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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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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]").

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[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. BLM Acted Arbitrarily and Capriciously When Promulgating the Rule.

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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