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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING and STATE OF MONTANA, *et al.*,	)	
Petitioners,	)	Civil No. 16-285-S (Lead Case)
v.	)	
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	**BRIEF IN SUPPORT OF WYOMING AND MONTANA'S PETITION FOR REVIEW OF FINAL AGENCY ACTION**
Respondents,	)	

WESTERN ENERGY ALLIANCE, *et al.*	)	
Petitioners,	)	
v.	)	Civil No. 16-280-S
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,	)	
Respondents.	)	

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INTRODUCTION

Congress does not hide elephants in mouseholes. *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 468 (2001) (internal citations omitted). Thus, when Congress gives one agency a job to do, it is unreasonable to believe that Congress also expects another agency with an entirely different mandate to do that same job under statutory schemes that were never meant to address the problem at hand. For better and worse, Congress designed a compartmentalized federal government, with specific agencies clearly assigned to exercise specific authorities to address specific problems. Congress does not expect or authorize all agencies to address all problems. Instead, "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 517 (1988)).

Congress has not assigned the burden of solving the problem of global climate change to the Bureau of Land Management, and yet that is transparently what the Bureau sought to do when it promulgated the rule at issue here. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83008 (Nov. 18, 2016) (Venting and Flaring Rule). Under the pretense of regulating mineral waste, the Bureau seeks to regulate greenhouse gas emissions associated with oil and gas production, a problem squarely within the Environmental Protection Agency's scope of authority and

expertise. But no reasonable regulator would impose the requirements of this rule on mineral producers to prevent waste because the costs of the rule vastly outweigh its benefits. It is only when the ancillary benefits associated with greenhouse gas reductions are added to the calculus that the Bureau can assert that this rule results in a net benefit. However, ancillary benefits irrelevant to the problem the Bureau purports to address cannot justify this agency action. Were that so, there would be no effective limit on agency action. Any colorable tie to an agency's authority would permit the agency to act on a problem Congress never asked the agency to solve and would allow agencies to impose unreasonable regulations on citizens and industries to achieve outcomes unrelated to the reason the regulation was purportedly adopted. Our form of government does not permit the ends, however laudable they may be, to justify the means. *Brown & Williamson*, 529 U.S. at 125.

The Bureau does not have the statutory authority or expertise to promulgate the Venting and Flaring Rule, and its decision to do so based on irrelevant ancillary benefits was arbitrary and capricious. Accordingly, this Court should set the rule aside.

BACKGROUND

I. The Bureau's statutory authority over mineral leasing and the public lands

The Bureau's authority over mineral leasing and the public lands flows from three different statutes.

First, the Mineral Leasing Act, 30 U.S.C. §§ 181-287 creates "a program to lease mineral deposits for private mining and marketing while preserving federal ownership of lands." *Natural Res. Def. Council, Inc. v. Berklund*, 609 F.2d 553, 555 (D.C. Cir. 1979)

(per curiam). It establishes terms for leasing oil and gas minerals on public land, 30 U.S.C. § 226(d), (e), and prohibits leasing of wilderness land, *id.* § 226-3. It authorizes the Secretary of Interior to lease all other public land for oil and gas development, *id.* § 223, 226(a); regulate surface-disturbing activities, *id.* § 226(g); and establish cooperative development plans to conserve oil and gas resources, *id.* § 226(m). The Mineral Leasing Act requires lessees to "use all **reasonable** precautions to prevent waste of oil or gas developed in the land."[1] 30 U.S.C. § 225 (emphasis added). Moreover, "Each lease shall contain provisions for the purpose of insuring the exercise of **reasonable** diligence, skill and care in the operation of said property" and "a provision that such rules … for the prevention of undue waste as may be prescribed by said Secretary shall be observed." 30 U.S.C. § 187 (emphasis added). To meet these objectives, Congress granted the Secretary the power to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish **the purposes of this [Act]**." 30 U.S.C. § 189 (emphasis added).

Second, "the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1751, creates a system for collecting and accounting for federal mineral royalties." *Wyoming v. U.S. Dep't of the Interior*, 2017 U.S. Dist. LEXIS 5736 at *23 (D. Wyo. Jan. 16, 2017). In addition to requiring the payment of royalties on minerals that

[1] "Waste of oil or gas means any act or failure to act by the operator that is not sanctioned by the authorized officer as necessary for proper development and production and which results in: (1) A reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations; or (2) avoidable surface loss of oil or gas." 43 C.F.R. § 3160.0-5.

make their way to market, the Act provides that, "Any lessee is liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence on the part of the operator of the lease, or due to the failure to comply with any rule or regulation, order or citation issued under this Act or any mineral leasing law." 30 U.S.C. § 1756. Again, Congress authorized the Secretary to "prescribe such rules and regulations as he deems **reasonably necessary to carry out this Act.**" 30 U.S.C. § 1751 (emphasis added).

Finally, the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1784, governs the Bureau's management of the public lands. At its core, "FLPMA is a planning statute." George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307, 325 (1990). FLPMA charges the Bureau with managing public land for multiple uses and sustained yield of natural resources through routine planning and inventorying of land and uses. 43 U.S.C. §§ 1702(c), (h), 1711–12. The "main thrust" of FLPMA is to ensure that management actions conform to management plans. Coggins, 61 U. Colo. L. Rev. at 324.

Congress declared thirteen policies in FLPMA governing the management of the public lands, which expand upon the "deceptively simple" multiple use mandate. 43 U.S.C. § 1701(a); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). Those policies direct the Bureau to manage "**the public lands** ... in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber," as well as the protection of "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values[.]" 43 U.S.C. §§ 1701(a)(8), (12), 1702(c)

(emphasis added). In pursuit of this general purpose, Congress authorized the Bureau to "prevent unnecessary or undue degradation **of the lands**" and to promulgate regulations "**to carry out the purposes of this Act**." 43 U.S.C. §§ 1732(b), 1733(a), 1740 (emphasis added).

FLPMA further provides that in the development and revision of land use plans, the Secretary shall "**provide for compliance** with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." 43 U.S.C. § 1712(c)(8) (emphasis added). Similarly, the Bureau's regulations provide that land use authorizations shall contain terms and conditions which shall "**[r]equire compliance** with air and water quality standards established pursuant to applicable Federal or State law[.]" 43 C.F.R. § 2920.7(b)(3) (emphasis added).

None of these statutes authorize the Bureau to regulate the emission of greenhouse gases. Nor is the prevention or mitigation of global climate change one of the purposes of any of these acts. The only mention of air quality standards in these Acts comes in FLPMA, where Congress directed the Bureau to require compliance with applicable pollution control laws enforced by other state and federal agencies.

II. The states' and the EPA's authority under the Clean Air Act to regulate emissions from oil and gas production

When it passed the Clean Air Act, Congress designated the EPA as the agency responsible for regulating substances that contribute to climate change. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). In contrast to the Bureau's authority, Congress expressly delegated authority to the states and the EPA to "protect and enhance the quality of the

Nation's air resources so as to promote the public health and welfare and productive capacity of its population." 42 U.S.C. § 7401(b)(l). Among other things, the EPA is responsible for setting health-based ambient air quality standards for six criteria pollutants, including ozone and nitrogen oxides. 42 U.S.C. § 7408.

After EPA sets the ambient air quality standards, each state is required to develop a state implementation plan, which is a collection of laws, regulations, and other enforceable mechanisms to control emissions of specific pollutants from in-state sources. 42 U.S.C. § 7410; *Train v. Natural Res. Def. Council,* 421 U.S. 60, 79 (1975). The EPA must approve each state implementation plan if it contains certain minimum requirements, which effectively converts the contents of the state implementation plan into federal law, enforceable by the state, the EPA, a private citizen, or even by another federal agency. *Espinosa v. Roswell Tower, Inc.,* 32 F.3d 491, 492 (10th Cir. 1994) ("The state implementation plan has the force and effect of federal law[.]"); 42 U.S.C. § 7413(b)(1) (explaining the process by which the EPA may enforce violations of a state implementation plan); 42 U.S.C. § 7604 (explaining the process by which any "person" may enforce violations of a state implementation plan); and 42 U.S.C. § 7602 (defining "person" to include, among other things, states and federal agencies). Both Wyoming and Montana have federally approved state implementation plans that include oil and gas permitting programs. *Rules Wyo. Dep't of Envtl. Quality, Air Quality*, ch. 6, § 2; 40 C.F.R. § 52.2620,

subpart ZZ; Mont. Admin. R. §§ 17.8.1601 to .1606 and 17.8.1710 to .1713; 40 C.F.R. § 52.1370, subpart BB.[2]

Congress thus established a process by which the EPA sets certain standards, each state uses localized knowledge to develop appropriate control regimes for industry within its borders, and the EPA strengthens those air pollution control regimes by making them federally enforceable by a large group of diverse state, federal, and private actors. *See, e.g.*, *Utah Physicians for a Healthy Env't v. Kennecott Utah Copper*, 191 F. Supp. 3d 1287, 1292 (D. Utah 2016).

In addition to serving in this cooperative leadership role to safeguard national ambient air quality, the EPA also develops standards of performance for specified categories of sources that the agency determines should be regulated to protect public health. 42 U.S.C. § 7411(b)(1)(A). Similar to state implementation plans, citizens and other interested parties also may bring citizen suits to enforce repeated or ongoing violations of new source performance standards. 42 U.S.C. § 7604; *United Steelworkers of Am. v. Or. Steel Mills*, 322 F.3d 1222, 1227 (10th Cir. 2003). The Clean Air Act defines "standards of performance" as "standard[s] for emissions of air pollutants which reflect[] the degree

[2] Under Wyoming's federally enforceable permitting program, owners and operators must use the best available control technology (BACT) at all minor sources. BACT is an individualized approach to permitting that enables air pollution control agencies to make specific control determinations based on a dollar per ton basis, taking "into account energy, environmental, and economic impacts and other costs associated with application of alternative control systems." David G. Hawkins, Assistant Administrator for EPA Air, Noise, and Radiation (January 4, 1979), available at https://www.epa.gov/sites/production/files/2015-07/documents/bactupsd.pdf (last visited Nov. 28, 2016). *See also* 42 U.S.C. § 7479(3); *Rules Wyo. Dep't of Envtl. Quality, Air Quality*, ch. 6, § 2(c)(v).

of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

To determine whether a system of emission reduction has been adequately demonstrated, the EPA will look to controls required by states to establish a national floor for controls. *Sierra Club v. Costle*, 657 F.2d 298, 331 (D.C. Cir. 1981). For example, Wyoming has issued, and frequently revises, an interpretive policy that describes presumptive best available control technology for minor oil and gas production facilities to allow operators to construct or modify before obtaining air quality permits. Wyo. Stat. Ann. § 35-11-801(e); *Oil and Gas Production Facilities*, Chapter 6, Section 2 Permitting Guidance, last revised May 2016 (Dkt. No. 22-3 at 97-153). The EPA relied on this non-binding interpretive guidance, and the knowledge of the permit writers who created it, when drafting new source performance standards for oil and gas production facilities. Requirements in the Venting and Flaring Rule also derive from this guidance. *Compare, e.g.*, 43 C.F.R. § 3179.204, *with* Dkt. No. 22-3 at 97-114 (both sections require analogous best management practices and recordkeeping for downhole well maintenance and liquids unloading).

The EPA has clear authority to regulate air emissions from oil and gas production. The Clean Air Act establishes a three-step process whereby the EPA first lists a source category, then develops new source performance standards for the listed source category, and finally develops a procedure for states to follow in developing plans to control

emissions from existing sources. 42 U.S.C. §§ 7411(b)(1)(A), (B), and (d)(1). Even before the EPA begins the third step, states may request concurrent enforcement authority over the new source performance standards. *Id.* at § 7411(c).

Although Congress gave the EPA power to do so decades earlier, the EPA did not undertake step one of the process to regulate emissions from oil and gas production facilities until 2012,[3] basing its standards largely on the work of regulators in Wyoming and Colorado. New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49490 (Aug. 16, 2012); *see also* Jana B. Milford, *Out in Front? State and Federal Regulation of Air Pollution Emissions from Oil and Gas Production Activities in the Western United States.* 55 Nat. Resources J. 1 (Fall 2014) ("The [EPA] did not adopt emission standards for most oil and gas production activities until 2012, when it relied on Colorado and Wyoming as proving grounds for control technology."). As part of President Obama's "Climate Action Plan: Strategy to Reduce Methane Emissions," the EPA updated those standards to control methane emissions, in addition to controlling emissions of volatile organic compounds and sulfur dioxide. *See* Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35824 (June 3, 2016) (codified at 40 C.F.R. §§ 60.5360a through 60.5432a, referred to as "Quad Oa" for its location in the Code of Federal Regulations). Wyoming adopted

[3] The EPA first listed crude oil and natural gas production in 1979, but the initial new source performance standards, issued in 1985, applied to midstream sources such as gas plants and compressor stations, not to individual well sites. Priority List and Additions to the List of Categories of Stationary Sources, 44 Fed. Reg. 49222 (Aug. 21, 1979); 40 C.F.R. § 60, subparts KKK and LLL.

Quad Oa into the Wyoming Air Quality Rules and EPA delegated to Wyoming concurrent enforcement authority over those standards. *Rules Wyo. Dep't of Envtl. Quality, Air Quality*, ch. 5, § 2; *see also* Letter from EPA Region 8, Air Program Director, to Wyoming Air Quality Division Administrator, *Regarding Automatic Delegation of Clean Air Act (CAA) Section 111 Requirements* (February 27, 2014) (on file with the Division).

The EPA first extended the compliance dates associated with these standards by three months,[4] then announced its intent to reconsider certain fugitive emissions control requirements contained within Quad Oa,[5] and most recently issued a two-year stay on fugitive emissions requirements, well site pneumatic pump standards, and closed vent system requirements.[6] These developments do not meaningfully change the regulatory environment for Wyoming oil and gas producers because in drafting Quad Oa federal regulators looked to pre-existing air pollution control requirements from states like

[4] Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25730 (June 5, 2017) (90-day stay of compliance date for fugitive emission monitoring requirements contained in the EPA's new source performance standards for oil and gas production facilities).

[5] Correspondence from EPA Administrator E. Scott Pruitt to Mr. Feldman, Ms. Broome, Mr. Elliot, and Mr. Hite, *Regarding Convening a Proceeding for Reconsideration of Final Rule, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources," published June 3, 2016, 81 Fed. Reg. 35824* (Apr. 18, 2017), available online at: https://www.epa.gov/sites/production/files/2017-04/documents/oil_and_gas_fugitive_emissions_monitoring_reconsideration_4_18_2017.pdf (last accessed June 12, 2017) (acceptance of petition for reconsideration of the new source performance standards).

[6] Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27645 (June 16, 2017) (two-year stay of fugitive emission requirements for new and modified oil and gas production facilities under the EPA's new source performance standards).

Wyoming, including those specific to fugitive emissions control requirements. Emission Standards for New and Modified Sources, Proposed Rule, 80 Fed. Reg. 56593 at 56625, 56628, 56634, and 56639 (Sept. 18, 2015). Nor do they significantly change the regulatory environment in Montana, where the state has required oil and gas operators to perform monthly leak inspections for over a decade. Mont. Admin. R § 17.8.1604.

In 2016, the EPA began the third step of the statutory process to regulate emissions from existing oil and gas production sources by seeking information about "monitoring, detection of fugitive emissions, and alternative approaches in the oil and natural gas section." Request for Information, Emerging Technologies, 81 Fed. Reg. 46670 (July 18, 2016). The EPA intended this request to be a predicate to the issuance of a regulation limiting air pollutants, including methane, from existing sources in the oil and natural gas extraction industry. *Id.* at 46671 ("This additional information may be key in addressing emissions from existing oil and natural gas sources under section 111(d) of the Clean Air Act."). In 2017, the EPA withdrew that request to assess the need for the requested information and to avoid undue burden to industry. Notice Regarding Withdrawal of Obligation to Submit Information, 82 Fed. Reg. 12817 (Mar. 7, 2017) ("The withdrawal is occurring because EPA would like to assess the need for the information that the agency was collecting through these requests, and reduce burdens on businesses while the Agency assesses such need.").

Thus, there are state and federal regulations in place governing the emission of greenhouse gases from new sources, but the EPA has chosen not to promulgate regulations governing these emissions from existing sources.

III. Overview of Venting and Flaring Rule

The Bureau promulgated the Venting and Flaring Rule on November 18, 2016. (AR 360). The Bureau claims that the rule was necessary because several oversight reviews raised concerns about waste gas from federal and Indian oil and gas production, and because the Bureau believes that there are "economical, cost-effective, and reasonable measures that operators can take to minimize gas waste." (AR 361-62).

A wide variety of chemical compounds are released to the atmosphere during oil and gas production, through both controlled and uncontrolled processes. Leaking or malfunctioning equipment results in uncontrolled emissions. Emissions also occur when operators proactively vent or flare gas that would otherwise remain inside piping, equipment, and tanks. *Wyoming*, 2017 U.S. Dist. LEXIS 5736 at *7-8. Operators may release emissions for safety reasons because excessive pressure buildup can cause explosions. Operators may also vent or flare otherwise saleable gas in the absence of infrastructure to transport the gas to market. *Id.* at 8.

Emissions that occur through leaking and venting are transformed into different emissions when flared. For waste minimization and resource conservation purposes, no difference exists between eliminating excess methane by burning it or leaking it – the same amount is wasted in either event. But there is a difference for air quality purposes. For air quality control agencies, the choice between venting or flaring is an opportunity to choose between different general sets of pollutants, based on comparative local and regional air quality concerns. (Dkt. No. 22-1 at 5 and 34). Flaring methane changes it from a potent greenhouse gas with global impacts into nitrogen oxides, which can trigger localized ozone

formation. Thus, a regulatory preference for flaring over venting prioritizes global climate change over regional ozone control without changing the amount of natural gas that is wasted.

The Bureau purportedly designed the Venting and Flaring Rule to: (1) reduce the waste of methane from oil and natural gas production activities on federal and Indian land; and (2) regulate air quality by controlling emissions from existing sources. (AR 1) ("Flaring, venting, and leaks waste a valuable resource [and] the wasted gas may harm local communities and surrounding areas [] and [contribute to] regional and global air pollution problems of [] climate change."). The rule applies to all oil and gas production facilities that either produce federal oil and gas or are combined for accounting purposes with facilities that do. (AR 391). Thus, a well that produces state minerals that is combined with at least one federal well for royalty accounting purposes must comply with the entirety of the rule. *See* 43 C.F.R. § 3217.11 (explaining the royalty accounting purposes for communitization agreements).

The Venting and Flaring Rule modifies Bureau regulations for the three stages of oil and gas production – pre-drilling, drilling, and production. At the pre-drilling stage, the rule requires operators to submit waste minimization plans along with applications for permits to drill. 43 C.F.R. § 3162.3-1. The rule generally bans venting and limits flaring during drilling, well-completion and related operations, and initial production testing. 43 C.F.R. § 3179.101 through 3179.104. However, the rule authorizes royalty-free flaring and venting for a 24-hour period during specified "emergency conditions." 43 C.F.R. § 3179.105.

During both drilling and production stages, the Venting and Flaring Rule bans venting, limits flaring, and establishes new recordkeeping and reporting requirements. 43 C.F.R. §§ 3179.6 through 3179.9. The proposed rule described the flaring limit as a well-specific numeric limit, but the final rule describes the flaring limit as a "capture requirement," which is still a numeric limit calculated on a well-specific basis. 43 C.F.R. § 3179.7. Operators can comply with the limit by averaging results across multiple wells. *Id.* This preference for flaring over venting is the sine qua non of the Venting and Flaring Rule and the origin of its nickname.

In the proposed rule, the Bureau explained that flaring is preferable to venting because leaked methane contributes to global climate change, while burned methane does not. (AR 361). In the proposed rule, the Bureau did not explain why the preference for flaring over venting matters for waste prevention. However, in the final rule, the Bureau attempted to assert that the addition of an averaging scheme, derived from North Dakota's state regulations, transforms the preference for flaring into a "waste prevention" mechanism. (AR 389). But the same amount of methane is wasted if it is burned or vented, no matter how rates are averaged.

The Venting and Flaring Rule identifies different scenarios when oil and gas may be used royalty-free. 43 C.F.R. §§ 3178.1 through 3178.10. It also clarifies when flared gas is considered "unavoidably lost" and thus not subject to royalties. 43 C.F.R. §§ 3179.4, 3179.5, 3179.10, 3179.11. During production, operators must minimize venting during downhole well maintenance and liquids unloading and maintain certain records. 43 C.F.R. § 3179.204.

The Venting and Flaring Rule also imposes a host of equipment-specific requirements applicable to all oil and gas wells, including existing wells. 43 C.F.R. §§ 3179.201 through 3179.203. These requirements apply to pneumatic controllers, pneumatic diaphragm pumps, and storage tanks. *Id.* Each section requires operators to either replace older models of the specified equipment, flare, or otherwise eliminate associated emissions, whether by capture, reinjection, or productive use on-site. *Id.* Specifically, the rule prohibits operators from using pneumatic controllers that leak more than six standard cubic feet of natural gas per hour, pneumatic diaphragm pumps that vent any exhaust, unless they are used fewer than 90 days per year, or storage vessels with a potential to emit more than six tons per year (tpy) of volatile organic compounds. 43 C.F.R. § 3179.201(a)(1), 3179.202(b), and 3179.203(c). The rule clarifies that each section is only applicable to well-sites that are not already subject to new source performance standards, but would be subject to existing source performance standards, if the EPA issues such regulations, or would be subject to new source performance standards based on well-site modification. 43 C.F.R. §§ 3179.201(a)(2), 3179.202(a)(2), and 3179.203(a)(2). The requirements for storage vessels and pneumatic controllers reference both the original and more recent new source performance standards, but the requirements for pneumatic diaphragm pumps only reference the most recent new source performance standards. This is likely because the older new source performance standards addressed emissions from storage vessels and pneumatic controllers, but not pneumatic diaphragm pumps. *See* 40 C.F.R. § 60.5390 (older requirements for pneumatic controllers), 40 C.F.R. § 60.5395 (older requirements for storage vessels), 40 C.F.R. § 60.5390a (newer requirements for

pneumatic controllers), 40 C.F.R. § 60.5393a (newer requirements for pneumatic pumps), and 40 C.F.R. § 60.5395a (newer requirements for storage vessels).

The Venting and Flaring Rule also establishes leak detection and repair requirements for all well-sites. Similar to the equipment-specific requirements, this section references the EPA's new source performance standards and clarifies that the requirements contained in those regulations are also applicable to well sites that are not subject to the EPA's new source performance standards but would be subject to existing source performance standards, if promulgated. 43 C.F.R. §§ 3179.301 through 3179.305.

Finally, the Venting and Flaring Rule also contains a provision for case-by-case coordination with states to avoid adversely impacting production from non-federal, non-Indian leases. 43 C.F.R. § 3179.12. It contains a "state or tribal variance" provision, under which, at a given state or tribe's request, the Bureau may enforce the state or tribal standards alongside the state or tribe in lieu of the Venting and Flaring Rule. 43 C.F.R. § 3179.401. The variance provision does not contemplate that the decision to adopt standards that deviate from the Venting and Flaring Rule will adhere to the rulemaking procedures of the Administrative Procedure Act. Whether to grant a particular state or tribe's request rests in the sole discretion of the Bureau's State Director, with no opportunity for administrative or judicial review. 43 C.F.R. § 3179.401(b). The Bureau may also unilaterally rescind or alter a variance, but it is unclear what factors should be considered in making such a decision. 43 C.F.R. § 3179.401(d).

Thus, a significant portion of the Venting and Flaring Rule directly regulates the emission of greenhouse gases. The Bureau intentionally cross-referenced both new source

performance standards developed by the EPA and a then nascent existing source regulatory process to avoid redundancy with EPA requirements. (*See, e.g.*, AR 13 and AR 21). But because the EPA has determined to stay and likely unwind the rules for new and modified sources and to stop efforts to develop regulations for existing sources, the Venting and Flaring Rule includes air pollution control requirements, initially meant to eliminate redundancy, that will now be enforced only by the Bureau. Instead of enforcing those requirements uniformly nationwide, as envisioned by the Clean Air Act, the Bureau does so on a "one drop federal" basis, for all oil and gas production facilities that either produce at least a modicum of federal minerals or are combined, for accounting purposes, with facilities that do. In other words, the Bureau has "hijacked the EPA's authority under the guise of waste management."[7] *Wyoming*, 2017 U.S. Dist. LEXIS 5736 at *29.

Moreover, those same provisions in the rule referencing the EPA's newer, stayed regulations still overlap with Wyoming and Montana state oil and gas requirements.[8] But instead of automatically accepting those state requirements like the Bureau does for the corresponding EPA standards, the states must apply for variances from the Bureau to allow

[7] FACT SHEET: Administration Takes Steps Forward on Climate Action Plan by Announcing Actions to Cut Methane Emissions (Jan. 14, 2015), available online at: https://obamawhitehouse.archives.gov/the-press-office/2015/01/14/fact-sheet-administration-takes-steps-forward-climate-action-plan-anno-1 (last accessed June 12, 2017); *see also* AR 371.

[8] *See Rules Wyo. Dep't of Envtl. Quality, Air Quality*, ch. 6, § 2; 40 C.F.R. § 52.2620, subpart ZZ; Mont. Admin. R. §§ 17.8.1601 to .1606 and 17.8.1710 to .1713; 40 C.F.R. § 52.1370, subpart BB.

the Bureau to enforce those same requirements now that they are only contained in state permits.

The Bureau admits that climate change was a significant driver of this regulation because methane, in addition to being a saleable federal mineral, is also a potent greenhouse gas. (*See, e.g.*, AR 12). According to the Bureau, greenhouse gas emissions "have negative climate, health, and welfare impacts" that "impose costs to society that are not reflected in the market price of the gas." (AR 449). It referred to "[t]hese uncompensated costs to society" as "negative externalities." (*Id.*). It then concluded that, "Several market inefficiencies occur when society, rather than the producer, bears the costs of pollution damage." (*Id.*). Needless to say, the Bureau has no statutory mandate to cure "market inefficiencies."

The Bureau also performed a cost-benefit analysis of the Venting and Flaring Rule. (AR 442-668). It acknowledged that the rule "will require operators to incur costs to reduce flaring, replace outdated equipment, and administer these programs." (AR 450). The Bureau estimated that the rule would impose costs of about $114 – 279 million per year or $110 – 275 million per year depending on the discount rate. (*Id.*). It then considered the benefits of the rule which included "the cost savings the industry will receive from the recovery and sale of natural gas, and the environmental benefits of reducing the amount of greenhouse gases [] and other air pollutants released into the atmosphere." (AR 451). The Bureau found that the cost saving to industry from the recovery of additional natural gas would be $20 – 157 million per year. (*Id.*). But it valued the environmental benefits of the rule using a global social cost of methane analysis at $189 – 247 million per year. (*Id.*).

Thus, the rule only results in a net benefit if the ancillary benefits to global climate change are considered a relevant variable in the cost-benefit analysis. Without these ancillary benefits the costs of the rule likely more than double the benefits every year.

IV. Course of Proceedings

Shortly after the Bureau finalized the Venting and Flaring Rule, multiple states and organizations challenged the rule. This Court heard and subsequently denied motions for a preliminary injunction, and the Venting and Flaring Rule went into effect on January 18, 2017.

On March 28, 2017, President Trump issued an Executive Order directing the Bureau to review the rule for consistency with his stated policy goals of promoting energy independence and economic growth. Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017). If the review finds the rule to be inconsistent with those policy goals, then the Bureau was directed to "suspend, revise, or rescind[]" the Venting and Flaring Rule, through notice and comment rulemaking. *Id.* The Bureau has taken the first of three planned steps to review the Venting and Flaring Rule by staying compliance dates for all sections of the rule not already in effect. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27430 (June 15, 2017) (staying compliance dates for 43 C.F.R. §§ 3179.7, 3179.9, 3179.201 through .203, and 3179.301 through .305, the sections which include the provisions related to flare capture percentage, flaring measurement, pneumatic pumps and controllers, storage tank emissions, and leak detection and repair). However, the Bureau could not stay compliance dates for sections that were already in effect. *Id.* at 27431

(acknowledging that 43 C.F.R. §§ 3162.3-1, 3178, 3179.4, 3179.101 through .105, and 3179.204 were in effect). Those sections that remain in effect govern waste minimization plans, royalty-free use of production, limits on venting and flaring during drilling and production operations, and downhole well maintenance and liquids unloading. *Id.* Finally, the Bureau stated that the agency "intends to conduct notice-and-comment rulemaking to suspend or extend compliance dates." *Id.* Thus, some components of the Venting and Flaring Rule remain in effect, while compliance dates for other components have been temporarily stayed, and the Bureau is preparing additional notice-and-comment rulemaking.

ARGUMENT

I. Standard of Review

Under the applicable Administrative Procedure Act standard of review, this Court must set aside an agency's rule if it finds the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or if the rule is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id.* § 706(2)(C). "[T]he essential function of judicial review [of agency action] is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

Before a court begins its analysis of agency rulemaking, it must look at the agency's claimed source of statutory authority to determine "whether Congress has delegated to an

agency the authority to provide an interpretation that carries the force of law." *City of Arlington, Tex. v. FCC*, --- U.S. ---, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring); *see also* 5 U.S.C. § 706 (requiring the court to "decide all relevant questions of law" when reviewing agency action). "An agency literally has no power to act ... unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under Chevron is a congressional delegation of administrative authority"). Ultimately, a "[d]etermination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency's authority and discretion, and consideration of whether on the facts, the agency's action can reasonably be said to be within that range." *Olenhouse*, 42 F.3d at 1574.

When a court reviews an agency's construction of a statute it administers, the specificity of the statute shapes the court's inquiry. *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1293 (10th Cir. 1999) (citation and quotation omitted). "Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *Arlington*, 133 S. Ct. at 1876. Therefore, the Court must first ask whether Congress has directly spoken to the precise question at issue. *Id*. at 1868. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. However, if Congress has not directly addressed the precise question at issue, the court asks "whether the agency's answer is based on a permissible construction of the statute." *Id*. "No matter how it is

framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *Id.* (emphasis in original).

Therefore, even under *Chevron*, "agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp. v. EPA*, --- U.S. ---, 134 S. Ct. 2427, 2442 (2014) (quoting *Arlington*, 133 S. Ct. at 1868). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [the Court] typically greet[s] its announcement with a measure of skepticism." *Id*. at 2444 (internal citations and quotations omitted). Congress generally "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions" nor does it "hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

"Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adams Fruit Co.*, 494 U.S. at 650 (quoting *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). "Regardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Brown & Williamson*, 529 U.S. at 125 (quoting *ETSI Pipeline Project*, 484 U.S. at 517).

II. The Bureau exceeded its statutory authority.

The Bureau has clear statutory authority to promulgate rules to minimize the waste of federal minerals, including methane, under the Mineral Leasing Act and FOGRMA.

Wyoming, 2017 U.S. Dist. LEXIS 5736 at *23. But the Bureau has no authority to promulgate air quality regulations to minimize the emission of methane or other greenhouse gases under either of these statutory regimes or FLPMA. *Id.* at *25, n.7. The Bureau's authority to promulgate regulations under each of these statutes is limited to regulations that are necessary to carry out the purposes of those acts. *See* 30 U.S.C. §§ 189 and 1751; 43 U.S.C. § 1740. Minimizing greenhouse gas emissions to combat global climate change is not one of the purposes of any of those acts. Thus, although the Bureau might have authority to promulgate a waste minimization rule with venting and flaring components specifically tailored to minimize methane waste, it does not have the authority to promulgate this rule.

The air quality components of the Venting and Flaring Rule predominate over the resource conservation components. The Bureau's true purpose in promulgating the rule is evident from the insertion of what are essentially existing source performance standards into the rule, with explicit reference to the EPA's requirements. The Bureau candidly admits that one of the purposes of the rule and its primary benefit comes from the regulation of greenhouse gases by controlling their emission from existing sources. (AR 1). Similarly, the Bureau's preference for flaring over venting belies the predominant purpose of the rule because the same amount of waste occurs either way. The Bureau tries to distinguish venting and flaring by creating a complex averaging scheme, but the root of the preference for flaring over venting lies in air quality, not in waste minimization. Thus, even though the rule contains some arguably waste-specific components, the rule itself is so thoroughly dominated by air quality requirements that it must be set aside entirely. *See, e.g., Seatrain*

Lines, 411 U.S. at 745 ("an agency may not bootstrap itself into an area in which it has no jurisdiction").

The Bureau claims that as a land management agency it has "the authority to regulate air quality and [greenhouse gas emissions] on and from public lands pursuant to FLPMA." (AR 407). But nothing in FLPMA empowers the Bureau to regulate air quality. 43 U.S.C. § 1702(c) and (h). That responsibility belongs to state air pollution control agencies and the EPA under the Clean Air Act. 42 U.S.C. § 7401(a)(3). FLPMA merely requires the Bureau to require lessees to comply with applicable air pollution control laws. 43 U.S.C. § 1712(c)(8). It does not allow the Bureau to create its own air pollution regulations universally applicable to all federal land.[9] Thus, the Bureau's attempt to justify the air quality components of the Venting and Flaring Rule under its FLPMA authority is misplaced.

Similarly, the Mineral Leasing Act and the FOGRMA "create a program for leasing mineral deposits on federal land" and "a system for collecting and accounting for federal mineral royalties." *Wyoming*, 2017 U.S. Dist. LEXIS 5736 at *21 and *23. "The purpose of the [Mineral Leasing Act] is to promote the orderly development of oil and gas deposits in publicly owned lands of the United States through private enterprise." *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 842 (D. Wyo. 1981) (internal citations omitted). "The terms of the [Mineral Leasing Act] and FOGRMA make clear that Congress intended the

[9] The Bureau also asserts authority to regulate specific air quality concerns under FLPMA through individual Records of Decisions. (AR 390). The validity of that position is not at issue in this litigation, and Wyoming and Montana do not waive their right to challenge the Bureau's position in future litigation.

Secretary, through the [Bureau], to exercise its rulemaking authority to prevent the waste of federal and Indian mineral resources and to ensure the proper payment of royalties to federal, state, and tribal governments." *Wyoming*, 2017 U.S. Dist. LEXIS 5736 at *23. Neither of these statutory regimes were enacted to address global climate change or purport to authorize the Bureau to promulgate air pollution regulations.

The Bureau argues that it is entitled to *Chevron* deference for its assertion of authority and new interpretations of old statutes. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). It is not. Congress has spoken to the issue – Congress tasked the EPA, not the Bureau, with developing generally applicable performance standards for both new and existing types of specified source categories. 42 U.S.C. § 7411. Conversely, Congress articulated the purposes for the Mineral Leasing Act, FOGRMA, and FLPMA, and those purposes do not include the regulation of greenhouse gases to combat global climate change. There is no ambiguity on this point in any of these statutes. It may be that the emission of methane into the atmosphere during oil and gas production causes "negative externalities" and "market inefficiencies," but these are not the Bureau's concern.

The Bureau was created to manage federal land, which includes an array of responsibilities. Mineral development is unquestionably one of the more important responsibilities allocated to the Bureau. "[A] review of all legislation dealing with use of public lands shows the serious concern of Congress over mineral development." *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383, 394 (D. Wyo. 1980) (internal citations omitted). "The Mineral Leasing Act was intended to promote wise development of natural

resources and to obtain for the public reasonable financial returns on assets belonging to the public." *Id.* at 392. But while the Bureau has great responsibility over federal lands, its authority is not unlimited, and it does not extend to every problem the nation faces. "Even under Chevron's deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (internal citation omitted).

Congress chose the EPA and the states to occupy this field. The fact that the EPA has chosen not to act at this time does not open the field for the Bureau. No matter how serious a problem may be, the administrative state cannot decide for itself to act without Congressional authorization. Accordingly, the Venting and Flaring Rule should be set aside because it exceeds the Bureau's statutory authority.

III. The Bureau's reliance on ancillary benefits is arbitrary and capricious.

When a court reviews a challenge to an agency's cost-benefit analysis, its role is limited to determining "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985). Here, the ancillary benefits associated with the social cost of methane are irrelevant, and the Bureau committed a clear error of judgment in promulgating a rule that costs significantly more than it saves.

This case requires this Court to answer the question left open in *Michigan v. EPA*—whether an agency can rely on ancillary benefits when deciding whether to adopt a regulation. *Michigan v. EPA*, --- U.S. ---, 135 S. Ct. 2699, 2711 (2015). In that case, the United States Supreme Court considered a challenge to regulations governing the emission

of hazardous air pollutants by power plants under the Clean Air Act. Under the Clean Air Act, EPA can regulate power plants only if "regulation is appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). Having estimated some $9.6 billion per year in regulatory costs, EPA had nonetheless refused to consider cost in its calculus. *Michigan,* 135 S. Ct. at 2705-06. The Court invalidated EPA's rule because the EPA misinterpreted its duty to consider cost under the statute.

The Court first observed that "agency action is lawful only if it rests 'on a consideration of the relevant factors.'" *Id.* at 2706 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted)). The Court then turned to the statutory text, noting that "'appropriate' is 'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'" *Id.* at 2707 (citing *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part)). Although the term leaves some discretion, "an agency may not 'entirely fai[l] to consider an important aspect of the problem' when deciding whether regulation is appropriate." *Michigan*, 135 S. Ct. at 2707 (citing *State Farm*, 463 U.S. at 43).

The Court concluded that cost was an important aspect of the problem. *Id.* at 2707 ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."). In fact, cost-benefit analysis is a central part of the administrative process:

> Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages

> *and* the disadvantages of agency decisions. It also reflects the reality that "too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether "regulation is appropriate and necessary" as an invitation to ignore cost.

Id. at 2707-08 (internal citation omitted). In the end, cost must be balanced against benefit because "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Id.* at 2707.

After concluding that the EPA must consider the costs of its regulation, the Court noted that some parties urged it to uphold the regulation because the rule's ancillary benefits exceeded its costs. *Id.* at 2711. Those benefits included reductions in power plant emissions of particulate matter and sulfur dioxide, substances that are not covered by the hazardous air pollutants program under which the rule was promulgated. *Id.* at 2706. The majority viewed the request with skepticism. *Id.* at 2711. However, because the EPA did not consider cost at all, the Court declined to decide whether the EPA could have considered those ancillary benefits in its cost-benefit analysis. *Id.*

Like the EPA, the Bureau must consider the costs and benefits of the Venting and Flaring Rule, because the Bureau may only require lessees to "use all **reasonable** precautions to prevent waste of oil or gas developed in the land." 30 U.S.C. § 225 (emphasis added). And it may only include lease "provisions for the purpose of insuring the exercise of **reasonable** diligence, skill and care in the operation of said property." 30 U.S.C. § 187 (emphasis added). A regulation that imposes exorbitant costs on lessees in exchange for minimal benefits is unreasonable, and therefore, arbitrary and capricious. *Michigan*, 135

S. Ct. at 2707 ("[n]o regulation is 'appropriate' if it does significantly more harm than good.").

Here the Bureau did conduct a cost-benefit analysis and it showed that the rule only results in a net benefit if the ancillary benefits are considered. But they cannot be. While it does not appear that this precise question has been answered, the answer must be that ancillary benefits cannot provide the primary justification for a regulation. Otherwise, agencies could use transparent pretexts, as the Bureau has done here, to regulate matters outside the scope of their statutory authority. Congress authorized the Bureau to lease public lands for oil and gas development, to collect appropriate royalties, and to do so using the principles of multiple use and sustained yield. While the Bureau can consider environmental impacts **to the public lands** when it chooses to regulate, there is nothing in any of the statutes empowering the Bureau to consider or work to address **global** climate change in the process. Congress gave the Bureau authority over the public lands not the Earth.

There are reasons why the Bureau's regulatory authority is limited to the purposes outlined in the Mineral Leasing Act, FOGRMA, and FLPMA. Practically, the Bureau does not have the expertise to promulgate and enforce appropriate air quality regulations, and Congress has not provided the Bureau the necessary resources to do so. More importantly, if, when, and how to address global climate change is a political question that Congress must answer. If it does so, Congress may then delegate appropriate authority to federal agencies to implement its political determination. Until it does so, however, the Bureau "literally has no power to act," and that limitation must necessarily extend to the

consideration of benefits that are not related to the Bureau's specific authority. *La. Pub. Serv. Comm'n*, 476 U.S. at 374. Accordingly, the ancillary benefits identified by the Bureau are irrelevant to a proper cost-benefit analysis.

Absent the ancillary benefits identified by the Bureau, the Venting and Flaring rule is arbitrary and capricious. The rule likely will cost more than double what it saves annually. In short, it fails the statutory test that the Bureau's regulations must be "reasonable" because it does more harm than good. *Michigan*, 135 S. Ct. at 2707 ("[n]o regulation is 'appropriate' if it does significantly more harm than good."). This fact is also self-evident from industry's decision not to implement these methane saving provisions itself. If the actions mandated by the rule actually resulted in more benefits than costs, industry would have a significant profit incentive to implement them.

As the costs of the rule exceed its benefits without the irrelevant ancillary benefits, the Bureau's decision to adopt the rule was arbitrary and capricious, and it must be set aside.

IV. The variance provision conflicts with the Clean Air Act and the APA.

The variance provision directly conflicts with the citizen suit provision of the Clean Air Act and the rulemaking process set forth in the APA. *Compare* 43 C.F.R. § 3179.401, *with* 42 U.S.C. § 7604; 5 U.S.C. § 553. The purpose of the variance provision is ostensibly to minimize redundant regulations, but the effect of it is to enable the Bureau to enforce state implementation plans in violation of the Clean Air Act, and to do so without properly promulgating what is effectively a new federal rule.

Congress authorized the Bureau promulgate rules to minimize waste, but more recently, Congress also gave the Bureau, along with many other governmental and private actors, authority to enforce state implementation plan provisions that both the state and the EPA fail to enforce. *Compare* 30 U.S.C. § 187 and 30 U.S.C. § 1751, *with* 42 U.S.C. § 7604. But under the Clean Air Act, the Bureau may not file a citizen suit unless both the EPA and the state in which the violation occurred fail to take appropriate action to enforce the act. Even then, the Bureau first must give the EPA and the state in which the violation occurred 60 days' notice of its intention to file a citizen suit. 42 U.S.C. 7604(b). This notice ensures that the EPA and the state air pollution control agency must both consciously decide not to enforce a violation before a "person" may pursue a citizen suit.

But the Venting and Flaring Rule's variance provision would authorize the Bureau to enforce state implementation plans, even if both the EPA and the state air pollution control agency already are taking action against those same violations. The Bureau cannot enact a regulation that so directly conflicts with and undermines the process set forth in the Clean Air Act. *Wyoming*, 2017 U.S. Dist. LEXIS 5736 at *28 ("[T]he [Venting and Flaring] Rule has potential conflict and inconsistency with the implementation and enforcement provisions of the CAA."). The fact that a state requests a variance does not change this analysis because states are not authorized by the Clean Air Act to preemptively approve a specific class of citizen suits, nor would that be consistent with the purpose of the citizen suit provision. *See, e.g., Friends of the Earth v. Potomac Elec Power Co.,* 546 F. Supp. 1357, 1362 (D.C. Cir. 1982). Further, the Bureau developed the variance provision to avoid overlap with preexisting state and federal regulations. (*See, e.g.,* AR 365). Thus, the

variance is a central part of the Venting and Flaring Rule, and the unlawfulness of that provision may not be remedied by excising it from the rule. *See, e.g.*, *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009) (("A regulation is severable if the severed parts operate entirely independently of one another, and the circumstances indicate the agency would have adopted the regulation even without the faulty provision.") (internal quotations omitted)).

Additionally, the variance provision of the Venting and Flaring Rule illegally sidesteps the APA. This provision is a backdoor rulemaking mechanism that allows the Bureau to enforce regulations without first promulgating them through the public notice and comment process. 43 C.F.R. § 3179.401. The regulatory process by which a state or tribe can request a variance does not include any level of public involvement consistent with the requirements for rulemaking laid out in the Administrative Procedure Act. 5 U.S.C. § 553(b). The process is straightforward - the state or tribe submits a request for a variance, the Bureau acts on it, and if the Bureau grants a variance, then the Bureau will enforce the state or tribe's standards in lieu of the Venting and Flaring Rule. But the APA does not allow an agency to unilaterally alter a rule based on a request from a state or tribe.

Thus, the unlawful variance provision renders the Venting and Flaring Rule arbitrary and capricious and the rule should not survive judicial review.[10]

[10] Although this argument was not put before the Bureau through publicly submitted comments, the Bureau bears the primary responsibility to ensure that it complies with theAPA, even absent specific public comment. *Dep't. of Transp. v. Public Citizen,* 541 U.S. 752, 765 (2004).

CONCLUSION

For the foregoing reasons, the States of Wyoming and Montana request that the Court enter an order setting aside the final rule entitled Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule published at 81 Fed. Reg. 83008 (Nov. 18, 2016) as both contrary to law and arbitrary and capricious agency action.

DATED this 2nd day of October 2017.

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CERTIFICATE OF WORD COUNT

I hereby certify that this response complies with the type-volume limitation set forth in U.S.D.C.L.R. 83.6(c) because this brief contains 9,190 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2017, the foregoing was filed electronically with the Court, using the CM/ECF system, which caused the foregoing to be served electronically upon counsel of record.

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