Rule and substantially revising others. BLM published the proposed rule in the Federal Register today, after conclusion of its review by the Office of Information and Regulatory Affairs. *See* "Waste Prevention, Production Subject to Royalties, and Resource Conservation: Rescission or Revision of Certain Requirements," 83 Fed. Reg. 7924 (proposed Feb. 22, 2018).

In the interim, BLM developed a rule to delay for one year the effective date of the provisions of the Waste Prevention Rule that had not yet become operative and suspend for one year the effectiveness of certain provisions already in effect ("Suspension Rule").[2] 82 Fed. Reg.

[2] The parties have used various naming conventions in reference to the Waste Prevention Rule and the Suspension Rule. They shall adopt these two naming conventions for purposes of this litigation.

58,050, 58,051 (Dec. 8, 2017). BLM published the proposed Suspension Rule on October 5, 2017, and on December 8, 2017, published the final Suspension Rule. *See* 82 Fed. Reg. 46,458, 58,050. It took effect on January 8, 2018. The rule temporarily suspended or delayed certain requirements at the heart of the pending *Wyoming* litigation.

Plaintiffs in this action filed suit challenging the Suspension Rule on December 18, 2017, and moving for a preliminary injunction. *California v. BLM*, No. 17-cv-07186 (N.D. Cal. filed Dec. 19, 2017); *Sierra Club v. Zinke*, No. 17-cv-07187 (N.D. Cal. filed Dec. 19, 2017). On December 29, 2017, the court in the *Wyoming* cases stayed those cases in light of the Suspension Rule and BLM's continued efforts to revise the Waste Prevention Rule, as well as the present lawsuits, which raise procedural challenges to the Suspension Rule and seek to reinstate the Waste Prevention Rule. *Wyoming*, Nos. 16-cv-0280, 16-cv-0285 (D. Wyo. Dec. 29, 2017) [Dkt. Nos. 184, 189]. In that decision, the court explained that "it is fair to say those actions are inextricably intertwined with the cases before this Court and with the ultimate rules to be enforced." *Id.* at 4.

LEGAL STANDARD

I. Transfer of Venue

A court may transfer an action to another district "where it might have been brought" "[f]or the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). A motion for transfer lies within the broad discretion of the district court and must be determined on an individualized basis. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). Section 1404(a) requires the court to make a threshold determination of whether the case could have been brought where the transfer is sought. If venue is appropriate in the alternative venue, the court must weigh the convenience of the parties, the convenience of the witnesses, and the interest of justice. *See* 28 U.S.C. § 1404(a). In making its determination, the court may consider several factors, including: "(1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of

unwilling non-party witnesses, and (8) the ease of access to sources of proof." *Jones*, 211 F.3d at 498–99.

"The burden is on the party seeking transfer to show that when these factors are applied, the balance of convenience clearly favors transfer." *Lax v. Toyota Motor Corp.*, 65 F. Supp. 3d 772, 776 (N.D. Cal. 2014) (citing *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979)). "The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

II. Preliminary Injunction

In order to obtain a preliminary injunction, a plaintiff must demonstrate four factors: (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). While this is a four-part conjunctive test, the Ninth Circuit has held that a plaintiff may also obtain an injunction if it has demonstrated "serious questions going to the merits," that the balance of hardship "tips sharply" in its favor, that it is likely to suffer irreparable harm, and that an injunction is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011). Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

DISCUSSION

I. Motion to Transfer Venue

The parties do not dispute that the District of Wyoming is a proper venue where this action could have been brought. Instead, they dispute how the convenience and interest of justice factors should be weighed. For the following reasons, I conclude that Defendants have not met their burden to show that the balance of all of the relevant factors clearly favors transfer such that I should upset Plaintiffs' choice of forum in this district.

A. Convenience of the Parties and Witnesses

Defendants' primary argument in support of the "convenience" factors is that litigating this

case in the District of Wyoming would be more convenient because it would allow both the preceding *Wyoming* cases and this action to be litigated "in a coordinated fashion." *See Elecs. for Imaging, Inc. v. Tesseron, Ltd.*, No. 07-cv-05534 CRB, 2008 WL 276567, at *2 (N.D. Cal. Jan. 29, 2008). They point to *Electronics for Imaging*, in which a lawsuit was filed in the District of Ohio raising a patent infringement claim based on two patents. One of the defendants in that action filed a second suit in the Northern District of California for declaratory relief, seeking to determine its rights to those two (among other) patents. The Hon. Charles R. Breyer transferred the second suit to the District of Ohio, reasoning that "the pertinent question is not simply whether *this* action would be more conveniently litigated in Ohio than California, but whether it would be more convenient to litigate the California and Ohio actions separately or in a coordinated fashion." *Id.*

Those two cases each raised the issue of the parties' rights under the same two patents. This matter shares no identical issues with the *Wyoming* cases. It is true that the cases pertain to related rules, but the legal issues are distinct. *Wyoming* concerns a challenge to the Waste Prevention Rule in which the petitioners argue that BLM exceeded its authority by impermissibly encroaching on both the EPA's authority to regulate air pollution and states' regulatory authority over certain state lands, as well as that the Waste Prevention Rule is arbitrary and capricious because its cost-benefit analysis takes into consideration air pollution benefits rather focusing on waste prevention. The matter here deals with the procedural propriety of the Suspension Rule under the APA, and whether the Suspension Rule is arbitrary and capricious because, among other reasons, it does not provide the requisite detailed justification for relying on inconsistent and contradictory facts to its prior findings. This matter does not deal with any issues regarding BLM's authority to regulate air pollution, as is the focus of the *Wyoming* litigation. As the cases share no identical legal issues, there is no substantial convenience in litigating them "in a coordinated fashion" as there was in *Electronics for Imaging*. While the disposition of this matter may affect the proceedings in the *Wyoming* cases, the court's issuance of the stay in that litigation ensures that the *Wyoming* court is not wasting judicial resources or coming to a premature decision pending the outcome of this litigation.

Defendants' remaining contentions in support of the convenience factors amount to arguments that Plaintiffs cannot show that the Northern District of California is a more convenient forum. That is not Plaintiffs' burden. Defendants must show that the convenience of the parties and the witnesses favors the District of Wyoming. Defendants assert that Plaintiffs' California connections are limited and tempered by their voluntary participation in the *Wyoming* litigation, that the Northern District of California is less convenient for Defendants than the District of Wyoming, and that Wyoming has just as much interest in and ties to these cases as California. Defendants' first and third points are true but not relevant to the question of convenience. That most of the plaintiffs in this matter are litigating a case in the District of Wyoming does not somehow mean that litigating a second case there is not an additional burden or inconvenience to them. Defendants' arguments boil down to the District of Wyoming being more convenient for themselves only, due to the cost of litigating a second set of cases in this district. The transfer of venue, however, "would merely shift rather than eliminate the inconvenience" from Defendants to Plaintiffs. *Decker Coal*, 805 F.2d at 843. This is insufficient to show that the convenience of the parties and witnesses weighs in favor of transferring the case to the District of Wyoming.

B. Interest of Justice

Defendants argue that the interest of justice heavily favors transfer of these cases because of the strong interest in having a single court review issues arising out of the same rulemaking, emphasizing the District of Wyoming's familiarity with the Waste Prevention Rule. They urge the court to focus its attention on this analysis because "[t]he question of which forum will better serve the interest of justice is of predominant importance on the question of transfer, and factors involving convenience of parties and witnesses are in fact subordinate." *Wireless Consumers All., Inc. v. T-Mobile USA, Inc.*, No. 03-cv-3711-MHP, 2003 WL 22387598, at *4 (N.D. Cal. Oct. 14, 2003). In opposition, Plaintiffs argue that Defendants mischaracterize the relationship between the two actions, and that none of the legal issues before the *Wyoming* court are before this one.

As discussed above, this case and the *Wyoming* litigation involve separate legal issues. That the subject matter at the heart of both of these actions is the same is hardly grounds for transfer. Indeed, many cases may arise from a single rule or statute. But Section 1404(a) "was

designed to prevent" "a situation in which two cases involving *precisely the same issues* are simultaneously pending in different District Courts." *Elecs. for Imaging*, 2008 WL 276567, at *1 (emphasis added). It is not enough that these cases deal with and require me to become familiar with the substance of the Waste Prevention Rule; instead, Defendants must show that the two cases present the same legal questions so that litigating them separately would be a waste of judicial resources. This Defendants cannot do.

Defendants make much of the *Wyoming* court's statement that these two cases are "inextricably intertwined." *Wyoming*, Nos. 16-cv-0280, 16-cv-0285 (D. Wyo. Dec. 29, 2017) [Dkt. Nos. 184, 189] at 4. For purposes of the *Wyoming* court's decision to issue the stay, I agree that the resolution of this litigation is "inextricably intertwined . . . with the ultimate rules to be enforced" because the resolution here determines the timing of the effectiveness of the Waste Prevention Rule's provisions, and therefore which provisions the *Wyoming* court will review and the ripeness of those cases. While the cases can be said to be inextricably intertwined due to the implications on timing and effectiveness of the Waste Prevention Rule's provisions, they are otherwise substantively distinct, and the challenges to each raise unique legal questions and require the evaluation of two separate rules promulgated for different reasons.

Given the distinctions between the two cases, Defendants' arguments regarding the threat of "inconsistent judgments" are unfounded because this litigation does not require an evaluation of the Waste Prevention Rule. Defendants argue that disposition in this case will necessarily require me to review the underlying Waste Prevention Rule and evaluate its substantive provisions, as it serves as the benchmark by which the Suspension Rule will be judged. While it is true that I must review the Waste Prevention Rule insofar as I am required to determine whether, for example, the Suspension Rule rests on factual findings that contradict those underlying the Waste Prevention Rule, that is the extent to which I am required to review the Waste Prevention Rule. I need not evaluate the merits of its substance or the persuasiveness or propriety of its justifications. Indeed, I express no judgment whatsoever in this opinion on the merits of the Waste Prevention Rule. Instead, I need only look to see whether any contradictions exist between the two rules, and if so, whether the Suspension Rule provides the necessary detailed justification for such a contradiction.

For that reason, this case is distinguishable from *Bay.org v. Zinke*, Nos. 17-CV-03739-YGR, 17-CV-3742-YGR, 2017 WL 3727467 (N.D. Cal. Aug. 30, 2017). In that case, an initial suit was filed in the Eastern District of California in 2005 challenging the United States Fish and Wildlife Service's ("FWS") biological opinions supporting two water projects, which plaintiffs alleged would harm the delta smelt. *Id.* at *2. A separate case was filed in 2017 in the Northern District of California challenging the biological opinion underpinning a new FWS water project, which plaintiffs alleged "[wa]s the latest in a long line of water diversion projects and policies, including the [earlier two projects], which have had devastating effects" on the delta smelt. *Id.* at *3. Those cases required the court to make substantive determinations regarding the biological opinions for three related water projects in the same region, all challenged on similar grounds, and plaintiffs in both cases sought "an order instructing the FWS to reinstate consultation with the relevant organizations to develop different plans." *Id.* at *5. Thus, there was both "overlap in the issues" and a serious possibility for "inconsistent rulings," a concern that is not present in the instant case. Furthermore, it was more efficient for the court to promote "[c]onsistency with respect to the nature and scope of [the sought] consultations, if any." *Id.* Here, the remedy that Plaintiffs seek does not require any coordination with the *Wyoming* case.

Nor would transferring these actions aid judicial efficiency. The *Wyoming* court has already stayed those cases pending the outcomes here, and the most efficient and expedient option is for this court to proceed with the motions for preliminary injunctions, which are fully briefed and ripe for review. Granting Defendants' transfer would require refiling of all the briefing and setting of a new hearing date in the District of Wyoming, incurring delay and contributing to Plaintiffs' alleged irreparable harm.

C. Plaintiffs'' Choice of Forum

An important additional factor is the plaintiff's choice of forum.[3] Although it is not a statutory requirement, the Supreme Court has placed a strong emphasis on the plaintiff's choice of forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) ("[T]here is ordinarily a strong

[3] The parties agree that the other factors are irrelevant or neutral.

presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum."); *see also Ravelo Monegro v. Rosa*, 211 F.3d 509, 513 (9th Cir. 2000) (noting the "strong presumption in favor of a domestic plaintiff's forum choice"); *Ctr. for Biological Diversity v. McCarthy*, No. 14-cv-05138-WHO, 2015 WL 1535594, at *3 (N.D. Cal. Apr. 6, 2015) (plaintiff's" choice of forum receives substantial deference, especially when the forum is within the plaintiff's home district or state") (citing *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987)).

This forum is home to the State of California, a state sovereign, which contains a significant amount of land that stands to be affected by the outcome of this litigation. While Defendants argue that the State of Wyoming has a larger amount of federal and Indian oil and gas development impacted by the Suspension Rule, this does not diminish California's real interest. *See* Mot. at 15 ("[T]he federal minerals in the entire State of California produced 11.5 million barrels of oil and 12.2 billion cubic feet (Bcf) of natural gas."). The State of Wyoming has not sought to intervene in these cases to protect its interests.

Because Defendants have not shown that the convenience or interest of justice factors weigh strongly in favor of transfer, I will not disturb Plaintiffs' choice of venue. The most expedient result is for the case to remain in this district. Defendants' motion for transfer of venue to the District of Wyoming is DENIED.

II. Motion for Preliminary Injunction

Plaintiffs move for a preliminary injunction enjoining BLM from enforcing the Suspension Rule, effectively putting the Waste Prevention Rule back into place and requiring immediate compliance. While the parties dispute all of the elements of the preliminary injunction analysis, the most rigorous arguments focus on and the most challenging questions arise under Plaintiffs' likelihood of success on the merits. Plaintiffs raise several challenges to BLM's justifications for the Suspension Rule, contending that it is not supported by a reasoned analysis and is therefore arbitrary and capricious. These challenges, along with the arguments regarding irreparable harm, the balance of equities, and the public interest, will each be addressed in turn.

A. Likelihood of Success on the Merits

"The Administrative Procedure Act, 5 U.S.C. § 551 et seq., [] sets forth the full extent of judicial authority to review executive agency action for procedural correctness . . . ." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). It permits a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be" either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Under this standard of review, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action is "arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* "[A] court is not to substitute its judgment for that of the agency." *Fox Television Stations*, 556 U.S. at 513.

When an agency takes an action that represents a policy change, it "must show that that there are good reasons for the new policy," "[b]ut it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute [and] that there are good reasons for it . . . ." *Fox Television Stations*, 556 U.S. at 515. The Supreme Court has advised that "when, for example, [an agency's] new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank state." *Id.* at 515; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency" between agency actions is "a reason for holding an interpretation to be an arbitrary and capricious change."). "In such cases it is not that further justification is demanded by the mere fact of the policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515–16; *see also Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C. Cir. 1987) ("It is axiomatic that an agency choosing to alter its regulatory course must supply a reasoned analysis indicating its prior

policies and standards are being deliberately changed, not casually ignored.").

BLM argues that Plaintiffs conflate the Suspension Rule with the proposed future revision of the Waste Prevention Rule. I agree that I must analyze the Suspension Rule as a discrete agency action separate from any proposed future revision. Because BLM has yet to pass any future revision, its substance, validity, and procedural proprietary are not before this Court. But reviewing the Suspension Rule as a discrete action cuts both ways; while Plaintiffs may not conflate it with any future feared revision, BLM cannot use the purported proposed future revision, which has yet to be passed, as a justification for the Suspension Rule.

Any suggestion, however, that the Suspension Rule should be reviewed with less rigor than any future revision has no merit. *See Fox Television Stations*, 556 U.S. at 515. As BLM agrees with Plaintiffs that the Suspension Rule represents a substantive change in policy, *see* Opp. at 17, it is subject to the standard of review outlined by the Supreme Court in *Fox Television Stations*. BLM does not have to provide the same reasoned analysis in support of a temporary suspension that it would for a future substantive revision, but it must nonetheless provide good reasons for the Suspension Rule. To the extent that its reasoning contradicts the reasoning underlying the Waste Prevention Rule, it must be prepared to provide the requisite good reasons and detailed justification.

Under this framework, Plaintiffs argue that BLM's Suspension Rule is arbitrary and capricious for several reasons. First, they assert that BLM has failed to provide a reasoned analysis for the Suspension Rule because its stated rationales are not legitimate and its justifications are inconsistent with and not supported by the evidentiary record. They also criticize the 2017 Regulatory Impact Analysis ("RIA") underpinning BLM's cost and benefit analysis. Beyond the substance, Plaintiffs argue that the Suspension Rule is inconsistent with BLM's statutory duties and that BLM failed to provide meaningful notice and comment to the public. Each of these arguments, and Defendants' responses, will be considered in turn.

1. Whether BLM Provided A Reasoned Analysis for the Suspension Rule

Plaintiffs contend that BLM failed to provide a reasoned analysis with legitimate rationales and justifications supported by the record for the Suspension Rule. BLM's primary rationale in

the Suspension Rule is that it "has concerns regarding the statutory authority, cost, complexity, feasibility, and other implications of the [Waste Prevention] rule, and therefore wants to avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future." 82 Fed. Reg. at 58,050. BLM states that after an initial review of the Waste Prevention Rule in the spring of 2017, it concluded that certain provisions enacted just months earlier "add considerable regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." *Id.*

Plaintiffs argue that this conclusion is contrary to and inconsistent with BLM's earlier finding that the Waste Prevention Rule imposes "economical, cost-effective, and reasonable measures . . . to minimize gas waste." 81 Fed. Reg. at 83,009. Because BLM's new concerns appear to rest upon factual findings that contradict those underlying its prior policy, BLM must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox Television Stations*, 556 U.S. at 515.

As an example of the Waste Prevention Rule's considerable regulatory burden, BLM first points to operators of marginal or low-producing wells, explaining that "[t]here is newfound concern that this additional burden would jeopardize the ability of operators to maintain or economically operate these wells." 82 Fed. Reg. at 58,050. Plaintiffs argue, however, that BLM provides no analysis or factual data to support this concern. Reviewing the Suspension Rule's discussion of marginal wells, I agree with Plaintiffs. BLM states that it is "reconsidering whether it was appropriate to assume that all marginal wells would receive exemptions from the rule's requirements and whether the assumption might have masked adverse impacts of the [Waste Prevention Rule] on production from marginal wells." *Id.* at 58,051. The Suspension Rule provides no basis for this reconsideration and points to no facts casting doubt on this assumption.

In its briefing, BLM offers that marginal wells "are less likely to support additional compliance costs associated with the LDAR [leak detection and repair] requirements," and that these costs "could cause operators to shut-in marginal wells, thereby ceasing production and reducing economic benefits to local, State, tribal, and Federal governments," citing its 2017 Environmental Assessment in support. Opp. at 24 (internal quotation marks and citation omitted).

Yet the Environmental Assessment provides no citation or factual basis for that claim either, nor does it offer any more detail about what the additional compliance costs are, at what point they would cause shut-in of marginal wells, or the value of the supposed lost benefits. At the hearing on this matter, counsel for the government essentially conceded that it was in possession of no new facts or data underlying this "newfound" concern, but instead contended that it had no burden to point to any such data at this stage because BLM merely suspended the Waste Prevention Rule (as opposed to revoking or revising it). This is contrary to the law and the standard set forth by the Supreme Court under *Fox Television Stations*. Because BLM fails to point to any factual support underlying its concern, the marginal wells cannot serve as a justification for BLM's Suspension Rule.

BLM also expresses concern that certain provisions would have "a disproportionate impact on small operators." 82 Fed. Reg. at 58,051. Under the Waste Prevention Rule, BLM estimated "that average costs for a representative small operator would increase by about $55,200, which would result in an average reduction in profit margin of 0.15 percentage points." 81 Fed. Reg. at 83,013–14. It concluded that this impact was "small, even for businesses with less than 500 employees." *Id.* at 83,013. In the Suspension Rule, BLM's new analysis estimates "the potential reduction in compliance costs to be about $60,000," "result[ing] in an average increase in profit margin of 0.17 percentage points." 82 Fed. Reg. at 58,058. BLM also concludes, in its section evaluating the economic effect on small entities under the Regulatory Flexibility Act ("RFA"), that "the average reduction in compliance costs associated with this final delay rule will be a small fraction of a percent of the profit margin for small companies, which is not a large enough impact to be considered significant." *Id.* at 58,064.

Plaintiffs argue that there is no significant difference between the burden imposed by the Waste Prevention Rule and the reduction associated with the Suspension Rule, given that they both represent a fraction of a percentage point. BLM's characterizations of those savings concede as much. Given that, BLM's concern that small operators' ability to maintain or economically operator their wells would be jeopardized is unfounded. While BLM attempts to explain that its significance finding was "not made as a general determination that $60,000 savings is irrelevant

for a small business . . . , but rather as part of its analysis to determine whether it is required to prepare a regulatory flexibility analysis" per the RFA, Opp. at 23, the RFA requires BLM to evaluate whether a "rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities" so as "to ensure that government regulations do not unnecessarily or disproportionately burden small entities." 82 Fed. Reg. at 58,064. BLM does not explain how or why it could conclude that the calculated costs could be so insignificant as not to unnecessarily or disproportionately burden small entities within the meaning of the RFA, and simultaneously conclude that there would be a disproportionate effect for other purposes. Nor could it, as these two positions are entirely inconsistent. Nor does BLM attempt to show in a concrete manner how the $55,200 burden of the Waste Prevention Rule would affect small operators; BLM does not quantify how many would no longer be able to operate given the cost of compliance, nor does it provide any other metric for qualitatively evaluating the impact on small operators.[4] And even if BLM had provided such factual evidence, by itself it would not justify the Suspension Rule, as the rule is not properly tailored and does not merely suspend the Waste Prevention Rule as applied to small operators, but instead is a blanket suspension as to all operators, regardless of size. For these reasons, I agree with Plaintiffs that BLM's concerns about small operators cannot serve as a justification for the change in policy that the Suspension Rule represents.

BLM similarly expresses concern about the Waste Prevention Rule's calculation on impacts on royalties. BLM states that it is reexamining the 2016 RIA underlying the Waste Prevention Rule and its conclusion that royalty payments would increase under the Waste Prevention Rule. The basis for this reconsideration appears to be that

> [s]ome commenters were concerned that the [Waste Prevention Rule] would impact oil and gas development on tribal reservations and royalties to tribes. Some tribes are located in known shale play areas and contain large amounts of undeveloped or underdeveloped areas. In particular, the commenters suggested that the [Waste Prevention Rule] could delay drilling on or drive industry away from tribal lands, reducing income flowing to

[4] At the hearing on this matter, Defendants urged that many of these small entities were "mom and pop shops" with fewer than 15 employees. According to BLM's "Detail of Small Businesses Impacts Analysis," the average small entity reports 181 employees, and only two of the 26 examples provided had fewer than 15 employees. *See* 2016 RIA at 183.

Indian mineral owners and tribal economies.

82 Fed. Reg. at 58,059. While these commenters' concerns might be valid, BLM does not provide any factual support for their concern, explain how the Waste Prevention Rule would result in such an impact, or attempt to calculate or even estimate any quantifiable effect on royalties. This concern is directly contradicted by the 2016 RIA, which estimated a significant increase in total royalties. *See id.* at 58,057. BLM's explanation falls short of meeting the requisite reasoned analysis, let alone the "more detailed justification" required when contradictory findings are involved. *See Fox Television Stations*, 556 U.S. at 515.

Plaintiffs further criticize the Suspension Rule for reaching conclusions in support of the Suspension Rule that contradict its stated factual findings. While BLM states that some provisions of the Waste Prevention Rule would "unnecessarily encumber energy production, constrain economic growth, and prevent job creation," 82 Fed. Reg. at 58,050, it provides no support for this claim, and later states that the Suspension Rule will not "significantly impact the price, supply or distribution of energy," nor "substantially alter the investment or employment decisions of firms," *id.* at 58,057. BLM argues that these statements are taken out of context, and instead that the Suspension Rule will not significantly impact price supply, or distribution of energy worldwide because "relative changes in production compared to global levels are expected to be small." *Id.* While this may be true, BLM does not then point to any fact that justifies its assertion that the Waste Prevention Rule encumbers energy production. Its concern remains unfounded. BLM further argues that its finding regarding employment and investment decisions of firms was based on its findings in the 2016 RIA, which are under review. While this again may be true, that simply means that as of right now, the 2016 RIA remains the most recent factual finding on that point. BLM fails to point to contradictory evidence that could support an alternate conclusion.

Perhaps the BLM's best justification for the Suspension Rule is its concern that not all of the Waste Prevention Rule's provisions will survive judicial review. *See* 82 Fed. Reg. at 58,050. BLM states that the *Wyoming* court "express[ed] concerns that the BLM may have usurped the authority of the Environmental Protection Agency (EPA) and the States under the Clean Air Act, and questioned whether it was appropriate for the Waste Prevention Rule to be justified based on

its environmental and societal benefits, rather than on its resource conservation benefits alone." *Id.*; *see also Wyoming*, 2017 WL 161428, at *8, *10. Unlike several other of BLM's concerns, this one is grounded in a federal judge's reasoned skepticism outlined in a judicial order regarding the propriety of the Waste Prevention Rule. While this concern for judicial review may serve to justify a suspension or delay of specific provisions addressed by the court in order to evaluate BLM's authority with respect to EPA's, BLM concedes that the Suspension Rule was not tailored with this in mind, but rather "tailored [] to achieve its goal of relieving operators and the agency of the burden of complying with a rule that may shortly change." Opp. at 22. To the extent that BLM's concern regarding judicial review is a legitimate one, the Suspension Rule is an inappropriate response because it is not tailored to address that issue.[5]

BLM argues that for this Court to require it to provide the necessary factual underpinnings in support of the Suspension Rule, BLM would be at risk of a predetermination challenge. BLM misunderstands its burden. It need not provide a level of analysis equivalent to the Waste Prevention Rule in support of the Suspension or equivalent to any future revision rule. But it must provide at least some basis—indeed, a "detailed justification"— to explain why it is changing course after its three years of study and deliberation resulting in the Waste Prevention Rule. New facts or evidence coming to light, considerations that BLM left out in its previous analysis, or some other concrete basis supported in the record—these are the types of "good reasons" that the law seeks. Instead, it appears that BLM is simply "casually ignoring" all of its previous findings and arbitrarily changing course. *See Action for Children's Television*, 821 F.2d at 745. Given the various concerns that contradict the factual findings underpinning the Waste Prevention Rule, and BLM's failure to provide the detailed justifications necessary to explain such contradictions in support of the Suspension Rule, Plaintiffs have shown a reasonable likelihood of success on the merits of their claim that the Suspension Rule is not grounded in a reasoned analysis and is therefore arbitrary and capricious.

[5] Indeed, if BLM had not moved in June of 2017 to extend the briefing schedule by 90 days in the Wyoming litigation, that court might have completed its review of the record and resolved the BLM's concerns in this regard.

That said, I will continue to address all of the parties' arguments regarding Plaintiffs' likelihood of success on the merits.

2. Whether the Suspension Rule is Based on a Flawed RIA

Plaintiffs next contend that the Suspension Rule is based on a flawed RIA. They launch three attacks on the RIA to argue that because it improperly calculates the costs and benefits of the Waste Prevention Rule, the Suspension Rule is not the result of a reasoned analysis.

First, Plaintiffs argue that the BLM assumes that the Waste Prevention Rule will only be delayed for one year, then instituted in its current form, while BLM has made clear that it intends to rescind or revise most of the Waste Prevention Rule's suspended provisions. Regardless of BLM's plans or intentions, however, it has yet to pass a future revision. Neither Plaintiffs nor BLM nor I can say with any certainty, at this time, what form the future revision will take, if any. It would be improper for BLM to base its calculations on anything but what is known today.

Currently, after the year of the Suspension Rule is over, the Waste Prevention Rule is set to go back into effect in its unrevised form. For this reason, the RIA's assumption that the air quality and climate benefits of the Waste Prevention Rule will only be lost for one year is acceptable. What is not acceptable, however, is that the Suspension Rule then includes the reductions in compliance cost in its calculations of net benefits, as though such reductions would be permanent and no costs would be incurred in 2019 after the Suspension Rule expires and the Waste Prevention Rule is put into place. The BLM estimates such reductions to be between $110 to $114 million. *See* 2017 RIA at 37.

BLM cannot have it both ways: either the air quality and climate benefits will be lost indefinitely and not for only one year because the Waste Prevention Rule is not going into effect, and thus industry will never incur the compliance costs, or the air quality and climate benefits are lost for only one year, and there are no reductions in compliance cost because those costs are simply delayed for one year. BLM cannot base its calculations on inconsistent assumptions to inflate its calculation of the net benefits. Given this serious flaw, the RIA's calculation of total net benefits from 2017 to 2027, which depending on discount rate ranges from $19 to $52 million, *see id.* at 46, either deeply underestimates the lost air quality and climate benefits, or overestimates the

reduction in compliance costs. The total net figure is likely negative.

Plaintiffs' second argument is that BLM assumes without evidence in its calculations that no operators have undergone any compliance activities to meet the original January 17, 2018 deadlines under the Waste Prevention Rule, thereby likely overestimating the industry cost savings. The Waste Prevention Rule was effective on January 17, 2017, and in effect for the next five months before BLM attempted to postpone the rule on June 15, 2017. BLM responds that "[t]here is not [] a public count of operators who have not complied with the Waste Prevention] Rule, rendering a precise estimate of compliance cost savings elusive," and thus it determined "that many operators are not poised to comply with the [Waste Prevention] Rule," calling its determination "a judgment call." Opp. at 39. But BLM does not provide any factual basis for this arbitrary assumption. Moreover, the monetary amount that operators have already spent or will need to spend in order to come into compliance is a numerical figure capable of being determined, even if neither party has taken steps to calculate that number.

Obtaining factual, objective data and values is not subject to "judgment calls." Judgment calls are for the determination of subjective values, such as what the "best" course of action is or what constitutes reasonable doubt. Contrary to BLM's assertion, its baseless calculation of industry cost savings is not a "judgment call" entitled to deference, but rather an estimated figure that lacks a reasonable basis.

Plaintiffs' third attack on the 2017 RIA concerns BLM's failure to consider the global costs of increased methane emissions, which Plaintiffs characterize as effectively dismissing 90 percent of the associated costs. Cal. Mot. at 21. BLM justifies this change for two reasons. First, BLM argues that Executive Order 13783 directed agencies to ensure their analyses are consistent with the guidance in the Office of Management and Budget ("OMB") Circular A-4, which emphasizes that any regulatory analysis "should focus on benefits and costs that accrue to the citizens and residents of the United States." While Plaintiffs argue that the same Circular directs BLM to encompass "all the important benefits and costs likely to result from the rule," including "any important ancillary benefits," it does not specifically mandate that agencies consider global impacts. BLM also explains that since the 2016 RIA, "Section 5 of Executive Order 13793

withdrew the technical support documents on which the 2016 RIA relied for the valuation of the changes in methane emissions using a global metric." Opp. at 39. BLM has a broad mission and is in a better position than the plaintiffs to consider what constitutes an "important" benefit. It has provided a factual basis for its change in position (the OMB circular and Executive Order 13793) as well as demonstrated that the change is within its discretion, at least with respect to this aspect of the RIA.

While not all of Plaintiffs' criticisms of the 2017 RIA have merit, Plaintiffs are correct that its estimated cost savings is likely seriously inflated due to the flawed and inconsistent assumptions underpinning the compliance cost calculation and the reduction in compliance costs. These flaws in the RIA provide a separate reason that the Suspension Rule is not based on a reasoned analysis.

3. Whether BLM Failed to Consider Its Statutory Duties

Plaintiffs also argue that the Suspension Rule is arbitrary and capricious because BLM has "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 42–43, in this case, its mandated statutory duties to prevent waste of public natural resources. Plaintiffs point to BLM's earlier findings that "measures to conserve gas and avoid waste may significantly benefit local communities, public health, and the environment," 81 Fed. Reg. at 83,009, as well as that its existing regulations, dating back to 1979, were "not particularly effective in minimizing waste of public minerals," *id.* at 83,017. BLM stated that it "has independent legal and proprietary responsibilities to prevent waste in the production of Federal and tribal minerals, as well as to ensure the safe, responsible, and environmentally protective use of BLM-managed lands and resources." *Id.* at 83,018. Plaintiffs characterize the Suspension Rule, on the other hand, as undermining BLM's statutory duties without explanation, ignoring the reasons articulated for promulgation of the Waste Prevention Rule.

BLM counters that the Suspension Rule is an exercise of its broad authority, under the Mineral Leasing Act of 1920, Federal Oil and Gas Royalty Management Act of 1982, and Indian Mineral Leasing Act of 1938, which grant BLM broad authority to manage mineral development on public and Indian lands. Opp. at 27–28. Its directive under these statutes is not solely to

prevent waste of resources, but also "to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise." *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (citing S. Subcomm. of the Comm. on Interior & Insular Affairs, The Investigation of Oil and Gas Lease Practices, 84th Cong., 2d Sess. 2 (1957)). BLM points to other responsibilities as well, including to "ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands," *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1568 (10th Cir. 1984), to protect "the safety and welfare of workers," 30 U.S.C. § 187, to ensure minerals produced on public lands are sold "to the United States and to the public at reasonable prices," *id.*, "to diversify and expand the Nation's onshore leasing program to ensure the best return to the Federal taxpayer," 30 U.S.C. §226(b)(1)(C), and others. It argues that it has been delegated the authority to balance its broad range of responsibilities and is in the best position to evaluate how to weigh competing concerns.

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. The Suspension Rule, when considered as a discrete action and without guessing as to the content of any future proposed revision, does not necessarily represent an abdication of BLM's duty to prevent waste. Its effect is to delay the Waste Prevention Rule's provisions for one year, at which point the Rule is set to go into effect. Thus, Plaintiffs' contention that the Suspension Rule is arbitrary and capricious because it does not consider BLM's statutory duties fails. Simply because BLM does not fulfill its statutory duties in the manner that Plaintiffs would prefer does not mean that it failed to consider them.

4. **Whether BLM Has Prevented Meaningful Comment on the Suspension Rule**

Plaintiffs finally argue that the Suspension Rule is unlawful because it violates the basic requirement that agencies allow for meaningful comment on their proposed rules. *See* 5 U.S.C. § 553(c); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995) ("The purpose of the notice and comment requirements is to provide for meaningful public participation in the rule-making process."). Plaintiffs argue that the notice and comment in this case was not meaningful

because Secretary Zinke had already determined the outcome of the rulemaking before receiving comment and limited the scope of the rulemaking comments so as not to consider those addressing the substance of the Waste Prevention Rule or Suspension Rule.

BLM responds that "predetermination" is a high standard, citing cases arising in the context of environmental impact reviews under the National Environmental Protection Act ("NEPA"). *See* Opp. at 33. BLM cites no cases showing that this standard for predetermination, however, has ever been applied outside the context of NEPA environmental impact reviews. Instead, other circuit courts have evaluated whether comment was meaningful by evaluating whether an agency "remained 'open-minded' about the issues raised and engage[d] with the substantive responses submitted." *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 453 (3d Cir. 2011) (internal citations omitted); *Rural Cellular Ass'n v. F.C.C.*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) ("The opportunity for comment must be a meaningful opportunity, and we have held that in order to satisfy this requirement, an agency must also remain sufficiently open-minded.") (internal citations omitted).[6]

In *Prometheus Radio Project*, for example, the Third Circuit concluded that an agency did not keep the requisite open mind where a draft of the proposed rule was circulated internally two weeks before the comment period closed and before most of the comments were received, and the final vote occurred within a week of the response deadline. 652 F.3d at 453. In contrast, in *Rural Cellular*, the D.C. Circuit noted that the agency "compiled a record that included 113 sets of comments from interested parties, considered those comments" by properly taking the views of both supporters and critics into account and responding to specific critiques of the rule in the final order, and "did not issue the Order until the required rulemaking was complete. Nothing else is

[6] While these formulations are similar to that in *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008), which Plaintiffs cite in support of their argument, these cases are more directly on point because they deal specifically with the meaningfulness of the comment period under the APA, whereas *Nehemiah* and the authority it cites discuss disqualification of an official for prejudgment. As the issue of disqualification is not presently before me, I follow the standards expressed by *Prometheus Radio Project* and *Rural Cellular*. It is nonetheless worth noting, however, that in *Nehemiah*, the court explained that "[m]ere proof that the official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute is not enough to overcome the presumption that an official is objective and fair." 546 F. Supp. 2d at 847 (internal quotation marks and citation omitted).

required." 588 F.3d at 1101.

In this case, BLM has followed the required procedures and addressed specific comments in support of and in opposition to the Suspension Rule in an 89-page response. Nothing in the timeline of its process shows an impermissible predetermination or closed mindedness, as was the case in *Prometheus Radio Project*. Nor does the response to the comments suggest that BLM simply ignored the public participation in the deliberative process.

Plaintiffs' argument regarding the Secretary's limitation of the scope of the comments, however, has more merit. Secretary Zinke refused to consider comments regarding the substance or merits of the Waste Prevention Rule, determining that they were outside the scope of the Prevention Rule. For example, Secretary Zinke deemed comments asserting that the Waste Prevention Rule did not burden industry given companies' financial performance and job growth as outside the scope of the Suspension Rule. These comments, however, bear directly upon the Secretary's stated rationales for the Suspension Rule; indeed, the Suspension Rule explains that "[o]perators have raised concerns regarding the cost, complexity, and other implications of [the Waste Prevention Rule]." 82 Fed. Reg. at 58,058. The Secretary cannot, on the one hand, use concerns about cost and complexity to industry as a justification for the Suspension Rule, only to deny comments about the financial and economic burden to industry as outside the scope of the Suspension Rule, on the other.

Similarly, the Suspension Rule repeatedly expresses concerns that the Waste Prevention Rule is unnecessarily burdensome on industry, but the Secretary excluded comments that the Waste Prevention Rule "is not burdensome to operators because jobs have not been lost and [] drilling activity is increasing." Opp. at 34–35 (internal quotation marks and citations omitted). The relevant burden of the Waste Prevention Rule cannot serve as a justification for the Suspension Rule and yet at the same time be outside the scope for purposes of comment. While his actions in this case are certainly not as egregious those in *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 769 (4th Cir. 2012), the matters that the Secretary refused to consider were "not only 'relevant and important,' but were integral to the proposed agency action." For these reasons, the Secretary's content restrictions on the comments to the Suspension

Rule prevented meaningful comment on key justifications underpinning the Suspension Rule. That is insufficient to satisfy the APA.

Taking all parties' concerns into consideration, I agree with Plaintiffs that BLM has failed to provide the requisite reasoned analysis in support of the Suspension Rule, and it is therefore arbitrary and capricious within the meaning of the APA. BLM's contention that this result would mean that "an agency would never temporarily suspend a rule pending reconsideration—regardless of the costs imposed by the rule in the interim—because it would have to engage in the same level of analysis for the suspension as it would for any future substantive revision," Opp. at 36–37, is incorrect. Instead, I simply conclude that on the record before me, Plaintiffs are likely to succeed on their claim that BLM failed to consider the scope of commentary that it should have in promulgating the Suspension Rule and relied on opinions untethered to evidence, which is required to give a reasoned explanation to suspend the Waste Prevention Rule (that had an evidentiary basis).

B. Irreparable Harm

Plaintiffs argue that without a preliminary injunction of the Suspension Rule, they will suffer irreparable harm in the form of waste of publicly-owned natural gas, increased air pollution and related health impacts, exacerbated climate harms, and other environmental injury such as noise and light pollution. In order to obtain a preliminary injunction, "a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis in original). The Ninth Circuit recognizes the "well-established public interest in preserving nature and avoiding irreparable environmental injury." *Cottrell*, 632 F.3d at 1138 (internal quotation marks and citation omitted). "While . . . it would be incorrect to hold that all potential environmental injury warrants an injunction, . . . [t]he Supreme Court has instructed us that [e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (citing *Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir.2008) (en banc)).

In *League of Wilderness Defenders*, for example, the Ninth Circuit found that "the logging of thousands of mature trees" was a likely, irreparable harm that "c[ould not] be remedied easily if at all" by the "planting of new seedlings nor the paying of money damages." 537 F.3d at 764. On the other hand, in *Idaho Rivers United v. U.S. Army Corps of Eng'rs*, 156 F. Supp. 3d 1252, 1261–62 (W.D. Wash. 2015), the district court concluded that plaintiffs' assertion that "likely *potential* impacts and harm to Pacific lamprey *can* result from disturbance from dredge activities" fell short of demonstrating the requisite likely irreparable harm sufficient for the court to issue a preliminary injunction.

While Plaintiffs' assertions do not involve logging or damage to wildlife habitats, they do involve other concrete harms that BLM's own data suggests are significant and imminent. BLM estimates that the Suspension Rule *will* result in emissions of 175,000 additional tons of methane, 250,000 additional tons of volatile organic compounds, and 1,860 additional tons of hazardous air pollutants over the course of the year. 82 Fed. Reg. at 58,056–57. These numbers support Plaintiffs' concerns that the additional emissions will cause irreparable public health and environmental harm to Plaintiffs' members who live and work on or near public and tribal lands with oil and gas development. BLM characterizes the methane emissions, for example, as "infinitesimal," or "roughly 0.61 percent of the total U.S. methane emissions in 2015." Opp. at 12. But Plaintiffs submit affidavits from scientists who posit otherwise. Dr. Ilissa B. Ocko, climate scientist, states that the 175,000 additional tons of methane that will result during the one-year suspension is "equivalent to the 20-year climate impact of over 3,000,000 passenger vehicles driving for one year or over 16 billion pounds of coal burned." *See* App'x to Sierra Club Mot. at 499 ¶ 11. Dr. Renee McVay, whose research focuses on atmospheric chemistry, estimates that approximately 6,182 wells subject to the Waste Prevention Rule are located in counties already suffering from unhealthy air with elevated ozone levels. *See id.* at 786 ¶ 19. The Suspension Rule will result in additional emissions of 2,089 tons of VOCs in these already at-risk communities, where many of the conservation and tribal group plaintiffs' members reside, leading to and exacerbating impaired lung functioning, serious cardiovascular and pulmonary problems, and cancer and neurological damage. *See id.*; Sierra Club Mot. at 21.

Plaintiffs also provide several sworn affidavits from their individual members, attesting to the imminent and particularized harms from which they do and will suffer as a result of the Suspension Rule. Environmental Defense Fund member Francis Don Schreiber, for example, resides on a ranch in Governador, New Mexico, where there are 122 oil and gas wells either on or immediately adjacent to his land, all managed by BLM and subject to the Suspension Rule. *See* App'x to Sierra Club Mot. at 476–77. He notices an "extremely strong" "near-constant smell from leaking wells," which "make[s] breathing uncomfortable" and causes concern that he and his wife "are breathing harmful hydrocarbons." *Id.* at 479. As Schreiber suffers from a heart condition and has already had open heart surgery, he is "at a higher risk from breathing ozone," and is "constantly concerned about the impact of the air quality on [his] heart condition." *Id.* at 480. Plaintiffs provide similar affidavits from several other members. *See, e.g.*, *id.* at 510–16, 532–36, 562–64, 569–72, 627–31, 653–55, 717–22.

Nor does BLM dispute Plaintiffs' assertion that once such pollutants are emitted, they cannot be removed. The State of California, for example, asserts that once methane is released into the atmosphere, it contributes to irreparable harms, including a reduction in average annual snowpack (and therefore water supply), increased erosion and flooding from rising sea levels, as well as extreme weather events. *See* Cal. Mot. at 23. The State of New Mexico faces increased instances of water and electricity supply disruptions, drought, insect outbreak, and wildfire. *Id.* at 24. These are serious and irreparable harms that are directly linked to methane emissions.

Moreover, contrary to BLM's contention that increased air pollution is "incremental in nature" and does not require immediate relief, several courts, including the Supreme Court, have found that increased air pollution can constitute irreparable harm. *See, e.g.*, *Beame v. Friends of the Earth*, 434 U.S. 1310, 1314 (1977) (Marshall, J., in chambers) (recognizing "irreparable injury that air pollution may cause during [a two month] period, particularly for those with respiratory ailments); *Sierra Club v. U.S. Dep't of Agriculture, Rural Utils. Serv.*, 841 F. Supp. 2d 349, 358 (D.C. Cir. 2012) (concluding that plaintiff demonstrated irreparable harm where coal plant expansion would "emit substantial quantities of air pollutants that endanger human health and the environment"). Similar to *Sierra Club v. U.S. Department of Agriculture*, Plaintiffs have provided

affidavits from climate scientists and researchers supporting their assertions that the exposure to air pollution resulting from the Suspension Rule will have irreparable consequences for public health. *Compare Sierra Club v. U.S. Dep't of Agriculture*, 841 F. Supp. 2d at 358–59, *with* Sierra Club Mot. at 20–22. Plaintiffs have also offered affidavits from individual members showing concrete and particularized harms to respiratory health. *See Beame*, 434 U.S. at 1314. These affidavits are acceptable and sufficient to establish the requisite irreparable harm.[7]

BLM argues that Plaintiffs nonetheless cannot show that any alleged harms are "imminent" because operators are not ready to comply and will be unable to do so immediately. The relationship between these two contentions is unclear. Whether or not operators are ready to comply does not negate the imminence of Plaintiffs' harms; that operators are not currently poised to comply with the Waste Prevention Rule suggests that the harms to Plaintiffs from waste of natural gas and pollution would be even greater than estimated the longer that operators fail to comply. All the while, the wasted gas and emissions will continue to increase, leading to further irreparable harm.

Plaintiffs list several environmental injuries with effects statewide, to the general public, and on the personal level, any of which might be sufficient to establish likely irreparable harm. Considered collectively, plaintiffs easily meet their burden. Defendants' attempts to diminish these harms as merely incremental is unsupported by science as well as case law. For these reasons, I conclude that Plaintiffs have sufficiently demonstrated irreparable harm.

C. Balance of Equities and Public Interest

Finally, Plaintiffs must show that "the balance of equities tips in his favor, and that an

[7] BLM cites *Asarco, Inc. v. EPA*, 606 F.2d 1153, 1160 (9th Cir. 1980), and other cases for the proposition that the Court may not consider the "extra-record declarations" submitted by Plaintiffs "in evaluating the 'correctness or wisdom' of BLM's decision." *See* Opp. at 14 n.10. BLM is correct that it would be improper to consider these affidavits for purposes of substantive evaluation of the Suspension Rule under the APA. *See Asarco*, 606 F.2d at 1160 ("The same cases make clear that judicial consideration of evidence relevant to the substantive merits of the agency action but not included in the administrative record raises fundamentally different concerns."). I do not consider these affidavits in my analysis of the merits of the Suspension Rule and the arbitrary and capricious inquiry, as it would be inappropriate to look beyond the administrative record in so doing. The separate question of irreparable harm, however, is not limited to the administrative record, *see Sierra Club v. U.S. Dep't of Agriculture*, 841 F. Supp. 2d at 358–59, and none of the cases BLM cites discuss irreparable harm.

injunction is in the public interest." *Winter*, 555 U.S. at 20. The court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 24. All parties contend that the public benefits of their desired outcome are significant and urge the Court to find in their favor.

Plaintiffs focus on the loss of valuable natural resources through wasted gas, reduced royalties to local, state, and tribal entities, increased air pollution, the serious environmental harm to the public, as well as noise and visual nuisance. Defendants, for their part, argue that the Suspension Rule conserves the resources of operators and the agency while BLM reconsiders the Waste Prevention Rule. BLM estimates these costs to be approximately $110 to $114 million (depending on discount rates to annualize capital costs). *See* Opp. at 15. BLM also estimates that the initial upfront unrecoverable costs in 2018 would be $91 million. *Id.* They argue that "savings in compliance costs as compared to the monetized value of the increase in emissions and reduced captured gas results in a net benefit of $64–68 million, or $83–86 million depending on the discount rate used, during the suspension year." *Id.* at 15–16.

As previously discussed, these calculations are flawed because BLM assumes that compliance costs would never be incurred by industry, which is inconsistent with the Suspension Rule. Because it purports to merely suspend or delay compliance with the Waste Prevention Rule by only one year, those compliance costs are not saved, merely delayed. Even if I were to take these costs into consideration, placing these figures in context helps to understand their impact. Plaintiffs note that the average impact on individual businesses is insignificant; as previously discussed, even small operators will see an expected increase in profits of only 0.17%, a marginal amount, as a result of the Suspension Rule. Weighed against the likely environmental injury, which cannot be undone, the financial costs of compliance are not as significant as the increased gas emissions, public health harms, and pollution. *See, e.g.*, *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015) ("[I]t is well settled that economic loss does not, in and of itself, constitute irreparable harm.") (internal quotation marks and citation omitted); *accord Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1204 (9th Cir. 1980) (concluding that where plaintiff "has not shown that it will suffer any injury apart from

economic injury," its "injury is, therefore, not irreparable") (Wallace, J., concurring). Plaintiffs have demonstrated that these harms will have substantial detrimental effects on public health, and unlike economic loss, cannot be recovered. Thus, balancing the equities and considering both sides' impacts and costs, as well as the public interest, I conclude that the balance weighs in favor of granting the preliminary injunction.

Plaintiffs have provided several reasons that the Suspension Rule is arbitrary and capricious, both for substantive reasons, as a result of the lack of a reasoned analysis, and procedural ones, due to the lack of meaningful notice and comment. They have demonstrated irreparable harm and that the balance of equities and public interest strongly favor issuing the preliminary injunction sought. Because I conclude that they have met their burden on each element, I GRANT Plaintiffs' preliminary injunction enjoining enforcement of the Suspension Rule.

CONCLUSION

For the foregoing reasons, Defendants' motion to transfer venue to the District of Wyoming is denied. Plaintiffs' motion for a preliminary injunction is GRANTED.

IT IS SO ORDERED.

Dated: February 22, 2018

William H. Orrick
United States District Judge

United States District Court
Northern District of California

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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

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
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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

BRIEF IN SUPPORT OF WESTERN ENERGY ALLIANCE AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA'S PETITION FOR REVIEW OF FINAL AGENCY ACTION

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STATUTES

OTHER AUTHORITIES

Petitioners Western Energy Alliance and the Independent Petroleum Association of America (collectively, Industry Petitioners) respectfully request that the Court invalidate and remand the Bureau of Land Management's (BLM) rule related to the reduction of venting and flaring from oil and gas production on federal and Indian leases, Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, and 3170) (the Rule). The Rule exceeds BLM's statutory authority, is inconsistent with such statutory authority, and is arbitrary, capricious, and an abuse of discretion.

I. INTRODUCTION

BLM improperly relied on its authority to prevent waste under the Mineral Leasing Act of 1920, as amended, (MLA) and the Federal Oil and Gas Royalty Management Act of 1982, as amended, (FOGRMA) as cover to issue the Rule, which comprehensively regulates air emissions from all new and existing oil and gas wells developing federal and Indian leases. By doing so, BLM exceeded its statutory authority and promulgated a rule that is arbitrary and capricious, and otherwise not in accordance with law.

This Court already has recognized the Rule's fundamental flaws. Following motions and a hearing seeking a preliminary injunction, this Court determined "[t]he Rule upends the [Clean Air Act's] cooperative federalism framework and usurps the authority Congress expressly delegated under the CAA to the Environmental Protection Agency (EPA), states, and tribes to manage air quality." Order on Motions for Preliminary Injunction, No. 2:16-cv-00280-SWS, at 17 (D. Wyo. Jan. 16, 2017) (PI Order). The Court also observed that the Rule "conflicts with the statutory scheme under the CAA . . . particularly by extending its application of overlapping air quality provisions to existing facilities . . . ." *Id*. at 18. The Court described BLM as having

"hijacked the EPA's authority under the guise of waste management" and stated that "the BLM cannot use overlap to justify overreach." *Id*. at 19.

None of these fundamental flaws has changed. Therefore, under the familiar standard governing review of agency action, Petitioners respectfully request this Court confirm these holdings and strike down the Rule.

Specifically, the Court may invalidate the Rule on any of three independent grounds: (1) the Rule exceeds BLM's statutory authority; (2) the Rule is inconsistent with BLM's statutory authority; and (3) the Rule is arbitrary and capricious agency action, and abuse of discretion, and otherwise not in accordance with law. With respect to the Court's review of the first two, this Court need not defer to BLM's interpretation of its authority. Rather, the Court is well within its powers of judicial review to independently determine, without deference to the agency, that the Rule exceeds or is inconsistent with BLM's statutory authority. Although BLM enjoys general authority to regulate certain oil and gas activities on federal and Indian leases, including the prevention of waste, a clear expression of Congressional authority is required to authorize BLM's promulgation of air quality regulations. Not only do the MLA and FOGRMA lack such a clear expression of authority, the Rule is expressly precluded by another statute: the Clean Air Act (CAA), which provides exclusive authority to EPA, the states, and the tribes to regulate air quality. Moreover, the CAA prescribes specific procedures for the regulation of existing sources, all of which were ignored. In addition, the Rule improperly interprets "waste" as used in the MLA because the costs of the Rule outweigh its benefits and the Rule will strand hydrocarbons that will never be produced, thereby actually creating more waste.

The Rule should also be invalidated because it is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. The Rule imposes costs that exceed its *de*

minimis benefits once the air quality and climate change benefits—which were improperly calculated and relied on—are not considered.

II. BACKGROUND

The Rule purports to have a simple objective: to "reduce the waste of natural gas from mineral leases administered by the BLM." VF_0000361. On its face, the Rule updates BLM's Notice to Lessees (NTL) 4A, which specified when operators could vent or flare gas from oil and gas operations without incurring a royalty obligation and defined when gas may be used royalty-free for a beneficial lease purpose. VF_0003796–VF_0003800; PI Order at 3–4.

In substance, however, the Rule regulates air quality and greenhouse gas emissions by limiting emissions of methane and criteria pollutants from oil and natural gas production. The Rule most conspicuously regulates air quality by applying EPA's regulations at 40 C.F.R. Part OOOOa (Quad Oa), which address methane emissions from new and modified oil and gas facilities, to existing facilities on federal and Indian leases. As with Quad Oa, the Rule requires oil and natural gas operators to limit emissions from well completions, implement Leak Detection and Repair (LDAR) programs to identify and address leaks of fugitive emissions from certain production equipment, replace pneumatic controllers and pneumatic diaphragm pumps with equipment meeting the Rule's specifications, and control gas from storage vessels.[1] 43 C.F.R. §§ 3179.102, 3179.201 – 3179.203, 3179.301 – 3179.305; *see* VF_0223507–VF_0223508. The similarities to Quad Oa are no coincidence; BLM coordinated extensively with EPA in enacting the Rule. *See, e.g.*, VF_0156727; VF_0157236; VF_0157244; VF_0157464; VF_0157769; VF_0158245; VF_0162820; VF_0189411; VF_0189891;

[1] BLM recognized the parallels between the Rule and Quad Oa in Exhibit C attached to its Consolidated Opposition to Petitioners' and Petitioner-Intervenor's Motions for Preliminary Injunction, Dkt. No. 70.

VF_0204597; VF_0223301; *see also* VF_0188622 (comparing the Rule with Quad Oa Regulations). In addition, the Rule curbs flaring and limits emissions from well drilling, initial production and subsequent well tests, downhole well maintenance, and liquids unloading. *Id.* C.F.R. §§ 3179.7, 3179.101, 3179.103, 3179.104, 3179.204.

As an afterthought, the Rule redefines those uses of production for lease operations without royalty consequences, *see* 43 C.F.R. part 3178. Even though the Government Accountability Office (GAO) and the Department of the Interior's Inspector General recommended that BLM update its regulations regarding royalty-free use of production, VF_0000369, BLM failed to highlight these changes in the Rule's preamble and instead touted the Rule's climate change benefits. *See* VF_0000365 (heading "Other Provisions").

The White House's release of a Strategy to Reduce Methane Emissions in 2014 put the Rule into motion as part of the White House's 2013 Climate Action Plan.[2] *See* VF_0021020; VF_0000617 ("this action responds to . . . the Administration's priorities under the President's Climate Action Plan"). The strategy called for "updated standards to reduce venting and flaring from oil and gas production on public lands" as part of a "targeted strategy" to "cut methane emissions from a number of key sources." VF_0021022–VF0021023. Although the Rule purports to implement recommendations contained in 2008 and 2010 reports from GAO,[3] *see*

[2] Both the methane strategy and Climate Action plan have been rescinded and are not current federal policy. *See* Executive Order No. 13,783 of March 28, 2017, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 § 3(b) (Mar. 31, 2017).

[3] In contrast, BLM has disregarded other GAO recommendations regarding management of natural gas emissions. For example, although GAO recommended that BLM provide guidance on estimating natural gas emissions and that the Office of Natural Resources Revenue (ONRR) improve reporting of vented, flared, and royalty-free gas, VF_0000369; VF_0019908, neither BLM nor ONRR have implemented these recommendations. *See, e.g.*, 43 C.F.R. § 3178.8(e) (directing operators to estimate gas volumes using only "the best available information").

VF_0000362, it is inescapable that BLM only initiated the Rule after release of the White House's methane strategy. *See* VF_0000362 (noting stakeholder forums in 2014). Ultimately, the Rule's development and timing reveals a politically driven purpose of addressing climate change, not preventing waste.

Using this Rule to combat climate change is not rational given the miniscule methane reductions attributed to its implementation. The Rule purports to reduce global methane emissions by approximately 0.061 percent and overall global greenhouse gas emissions by approximately 0.0092 percent, an insignificant amount.[4] *See* VF_0033543; VF_0000553. Additionally, although BLM frequently cites data reflecting increases in the aggregate amount of gas flared from oil and natural gas wells, *see* VF_0000366, overall methane emissions from natural gas and petroleum systems have decreased since 1990 despite a "dramatic" increase in oil and natural gas production over the last decade, *id.*; VF_0016867.

Meanwhile, BLM ignored the most significant cause of flaring: lack of infrastructure to transport or process gas produced with oil. *See* VF_0019882. The Rule does nothing to permit the construction of infrastructure, which would directly reduce flaring. *See, e.g.*, VF_0034320–VF_0034321; VF_0034274. Instead, the Rule reflects BLM's zeal to achieve political objectives while ignoring the root cause of the problem (infrastructure) and the reductions operators are already achieving. Compounding these problems further, if allowed to remain in effect, the Rule would impose costly air quality requirements to existing sources on federal and Indian lands, without similar requirements being applied to sources on nonfederal lands, thus putting federal

[4] Given that BLM framed the monetary benefits of the Rule in terms of global social benefits using the social cost of methane, it is appropriate and instructive to place the actual emission reductions in a global context. *See* VF_0000553 – VF_0000560. In this context, the Rule's benefits in terms of global methane and greenhouse gas emissions reductions are effectively zero.

and tribal production at a serious disadvantage to nonfederal production. A decision by this Court upholding the Rule would mark the first time a court has sanctioned any federal agency other than EPA to promulgate comprehensive air quality regulations. For these and other reasons Petitioners request that the Court vacate the Rule and remand to the agency.

III. ARGUMENT

The Administrative Procedure Act (APA) requires a court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2). A court must conduct a "substantial inquiry" when reviewing agency action under the APA. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)). The Rule must be set aside under these tests because it suffers three fundamental flaws.

First, the Rule exceeds the scope of BLM's statutory authority to manage waste under the MLA and FOGRMA because Congress has not granted BLM the authority to regulate air quality.[5] *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161

[5] BLM also asserts that a patchwork of statutes other than the MLA and FOGRMA provide authority for the Rule, including the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1785, Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351–360; Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–g; Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–2108; Act of March 3, 1909, 25 U.S.C. § 396. VF_000361. Industry Petitioners continue to dispute BLM's claims of authority under these statutes and agree with this Court's conclusion that "[a]t its core, FLPMA is a land use planning statute." PI Order at 15 n.7 (citing 43 U.S.C. § 1712; *Rocky Mtn. Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 739 (10th Cir. 1982); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 57 (2004); 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)).

(2000) ("an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress"). Second, the Rule is inconsistent with BLM's authority to regulate "waste" under the MLA. Finally, the Rule constitutes arbitrary and capricious agency decisionmaking. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (requiring a rational connection between the facts found and choice made). As a threshold matter, in considering these arguments, the Court is not required to afford deference to BLM's interpretation of its statutory authority. *See Chevron USA, Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 844 (1984).

A. BLM's Interpretation of its Authority to Manage Waste is Not Entitled to *Chevron* Deference.

To determine whether Congress has granted BLM statutory authority to issue the Rule, this Court need not defer to BLM's own interpretation of its statutory authority. Under the *Chevron* doctrine, "a reviewing court must first ask whether Congress has directly spoken to the precise question at issue." *Brown & Williamson*, 529 U.S. at 132. If so, "the court must give effect to the unambiguously expressed intent of Congress." *Id.* If not, "a reviewing court must respect the agency's construction of the statute so long as it is permissible." *Id.*

There are two reasons BLM does not receive deference here. First, because Congress did not delegate authority to regulate air quality to BLM, and review of BLM's attempt to do so in this Rule raises questions of "deep economic and political significance," the Court should not defer to BLM regarding the scope of its statutory authority. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (citing *Brown & Williamson*, 529 U.S. at 159). It is unnecessary to even wade into the "*Chevron* abyss." *See* PI Order at 12. Second, even if a *Chevron* analysis is applied, Congress has directly and unambiguously granted exclusive jurisdiction to regulate air quality to

EPA and the states and the Rule conflicts with this unambiguous intent. Furthermore, BLM's interpretation of its waste authority under the MLA and FOGRMA is impermissible.

1. *Chevron Does Not Apply because the Rule Has Deep Economic and Political Significance.*

This Court may conclude the Rule exceeds BLM's statutory authority without applying a *Chevron* analysis. The United States Supreme Court has explained that *Chevron* does not apply when interpretation of a central part of a statutory scheme raises questions of "deep" or "vast" "economic and political significance." *King*, 135 S. Ct. at 2488-89; *Util. Air. Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2444 (2014) (*UARG*). The Court reasoned that, on issues of such importance, if "Congress wished to assign that question to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489; *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). This is "especially" true when an agency "has no expertise" in the matter. *King*, 135 S. Ct. at 2489. Moreover, where an agency "claims to [have] discover[ed] in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" the Court must "greet the agency's announcement with a measure of skepticism." *UARG*, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 160).

The Rule falls within the *King* and *UARG* line of cases to which *Chevron* deference does not apply. Decisions of "vast economic and political significance" arise when an agency asserts jurisdiction to regulate "tens of thousands" of sites, affecting the "operations of millions." *UARG*, 134 S. Ct. at 2444. Similarly, an agency action rises to the level of "deep economic and political significance" if it concerns the expenditure of substantial money. *King*, 135 S. Ct. at 2489 ("involving billions of dollars"). In such cases, rather than defer to the agency, it is the

Court's obligation to read the words of a statute "in their context and with a view to their place in the overall statutory scheme." *King*, 135 S. Ct. at 2483–84; *UARG* at 2444. The statute relied upon by the agency must "speak clearly" to and authorize the agency's action. *UARG*, 134 S. Ct. at 2444.

Here, the Rule represents a novel and transformative expansion of BLM's regulatory jurisdiction under the MLA and FOGRMA that imposes substantial burdens across a significant portion of the nation's oil and gas sector. BLM estimates the Rule will impose costs between one and two billion dollars over the next decade, VF_0000551—a cost Petitioners believe is vastly underestimated, *see* VF_0033613. The Rule reaches every new and all 96,000 existing onshore oil and natural gas wells located on the 700 million acres of subsurface estate administered by BLM. VF_0000361. The Rule also has important political significance, serving as a key pillar of the prior administration's climate change agenda. VF_0000366; VF_0000373; *see* VF_0182878 (receiving approximately 330,000 public comments). Therefore, based on BLM's own characterization, the Rule is significant and sweeping in its reach and effect.

Accordingly, this Court must be satisfied that BLM has clear and express Congressional authority for the Rule. Neither MLA nor FOGRMA reflect any Congressional intent, much less clear intent, to regulate air quality. Meanwhile, the CAA is abundantly clear in granting exclusive authority for such regulation to EPA and the states. *See* Section III.B., *infra*. Thus, the Court may overturn the Rule without applying a *Chevron* analysis.

2. *Even if the Court Applies a Chevron Analysis, BLM Receives No Deference Because Congress Delegated Air Quality Regulatory Authority to EPA, the States, and Tribes.*

BLM's reliance on its general authority to manage waste of oil and gas as authorization to regulate air quality warrants no deference from this Court. "A precondition to deference under Chevron is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*,

494 U.S. 638, 649 (1990). Here, Congress has granted exclusive jurisdiction over air quality to EPA, the states, and the tribes through the CAA. Furthermore, although "the delegation of general authority" may authorize regulation that extends into matters "within the agency's substantive field," this Court has already recognized that the protection of air quality is "expressly within the substantive field of the EPA and states pursuant to the [CAA]." *See* PI Order at 14-15 (citing *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1109 (10th Cir. 2015). Thus, BLM cannot use its general waste authority to authorize air quality regulations because doing so is not within BLM's substantive field. Instead, BLM must point to specific and clear direction from Congress, which it has not and cannot do. *See* VF_0000371-373 (citing only general authority under the MLA, FOGRMA and others).

Courts also "expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos v. United States*, 547 U.S. 715, 738 (2006); *accord Am. Bar Ass'n v. Fed. Trade Comm'n*, 430 F.3d 457, 471-72 (D.C. Cir. 2005). Congress declared in the CAA, as matter of national policy, that "pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). In comparison, the MLA authorizes BLM, among other things, 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 act, and to "use all reasonable precautions to prevent waste." PI Order at 13-14; VF_0000372. These are not the kind of "clear and manifest" Congressional statements required to encroach upon the states' established authority under the CAA to regulate air quality. *See Rapanos*, 547 U.S. at 738 ("we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity."). Because there is no clear and manifest

Congressional authority, this Court owes no deference to BLM regarding how far the agency thinks it can stretch its waste prevention authority.

Finally, BLM does not possess authority to regulate air quality simply because Congress has not expressly forbidden such regulation. "To suggest . . . that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent." *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994); *accord Am. Bar Ass'n*, 430 F.3d at 468 ("Plainly, if we were to presume a delegation of power from the absence of an express withholding of such power, agencies would enjoy virtually limitless hegemony." (internal quotations omitted)). Therefore, BLM may not regulate air quality simply because "Congress has not directly announced that the precise activity in question not be subject to federal regulation." PI Order at 12.

For these reasons, even under a *Chevron* analysis, the Court may independently determine, without deference to BLM's interpretation, that the agency acted outside of its authority by enacting the Rule. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

B. <u>The Rule Exceeds BLM's Statutory Authority.</u>

Under *Olenhouse*, the Rule exceeds BLM's statutory authority by intruding on the exclusive jurisdiction of EPA, the states, and the tribes under the CAA and conflicts in fundamental respects with the CAA's procedures for regulating existing sources—unlawful actions that cannot be cured through inter-agency coordination.

1. *The Rule Usurps the Exclusive Jurisdiction Given to EPA, the States, and Tribes Under the CAA.*

"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). Further, "it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'"[6] *Adams Fruit*, 494 U.S. at 650 (citation omitted).

The CAA provides exclusive authority to EPA, the states, and the tribes to regulate air quality—a core principle this Court previously acknowledged.[7] *See* PI Order at 15 ("the protection of air quality [] is expressly within the substantive field of the EPA and states pursuant to the [CAA]" (internal quotations and italics omitted)). At no point have Congress or the courts strayed from this core principle or otherwise sanctioned a federal agency other than EPA to take the kind of regulatory action BLM has taken here. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602 n.14 (2014); *Oklahoma v. EPA*, 723 F.3d 1201, 1204 (10th Cir. 2013) (recognizing the CAA's cooperative federalism framework); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3rd Cir. 2013) ("The [CAA] is a comprehensive federal law that regulates air emissions under the auspices of the [EPA]").

[6] One court has already rejected BLM's attempt to bootstrap its MLA authority into broader regulatory jurisdiction than BLM possesses. *See Chapman v. El Paso Nat. Gas Co.*, 204 F.2d 46, 51 (D.C. Cir. 1953) (holding that the MLA did not grant BLM authority to regulate pipelines as common carriers finding that "[h]ad Congress desired the Secretary to enter upon such comprehensive supervision . . . it would have expressed its desire more clearly and in more detail.").

[7] Although Congress acknowledged a role for Federal Land Managers such as BLM in the CAA, their authority is extremely narrow and limited to notice, coordination, and consultation and only in certain circumstances or geographic locations. *See, e.g.*, 42 U.S.C. §§ 7475(d), 7421, and 7491.

Consistent with this overwhelming and clear precedent, this Court stated that 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." PI Order at 17 (citing *Texas v. U.S. EPA*, 690 F.3d 670, 674-75 (5th Cir. 2012) (emphasis added)); *see also id*. at 19 ("[BLM] hijacked the EPA's authority under the guise of waste management.") (citing AR 371 (81 Fed. Reg. at 83,019) (emphasis added)). Accordingly, the record in this case already is sufficient for the Court to strike down the Rule as outside of BLM's authority. *Olenhouse*, 42 F.3d at 1574. In fact, a holding to the contrary would mark the first time any court has authorized a federal agency other than EPA to separately promulgate and administer comprehensive air quality regulations.

2. *The Rule Directly Conflicts with the Clean Air Act by Regulating Existing Sources.*

The Rule uses waste prevention as a guise to comprehensively regulate air quality and, in the process, entirely skips, and conflicts with, the required procedures under § 7411(d) of the CAA for regulating existing sources. The Rule's impact on existing sources is difficult to understate; 85 percent of the facilities subject to the Rule are low-producing, existing wells. VF_0000381. This is intentional. The Obama administration's Climate Action Plan and methane strategy goal of 40 to 45 percent reductions in methane emissions from the oil and gas sector is only possible by regulating existing wells. VF_0205318, 0205327 ("Fully attaining the Administration's goal will require additional action, particularly with respect to existing sources of methane emissions."). In the wake of these executive mandates, however, the inconvenience for EPA and the states to properly follow the 111(d) process became evident. Apparently the solution chosen was for BLM to bypass 111(d) altogether. Instead, given the "length of [the 111(d)] process and uncertainty regarding the final outcome," BLM settled on the more

expedient route of regulating methane emissions from existing oil and natural gas facilities in this "waste" Rule. VF_0000371.

Federal agencies, however, do not derive authority through administrative fiat. Similarly, executive directives do not excuse agencies from short-circuiting administrative procedures no matter how long they take—a point the Court has acknowledged. *See* PI Order at 19, n.10 ("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.").

BLM's decision to circumvent the 111(d) process left a hole in the record that prevented BLM from making a reasoned and rational decision. Section 111(d) requires a two-step process to regulate existing sources where the states play an outsized role. *Compare* 42 U.S.C. § 7411(b)(1)(B) *with* § 7411(d)(1). The first step requires EPA to issue "emission guidelines" to guide the states as to what emission reductions may be achievable. *Id*. In these guidelines, EPA must make a separate determination for existing sources regarding costs, environmental effects, time for compliance, and the potential need for differentiation based on size, types, and classes of facilities. *See* 40 C.F.R. §§ 60.22(b)(3), (5). The second step requires states, based on EPA's guidelines, to submit plans to EPA "establish[ing] standards of performance for any existing source." 42 U.S.C. § 7411(d)(1). In their plan, states may "take into consideration, among other factors, the remaining useful life of the existing source to which the standard applies." *Id*. at § 7411(d)(2). EPA may only impose a plan for a state if the state fails to submit a satisfactory plan. *Id*. at § 7411(d)(2)(A). In addition, states must notify the public and hold one or more hearings to allow for public input prior to plan submission. *See* 40 C.F.R. § 60.23.

A critical component of the section 111(d) process is the requirement that EPA consider the costs of regulating existing sources independently of the cost considerations for new and modified sources. EPA has long recognized the policy reasons behind this independent 111(d) requirement:

> Although section 111(d) does not explicitly provide for variances, it does require consideration of the cost of applying standards to existing facilities. Such a consideration is inherently different than for new sources, because controls cannot be included in the design of an existing facility and because physical limitations may make installation of particular control systems impossible or unreasonably expensive in some cases.

40 Fed. Reg. 53,340, 53,344 (Nov. 17, 1975) (emphasis added).

The Rule followed none of these statutorily required procedures. EPA has not issued 111(d) emissions guidelines for the oil and gas sector. No state or tribe has developed or submitted a state plan pursuant to such guidelines. There was not a separate determination, by BLM, EPA, or any other agency, regarding what, if any, standards may be cost-effective or environmentally-effective for existing oil and gas sources developing federal or Indian leases. BLM never considered the costs and benefits of the control requirements over the "useful life" of existing oil and natural gas wells. *See* 42 U.S.C. § 7411(d)(2). This latter consideration is essential. Oil and gas production from a given well declines over time, which changes the nature and rate of emissions. Typically, this means the costs of control requirements increase relative to the benefits. These considerations were entirely ignored during the promulgation of this Rule.

Instead, the Rule simply grafts EPA's standards for new and modified wells onto approximately 81,600 existing, low-producing wells developing federal and Indian leases,[8] with no independent determination about whether these standards are cost effective. VF_0000381. In

[8] BLM estimates that 96,000 existing wells will be subject to the Rule, 85 percent of which are low production. *See* VF_0000361.

this respect, we agree with the Court's initial assessment that BLM "hijacked EPA's authority under the guise of waste management." *See* PI Order at 19 (emphasis added). If the Court were to find that BLM does have authority to regulate air quality, BLM would inexplicably be free of the constraints that Congress imposed on EPA, states, and tribes under the CAA.

Such blatant disregard of required statutory procedure is, on its face, egregious. It is made even worse by the fact BLM ignored credible evidence on the record showing that standards applied to existing, low-production marginal oil and gas wells are not cost-effective, and at a minimum should be much different than for new and modified wells.[9] *See e.g.*, VF_0000842 (noting the RIA failed to account for a number of costs associated with applying storage tank controls to existing sources, which could exceed $100,000 per tank); VF_0000762 ("installation of pumps or gas lift is expensive and the expected production of many marginal wells will not support the investment necessary"); VF_0033577 (the cost of equipment to implement LDAR at low production, marginal wells may vastly exceed the benefits from emissions being saved). As a result, 112 million barrels of developable oil will be left potentially stranded because of premature well shut-in, creating substantial job losses, and reductions in federal, state, and local tax revenue. *See* VF_0033613. The Rule's economic exceptions cannot and do not substitute for the extensive 111(d) procedures that were skipped, nor the consequences of skipping them. *See*, *e.g.*, 43 C.F.R. §§ 3179.102(c), 3179.201(b)(4), 3179.203(c)(3). Had this Rule proceeded through EPA and the states as the CAA requires, the

[9] On June 16, 2017, EPA published a Federal Register notice announcing it will be revisiting its standards for new and modified sources. 82 Fed. Reg. 27,645 (June 16, 2017). Among other things, EPA is re-evaluating the applicability of fugitive emissions requirements to low production well sites, and more specifically whether the New Source Performance Standards should exempt low production well sites. *Id*. at 27,647.

final requirements may have been substantially different—an outcome not cured by the ability to avoid some of the Rule's requirements.

3. *Coordination Between BLM and EPA Does Not Render the Rule Lawful.*

That BLM and EPA may have coordinated does nothing to fix the fact BLM acted without statutory authority and promulgated a rule that conflicts in fundamental respects with the CAA. The fact that BLM required 40 separate meetings with EPA to draft the Rule yet corresponded with ONRR fewer than 10 times speaks volumes. *See* PI Order at 6; VF_0175787; VF_0154515; VF_0184564; VF_0172545; VF_0184572; VF_0154117; VF_0154144; VF_0154089; VF_0154163. The opposite should be true if the Rule is truly aimed at reducing waste and increasing royalties.

Furthermore, although coordination between agencies should be encouraged, BLM's and EPA's coordination does not remedy the fact that BLM is not equipped, and lacks the expertise or experience necessary, to now administer or enforce the Rule's air quality scheme. This holds true not only with respect to the Rule's application to existing wells, but also to its application to new and modified wells. *See e.g.*, §§ 3179.102(b), 3179.301(j) (effectively requiring BLM to independently determine compliance under OOOOa for new and modified sources).

Finally, BLM's lack of expertise to administer and enforce air quality regulations highlights why *Massachusetts v. EPA*, 549 U.S. 497 (2007), is not instructive or helpful here. The relevant issue in that case involved the Department of Transportation's (DOT) and EPA's respective roles in regulating mileage standards (DOT's role) and tailpipe emissions (EPA's role). The Court held "there [was] no reason to think [DOT and EPA] cannot both administer their obligations and yet avoid inconsistency." *Id.* at 532. This holding implicitly recognizes that neither agency was regulating within the other's sphere—EPA was not setting or

administering mileage standards, and DOT was not setting or administering emission standards. That is not the case here. BLM has usurped EPA's CAA authority by setting a complex set of air quality standards that replicate EPA standards for new sources and applying them to existing sources that it must now administer and enforce independently of EPA, the states, and tribes. This is a far cry from simply administering a clear statutory obligation to avoid inconsistency or conflict. For this reason, the Court should give no credence to *Massachusetts v. EPA*. In sum, because Congress delegated regulatory authority over air quality to EPA, the states, and tribes, the Rule is outside of BLM's authority and must be set aside.

C. The Rule is Inconsistent with BLM's Authority to Regulate "Waste" under the MLA and FOGRMA.

Not only does the Rule exceed BLM's authority, it is inconsistent with the common understanding of the term "waste" as used in the MLA and FOGRMA. *See* 30 U.S.C. §§ 187, 225. At the outset, similar to the CAA analysis, the Court should not defer to BLM's interpretation of waste because Congress' intent in the MLA is clear. "[D]eference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (citing *INS v. Cardoza–Fonseca*, 480 U.S. 421, 446–48 (1987)). Congress need not define every term in a statute to evidence its intent; rather, courts may look to "the statutory text, history, and purpose" to determine that Congress has spoken to an issue. *United Keetoowah Band of Cherokee Indians of Okla. v. U.S. Dep't of Hous. & Urban Dev.*, 567 F.3d 1235, 1240 (10th Cir. 2009). Even when Congress has not directly spoken to an issue, courts may look to the common meaning of a term to determine whether the agency's interpretation is "arbitrary, capricious, or manifestly contrary to the

statute."[10] *Harbert v. Healthcare Servs. Group, Inc.*, 391 F.3d 1140, 1149 (10th Cir. 2004) (quoting *Chevron*, 467 U.S. at 844).

The Rule's interpretation of "waste" is inconsistent with its common and historic usage. Nearly every state with oil and natural gas resources has a conservation statute directing the prevention of waste.[11] Stephen L. McDonald, *Petroleum Conservation in the United States: An Economic Analysis* 43 (2011). Though definitions vary slightly, "waste" is generally considered to be a "preventable loss [of oil and gas] the value of which exceeds the cost of avoidance." Howard R. Williams & Charles J. Meyers, *Manual of Oil and Gas Terms* 1135 (Patrick H. Martin & Bruce M. Kramer eds., 16th ed. 2015). In addition, subsurface waste is understood to occur when a well is prematurely abandoned, leaving unproduced hydrocarbons beneath the surface. *See, e.g.*, J. Howard Marshall & Norman L. Meyers, *Legal Planning of Petroleum Production*, 41 Yale L.J. 33, 66 n.124 (1931); *accord* 43 C.F.R. § 3160.0-5 (defining "waste" to include "[a] reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations"). Against this backdrop, Congress' use of the term "waste" in the MLA is not unique and cannot be considered in a vacuum.

[10] This "second step" of the *Chevron* analysis does not require that a court accept an agency's interpretation of a statute. The Supreme Court has recognized that *Chevron* deference "has important limits: A regulation cannot stand if it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002) (setting aside regulation interpreting the Family and Medical Leave Act of 1993).

[11] When Congress enacted the MLA, at least one state had an oil and gas conservation statute requiring the prevention of waste, and several other states shortly followed suit. *See* Robert E. Sullivan, "The History and Purpose of Conservation Law," *Oil & Gas Conservation Law & Practice*, 1- (Rocky Mtn. Min. L. Found. 1985).

1. *The Rule's Costs Exceed Its Benefits.*

The Rule's interpretation of "waste" is inconsistent with the term's common usage because it ignores the economics of implementing the Rule's numerous requirements to avoid venting and flaring gas. Most significant, the cost of implementing the Rule (between $110 million and $279 million) far exceeds the value of the gas that will be captured and sold under the Rule (between $20 million and $157 million). VF_0000451– VF_0000452. Although BLM asserts the Rule's social and environmental benefits outweigh its cost, *see* VF_0000366, BLM may not consider these benefits when evaluating whether "waste" of oil and gas will occur. *See* McDonald, *supra*, at 126 ("In general, petroleum conservation statutes define waste with respect to oil and gas only.").

The Rule's interpretation of "waste" also is inconsistent with the term's common usage as applied to individual lessees because it does not allow BLM to consider individual circumstances, operator prudence, or economic feasibility when determining whether waste occurred. Existing BLM regulation defines "waste" as "avoidable surface loss of oil or gas," which allows BLM to consider a lessee's diligence and compliance with BLM guidelines. 43 C.F.R. § 3160.0-5; *see also Plains Expl. & Prod. Co.*, 178 IBLA 327 (2010), 2010 WL 1063883 (Applying NTL 4A to allow consideration, on a case-by-case basis, whether the loss of gas was unavoidable under the circumstances). The Rule defines all lost gas as "avoidably lost" except in twelve very specific circumstances. *Id.* § 3179.4(1)(i)–(xii). By categorically defining whether or not loss of gas is prudent or feasible, the Rule removes BLM's discretion to consider the

specific circumstances surrounding the loss of gas when determining whether "waste" occurred.[12]

BLM's decisions to ignore the Rule's significant costs and to constrain its ability to consider case-by-case situations are particularly arbitrary because the Rule almost exclusively regulates existing wells and facilities. *See* VF_0000381. BLM failed to assess the Rule's impacts on a per-well basis or meaningfully consider impacts to marginal wells. *See* VF_0000381 (citing lack of data as rationale for not excluding low production wells from the LDAR program); VF_0000569 (stating without support that "[w]e generally believe that the cost savings available to operators would exceed the compliance costs or that the compliance costs would not be as significant as to force the operator to prematurely abandon the well"). Instead, BLM determined that compliance costs will range from $44,600 to $65,800 for a given oil and gas operator, *see* VF_0000575 (per-entity compliance costs). These per-operator compliance costs are meaningless. Obviously, an operator with a thousand wells producing from federal and Indian leases will incur more compliance costs than an operator with ten federal and Indian wells. BLM's per-operator compliance cost approach fails to account for this most basic distinction. *See* VF_0224735–VF_0224737. Thus, in the aggregate, the Rule's costs exceed its benefits and departs from the commonly understood and accepted definition of "waste." Therefore, the Rule results in an impermissible interpretation of the MLA and must be set aside.

[12] For example, BLM announced that gas lost during force majeure events can be considered waste because, although such events are out of an operator's control, "they are often expected and operators can plan for them." VF_0000400.

2. *The Rule Will Create Subsurface Waste Through Premature Abandonment of Wells.*

The Rule also is inconsistent with the commonly understood definition of "waste" because it will lead to premature abandonment of wells. Because the costs of compliance with the Rule so greatly exceed potential revenue from the additional natural gas that will be recovered, the Rule will cause operators to shut-in marginal wells. Specifically, BLM estimates the Rule will reduce crude oil production from federal and Indian leases by up to 3.2 million barrels per year. VF_0000561. Thus, BLM itself acknowledges that the Rule will strand production.

BLM attempts to assure the public that underground waste will not occur by pointing to the Rule's exemptions to requirements that will cause the abandonment of "significant recoverable oil reserves." *See* VF_0000569. Yet the Rule provides no exemption when the cumulative impact of the Rule's requirements render a well uneconomic; rather, the Rule only provides exemptions to individual requirements that will cause the operator to cease production. VF_0000393 (stating an operator cannot "add up the costs of compliance with multiple requirements of the rule to show that the cumulative costs of the requirements would cause the operator to cease production and abandon significant recoverable reserves under the lease"). The Court may not accept BLM's unsupported claim that the Rule does not result in waste. Accordingly, the Rule is inconsistent with the MLA and must be set aside.

D. <u>BLM Acted Arbitrarily and Capriciously When Promulgating the Rule.</u>

Finally, this Court must set the Rule aside because it is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A). The Court must "engage in a substantive review of the record to determine if the agency considered relevant factors and articulated a reasoned basis for its conclusion." *Olenhouse*, 42 F.3d at 1580.

To survive review, the agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation and citation omitted). Courts will set aside agency action "as arbitrary unless it is supported by 'substantial evidence' in the administrative record." *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (citing *Olenhouse*, 42 F.3d at 1575). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003) (quotation omitted).

The Rule is arbitrary and capricious in a number of respects, including the fact BLM has not adequately explained whether the Rule's gas capture targets are economically feasible or technically possible.[13] Most significantly, the Rule is arbitrary and capricious because its costs far exceed its *de minimis* benefits. "When an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining the analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see also Owner–Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (vacating regulatory provisions because the supporting cost-benefit analysis was based on an unexplained methodology).

BLM concluded "the benefits of this [R]ule outweigh its costs by a significant margin." VF_0000368 (emphasis added). Only by using the "social cost of methane," a variation on the "social cost of carbon" that attempts to estimate the "economic damages associated with a small increase in carbon dioxide" is BLM able to assert an economic benefit. VF_0009654; *see*

[13] For example, BLM acknowledges operators' assertions that the flaring limits in the proposed rule were "prohibitively expensive and, in some areas of the country, technically impossible," yet admits that the gas capture targets in the new rule are essentially identical. *See* VF_0000376-77.

VF_0018736. BLM estimated that the Rule would cost between $110 million and $279 million annually but would generate annual benefits ranging between $209 million and $403 million. VF_0000451– VF_0000452. These benefits, however, are misleading when taken at face value. The Rule's benefits in terms of increased gas captured and sold is estimated to be between $20 million and $157 million. VF_0000452. BLM arrived at the additional $189 million to $247 million in annual benefits only through the social cost of methane to extrapolate and monetize global climate change benefits.[14]

BLM's reliance on the social cost of methane fundamentally contradicts BLM's assertion that the Rule's objective is waste prevention rather than air quality regulation. Oil and gas operators will only realize a fraction of the benefits incurred to implement the Rule. BLM cannot rationally claim that the Rule's objective is waste prevention while justifying its considerable costs almost entirely on climate change benefits. An agency rule is arbitrary when "the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The MLA's waste prevention directives do not give BLM the authority to regulate the emission of gas from oil and gas out of a concern about the effect those emissions may have on climate change.

[14] The social cost of carbon "is meant to be a comprehensive estimate of climate change damages and includes changes in net agricultural productivity, human health, property damages from increased food risk, and changes in energy system costs . . . ." VF_0009654. Because impacts of carbon differ from methane, the costs are evaluated separately. *See* VF_0018737. In 2013 and 2015, an interagency working group issued guidance on the use of the social cost of carbon in regulatory impact analysis associated with rulemakings. VF_0007704. In 2016, this working group issued an addendum to this guidance that addressed the use of social cost of methane in regulatory impact analyses. VF_0018736. This guidance was withdrawn earlier this year. *See* Executive Order No. 13,783 of March 28, 2017, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093 § 5 (Mar. 31, 2017).

Furthermore, BLM acted arbitrarily by using the social cost of methane to justify a domestic rule. The social cost of methane analysis extrapolates climate change benefits to the rest of the world, reasoning that "anthropogenic climate change involves a global externality." VF_0018740. BLM, however, compares these global benefits to costs born only by domestic producers. VF_0000477–VF_0000483. This comparison is inconsistent with the objectives of Executive Order 12866, which calls for an analysis of the impact of regulations on "the well-being of the American people." *See* 58 Fed. Reg. 51,735 (Oct. 4, 1993). Similarly, this comparison is inconsistent with the Office of Management and Budget's (OMB) *Circular A-4*, which directs agencies to focus their analysis "on benefits and costs that accrue to citizens and residents of the United States" and calls for analysis of global benefits to "be reported separately." OMB Circular A-4 (2003).[15] It also conflicts with the MLA, FOGRMA, and the CAA, all of which focus on domestic regulation. At a minimum, BLM should have isolated the domestic benefits of methane reductions to reflect the costs and benefits.

The Rule's dubious benefits also further undermine the need for and efficacy of the rulemaking. An agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 (internal quotation and citation omitted). Because of technological advances, voluntary efforts, and regulation both methane emissions and flaring levels continue to decline despite significant growth in production. *See* Section II, *supra*. Moreover, the Rule will result in *de minimis* additional royalties to the United States. BLM estimates that volumes of gas "wasted" prior to the Rule in 2014 had a royalty value of $56 million. VF_0000449. GAO,

[15] Available at https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/. *See* 68 Fed. Reg. 58,366 (Oct. 9, 2003).

however, has determined that only 40 percent of "wasted" gas can be economically captured and sold using currently available technology. VF_0002655. Thus, BLM will realize not more than $22.4 million in annual royalty revenue from this Rule, which amounts to less than one percent of the $2.3 billion in royalties BLM received from onshore federal and Indian oil and gas leases in 2015. *See* VF_0000361. BLM provides no satisfactory explanation for why or how this *de minimis* amount of "waste" justifies the Rule, which carries up to $279 million in annual compliance costs.

In short, BLM has failed to justify the need for this Rule. Accordingly, the Rule must be set aside as arbitrary and capricious.

IV. CONCLUSION AND RELIEF REQUESTED

The Rule is unlawful because it was promulgated in excess of, and is inconsistent with, BLM's statutory authority. The Rule also represents arbitrary and capricious agency action, is an abuse of discretion, and otherwise not in accordance with law. Petitioners respectfully request that the Court invalidate the Rule and remand it to BLM.

Respectfully submitted this 2nd day of October, 2017.

s/ Eric P. Waeckerlin

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CERTIFICATE OF WORD COUNT

I hereby certify that this response complies with the type-volume limitation set forth in U.S.D.C.L.R. 83.6(c) because this brief contains 8,109 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ Eric P. Waeckerlin

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2017, the foregoing **BRIEF IN SUPPORT OF WESTERN ENERGY ALLIANCE AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA'S PETITION FOR REVIEW OF FINAL AGENCY ACTION** 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/ Eric P. Waeckerlin

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