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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

STATE OF WYOMING, et al.,	)
	)
Petitioners,	)
	) Civil Case No. 2:16-cv-00285-SWS [Lead]
v.	)
	) [Consolidated With 2:16-cv-00280-SWS]
UNITED STATES DEPARTMENT OF	)
THE INTERIOR, et al.,	) Assigned: Hon. Scott W. Skavdahl
	)
Respondents,	) **CITIZEN GROUPS' RESPONSE**
	) **BRIEF**
and	)
	)
WYOMING OUTDOOR COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY, CITIZENS FOR A HEALTHY COMMUNITY, DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, EARTHWORKS ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW AND POLICY CENTER, MONTANA ENVIRONMENTAL INFORMATION CENTER, NATIONAL WILDLIFE FEDERATION, NATURAL RESOURCES DEFENSE COUNCIL, SAN JUAN CITIZENS ALLIANCE, SIERRA CLUB, THE WILDERNESS SOCIETY, WESTERN ORGANIZATION OF RESOURCE COUNCILS, WILDERNESS WORKSHOP, AND WILDEARTH GUARDIANS,	)
	)
Respondent-Intervenors.	)

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INTRODUCTION

The Bureau of Land Management's ("BLM") Waste Prevention Rule is just that—a rule that has the purpose and effect of reducing the preventable loss of publicly and tribally owned natural gas. It derives from BLM's express mandate under the Mineral Leasing Act ("MLA") to require lessees to "use all reasonable precautions to prevent waste." 30 U.S.C. § 225. BLM initiated the rulemaking in response to the dramatic increase in oil and gas operations on public and tribal lands as a result of new drilling techniques and a well-documented and pervasive problem of waste of public resources through those operations. BLM tailored the Waste Prevention Rule to ensure that its requirements will stem the tide of preventable waste by increasing the capture of gas and reducing venting, flaring and leaking gas. The requirements are reasonable because they are based on widely available and low cost technologies for capturing gas that have developed since the Department of the Interior last updated its waste prevention regulations more than 35 years ago, in 1979. The Waste Prevention Rule provides a much-needed update to these longstanding regulations to address the urgent problem of natural gas waste.

Petitioners attempt to muddy the waters by asserting that the Waste Prevention Rule is in fact an air quality regulation that intrudes upon the Environmental Protection Agency's ("EPA") authority. But repeatedly saying so

does not make it so. As this Court earlier recognized, efforts to reduce waste of gas necessarily also reduce methane emissions because "the product is the pollutant." But this overlap does not relieve BLM (or EPA) of its independent legal obligations under its governing statutes. In adopting the Waste Prevention Rule, BLM effectuated its statutory mandate under the MLA while carefully avoiding conflict, just as the Supreme Court has instructed. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

BLM also reasonably considered the costs and benefits of its action, including both the public benefits (in the form of avoided economic damages from climate change and decreased air pollution) and private benefits (in the form of cost savings to operators). Although Petitioners argue that BLM should have limited its consideration to the private benefits that accrue to operators, there is no reason to think that Congress—which adopted the MLA's waste prevention provisions out of concern with the lax methods of private operators developing public resources and directed BLM to regulate to benefit the public welfare—intended BLM to only regulate where all of the benefits end up in the pockets of those operators.

Ultimately, the Waste Prevention Rule is thoroughly and independently justified by the MLA's waste prevention mandate, and should be upheld by this Court.

BACKGROUND

This Court thoroughly laid out the relevant background facts in its earlier opinion. Order on Mots. for Prelim. Inj. 2–8 (Jan. 16, 2017), ECF No. 92 ("PI Order.").

In brief, the Department of the Interior has regulated venting and flaring to prevent the waste of public and Indian natural gas for more than 30 years. PI Order 3. Over the past decade, oil and gas production on BLM-administered lands has increased dramatically. *Id.* at 4. In 2008 and 2010, the Government Accountability Office identified a pervasive problem of preventable natural gas waste and associated air pollution on public and tribal lands. *Id.* at 5. The Interior Department studied the problem, concluding that vast amounts of publicly owned gas—enough to serve about 6.2 million households for a year—was being wasted as development outpaced the existing infrastructure capacity, and lessees focused on near-term oil production rather than capturing associated gas. *Id.* at 4–5.[1] Moreover, as BLM recognized, recent studies suggest the waste may be substantially greater, making the agency's "estimate of losses . . . conservative." Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008, 83,015 (Nov. 18, 2016) ("Waste Prevention Rule" or "Rule").

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[1] The regulations define "capture" as "the physical containment of natural gas for transportation to market or productive use of natural gas." 81 Fed. Reg. at 83,081.

BLM also recognized that the prior waste regulation, found in Notice to Lessees and Operators 4A, 44 Fed. Reg. 76,600 (Dec. 27, 1979) ("NTL-4A"), did "not reflect modern technologies, practices, and understanding of the harms caused by venting, flaring, and leaks of gas," was not "particularly effective in minimizing waste of public minerals," and was "subject to inconsistent application." 81 Fed. Reg. at 83,015, 83,017, 83,038. Concluding that there is a "compelling need to update NTL-4A's requirements to make them clearer, more effective, and reflective of modern technologies and practices," BLM published a proposed rule, accepted public comments, and met with stakeholders and state regulators in states with significant oil and gas production. PI Order 5–6; *see also* 81 Fed. Reg. at 83,017 (noting Government Accountability Office's recommendations to clarify BLM requirements for royalty-free use of natural gas and to update regulations "to take advantage of opportunities to capture economically recoverable natural gas using available technologies").

On November 18, 2016, BLM issued the final Waste Prevention Rule, building on its prior regulation. The Waste Prevention Rule prohibits venting except in limited situations and limits flaring through a system—modeled after North Dakota's program—that requires operators to capture a certain percentage of the gas they produce each month. PI Order 6. The Rule also requires lessees to measure and report gas that is vented or flared, to detect and repair leaks of gas

from equipment, and to update old and inefficient equipment that contributes to the waste of natural gas. *Id*. at 6–7. BLM determined that these requirements were "economical, cost-effective, and reasonable measures . . . to minimize gas waste." 81 Fed. Reg. at 83,009. Although many of the provisions were modeled after existing, proven regulations, BLM determined neither the states nor the EPA were comprehensively regulating waste and that consistency was needed across the public lands. *See, e.g.*, *id.* at 83,010, 83,017–18, 83,019.

Petitioners immediately challenged the Waste Prevention Rule, and moved for a preliminary injunction. After full briefing and an oral hearing, this Court denied the motion in a written opinion on January 17, 2017. PI Order 29. Merits briefing was originally scheduled to take place in the spring, but the briefing schedule has been delayed four times: twice in response to motions made by Petitioners Western Energy Alliance and Independent Petroleum Association of America (collectively, "Industry Petitioners") and twice in response to BLM's requests. *See* Fed. Resp'ts' Mot. for an Extension of the Merits Briefing Deadlines (Oct. 20, 2017), ECF No. 155; Fed. Resp'ts' Mot. to Extend the Briefing Deadlines (June 20, 2017), ECF No. 129; Indus. Pet'rs' Mot. for Extension of Time to Move to Complete &/or Suppl. the Admin. R. & to Extend the Briefing Schedule (Mar. 30, 2017), ECF No. 110; Joint Mot. of Wyo., Mont., & Indus. Pet'rs to Extend Briefing Schedule (Mar. 3, 2017), ECF No. 97.

In the meantime, a majority of Senators voted *against* proceeding to debate a resolution to invalidate the Waste Prevention Rule. 163 Cong. Rec. S2851, S2853 (May 10, 2017). In June, without undergoing notice and comment, BLM suspended the Rule in an action that a court declared unlawful and vacated. 82 Fed. Reg. 27,430 (June 15, 2017); *California v. BLM*, No. 17-CV-03804-EDL, 2017 WL 4416409, at *13–*14 (N.D. Cal. Oct. 4, 2017). In October, BLM proposed a rulemaking to revise and delay the compliance dates for key provisions of the Rule, and on December 8, 2017, BLM finalized that revision. 82 Fed. Reg. 58,050, 58,052 (Dec. 8, 2017).

STANDARD OF REVIEW

To succeed, challenges to an agency decision brought under the APA must show that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573–74 (10th Cir. 1994). The scope of review is narrow and the court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Olenhouse*, 42 F.3d at 1575 (quoting *State Farm*, 463 U.S. at 50).

As this Court previously held, "[w]here a case involves an administrative agency's assertion of authority to regulate a particular activity pursuant to a statute that it administers, the court's analysis is governed by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." PI Order 12. Under *Chevron*, a court must "give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). But where Congress has not addressed the precise question at issue, the court must defer to an agency's interpretation "so long as it is permissible." *Id.* (quoting *Brown & Williamson*, 529 U.S. at 132).

This is true even when the question is one of the agency's jurisdiction, and even where it is asserted that that jurisdiction is in an area of traditional state authority, so long as the case "involves an administrative agency's construction of a statute that it administers." *City of Arlington, Tex. v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 297, 304 (2013); *contra* Br. in Supp. of Indus. Pet'rs' Pet'n for Review of Final Agency Action 10 (Oct. 2, 2017), ECF No. 142 ("Industry Br."); Joint Open. Br. of the States of N.D. & Tex. 24 (Oct. 5, 2017), ECF No. 144-1 ("N.D. Br."). "[T]he delegation of general authority to promulgate regulations extends to all matters 'within the agency's substantive field.' … [C]ourts need not try to discern whether '*the particular issue* was committed to agency discretion.'"

Helfrich v. Blue Cross & Blue Shield Ass'n, 804 F.3d 1090, 1109 (10th Cir. 2015) (quoting *City of Arlington*, 569 U.S. at 306); *see* PI Order 14–15 (same).

In conflict with this Court's ruling on the first preliminary injunction requests, Industry Petitioners argue that *Chevron* does not apply because the Rule has "deep economic and political significance." Industry Br. 7 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015)). *King*, however, does not stand for the proposition that any nationwide rule with significant impacts is no longer subject to *Chevron*, as Industry's argument suggests. Rather, the Supreme Court simply confirmed prior rulings that the plain meaning of a statute must be determined based on the context and overall structure of the Act. *King*, 135 S. Ct. at 2489. Here, the plain language, context, and overall structure of the MLA confirm that BLM has broad authority to regulate waste. *See infra* pp. 9–12.

Nor is this a case where "an agency claims to have discovered in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Contra* Industry Br. 8 (quotations & alterations omitted) (quoting *Util. Air. Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). To the contrary, in the Waste Prevention Rule, BLM merely updated its longstanding and outdated regulations for prevention of waste from lessees who profit from the development of publicly owned oil and gas resources. *See supra* pp. 3–4.

ARGUMENT

The Waste Prevention Rule aims to remedy deficiencies in existing standards that have led to significant and preventable waste of public resources on public lands, while affording states the flexibility to preserve or adopt state-level requirements where those will deliver the same or greater benefit. It derives expressly from the MLA's mandate that BLM require lessees to "use *all* reasonable precautions to prevent waste." 30 U.S.C. § 225 (emphasis added). The Rule's provisions are reasonable and will reduce preventable waste. Indeed, they are modeled on proven, cost-effective measures that are already required in many states and used by leading companies. Moreover, BLM's consideration of the significant environmental benefits of reducing waste is a virtue not a vice, and does not render BLM's decision arbitrary and capricious. Finally, to prevent waste of federal and tribal minerals that are pooled with private or state minerals, BLM lawfully applied the Waste Prevention Rule to all minerals within federal units and communitized areas.

I. BLM Has Authority to Promulgate the Waste Prevention Rule.

A. BLM has broad authority to regulate waste.

As this Court previously held, "the terms of the MLA and [the Federal Oil and Gas Royalty Management Act ("FOGRMA")] make clear that Congress intended the Secretary, through the BLM, to exercise its rulemaking authority to

prevent the waste of federal and Indian mineral resources." PI Order 14. These statutes "unambiguously grant BLM authority to regulate the development of federal and Indian oil and gas resources for the prevention of waste." *Id*. at 15 (emphasis omitted). Indeed, under the MLA, BLM must ensure that lessees "use *all* reasonable precautions to prevent waste of oil or gas." 30 U.S.C. § 225 (emphasis added); *see also* PI Order 13. Congress' use of the word "all" suggests that it intended BLM to aggressively control waste of publicly owned resources. *See Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014) (ruling that statutory term "all relief necessary" authorized broad remedies against defendant because "we think Congress meant what it said. All means all." (quotation omitted)).

BLM also has authority 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 [MLA]," 30 U.S.C. § 189, including the prevention of waste. BLM must ensure that each lease "contain[s] … a provision that such rules … for the prevention of undue waste as may be prescribed by said Secretary shall be observed." *Id.* § 187; *see also* PI Order 13 (recognizing that "Section 187 [of the MLA] confirms the BLM's authority to issue regulations to carry out the MLA's waste prevention objectives").

BLM's waste prevention mandate fulfills Congress' intent to protect and fairly develop the public's natural resources. To this end, the MLA also vests BLM with authority to "insur[e] the exercise of reasonable diligence, skill, and care in the operation of [leased] property," and "protect[] … the interests of the United States and … safeguard[] … the public welfare." 30 U.S.C. § 187.[2] The legislative history demonstrates that Congress' overriding concern was to "reserve to the Government the right to supervise, control and regulate the . . . [development of public natural resources], and prevent monopoly and waste, and other lax methods that have grown up in the administration of our public land laws." H.R. Rep. No. 65-1138, at 19 (1919) (Conf. Rep.).[3] Rather than leaving it to private

[2] BLM's express statutory authority goes far beyond preventing waste. For example, the MLA's public welfare goal gives BLM authority "to prevent environmental harm." *Nat. Res. Def. Council v. Berklund*, 458 F. Supp. 925, 936 & n.17 (D.D.C. 1978). The Act also directs BLM to "regulate all surface-disturbing activities" for purposes of "conservation of surface resources." 30 U.S.C. § 226(g). Courts have interpreted the term "conservation" in the MLA as "not only encompass[ing] conserving mineral deposits, but also [the] prevent[ion of] environmental harm." *See Hoyl v. Babbitt*, 129 F.3d 1377, 1380 (10th Cir. 1997); *Copper Valley Machine Works, Inc. v. Andrus*, 653 F.2d 595, 600 (D.C. Cir. 1981). Similarly, the Federal Land Policy and Management Act ("FLPMA") directs BLM to "protect the quality of the scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," 43 U.S.C. § 1701(a)(8), and to "take any action necessary to prevent unnecessary or undue degradation" of public lands, 43 U.S.C. § 1732(b).

[3] *See also* H.R. Rep. No. 65-206, at 6 (1917) ("Careful provisions relative to continued development to prevent waste and speculation are inserted in the bill that will . . . practice conservation of this resource that is so universally used and in which we all feel a keen interest in the prevention of its waste in any form.").

actors to manage the exploitation of public resources, Congress explicitly gave BLM the responsibility of ensuring that public resources are developed in a manner that furthers the public interest—including the specific obligation to prevent waste. *See, e.g.*, *Boesche v. Udall*, 373 U.S. 472, 481 (1986) (recognizing that preventing waste is part of the MLA's public interest purpose).

Indeed, no party disputes BLM's authority to regulate waste. *See* PI Order 15; Br. in Supp. of Wyo. & Mont.'s Pet'n for Review of Final Agency Action 22 (Oct. 2, 2017), ECF No. 141 ("Wyoming Br.") ("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."). Rather, Petitioners allege that the Waste Prevention Rule is actually an air quality regulation and not a rule for the prevention of waste. But that is not the case: the provisions of the Waste Prevention Rule challenged by Petitioners significantly reduce the amount of publicly and tribally owned natural gas that is lost to the atmosphere. *See infra* p. 14. As this Court previously recognized, "[o]f course, BLM has authority to promulgate and impose regulations which may have air quality benefits and even overlap with [Clean Air Act] regulations *if* such rules are independently justified as waste prevention measures pursuant to its MLA authority." PI Order 19. As explained below, that is the case here.

B. BLM's conclusion that the Waste Prevention Rule's provisions are reasonable precautions to prevent waste is consistent with the purposes of the MLA and entitled to deference.

BLM reasonably determined the Waste Prevention Rule's provisions constitute "reasonable precautions to prevent waste" of publicly owned resources under the MLA, 30 U.S.C. § 225. BLM defines waste of oil and gas in a way that attempts to maximize the recovery from a given pool for the benefit of the public, as:

> [A]ny act or failure to act by the operator that is not sanctioned by [BLM] 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. BLM did not change this definition as part of the Waste Prevention Rule, and Petitioners do not challenge it in this case. Instead, Petitioners challenge BLM's determination that the provisions of the Rule are in fact reasonable precautions to "avoid[] surface loss of … gas." There is no merit to these claims.

As an initial matter, BLM's determination of what constitutes reasonable precautions to control waste is entitled to deference. *See Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1234 (10th Cir. 2000). Indeed, this Court earlier "agree[d] that the BLM is entitled to deference regarding the determination of how

best to minimize losses of gas due to venting, flaring, and leaks, and incentivize the capture and use of produced gas"—i.e., how best to prevent waste. PI Order 15.

The specific provisions challenged by Petitioners will reduce the amount of publicly and tribally owned natural gas that is lost to the atmosphere through venting, flaring and leaking, and ameliorate the rampant problem of waste of publicly owned resources. *See* Admin. R. at VF_0000562 (showing gas savings associated with the capture targets and requirements for pneumatic controllers, pneumatic pumps, liquids unloading, storage tanks, and leak detection and repair); 81 Fed. Reg. at 83,010–13 (estimating current losses of gas from leakage and other sources addressed in the Rule). Overall, BLM expects that the Waste Prevention Rule will reduce venting by 35% and flaring by 49% from 2015 levels. 81 Fed. Reg. at 83,014.

Moreover, the Rule's requirements constitute "reasonable precautions" because they are based on measures that are already widely deployed in leading States and by leading companies. For example, the capture requirements are modeled after similar North Dakota regulations. 81 Fed. Reg. at 83,023, 83,025 & n.101 (discussing North Dakota's regulations found at VF_0003048–50). The leak detection and repair, pneumatics, and storage tank provisions are modeled after regulations in Colorado and Wyoming. *See id.* at 83,019; *see also id.* at 83,012 (noting the storage tank requirements are similar to, but less stringent than, the tank

requirements in Colorado and part of Wyoming and that the requirement to replace high-bleed pneumatic controllers with low-bleed pneumatic controllers is consistent with existing requirements in Colorado and Wyoming). Indeed, companies like XTO Energy, the production subsidiary of ExxonMobil, have declared not just that they are "complying with recent . . . [BLM Waste Prevention] regulations," but also that they will expend "considerable effort beyond regulatory requirements." *XTO Energy, Methane Emissions Reduction Program* (last visited Dec. 10, 2017), http://www.xtoenergy.com/responsibility/current-issues/air/xto-energy-methane- emissions-reduction-program#/section/1-regulatory-requirements.

The Rule's requirements likewise constitute "reasonable precautions" because they are associated with very modest costs. *See, e.g.*, 81 Fed. Reg. at 83,011 (BLM relying on multiple studies showing that leak detection and repair programs are a cost-effective means of reducing leaked gas) (citing Regulatory Impact Analysis ("RIA") at 27 (VF_0000473)). These leak detection and repair studies show that "once leaks are detected, the vast majority can be repaired with a positive return to the operator." *Id.* In support of the pneumatics provisions, BLM relied on studies showing that replacing higher emitting devices "would actually save industry $2.65 per Mcf of avoided methane emissions." *Id.* at 83,012. Even for those provisions that do not pay for themselves, BLM determined that the costs

would have only minor impacts to even the smallest businesses—accounting for only approximately 0.15% of these companies' profits. *Id.* at 83,068–69.

BLM further ensured the Rule's precautions were reasonable by providing exemptions and accommodations to facilitate industry compliance. For example, BLM modified the capture requirements between the proposed and final rule in response to comments "to make compliance more feasible and less costly." *Id.* at 83,011. To enhance flexibility and reduce costs, the final Rule phases the capture targets in over a longer period of time and allows operators to meet their capture targets on a lease-by-lease basis or an average basis over all their leases in a county or state. *Id.* Moreover, where BLM's efforts to prevent waste through venting, flaring, and leaking "would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease," an operator can receive an exemption from the Rule's requirements, including for well completion, pneumatic controllers, pneumatic diaphragm pumps, storage vessels, and leak detection requirements. 43 C.F.R. §§ 3179.102(c), 3179.201(b)(4), 3179.202(f), 3179.203(c)(3), 3179.303(c); *see* 81 Fed. Reg. at 83,011–12.

In sum, BLM's approach was reasonable and consistent with the MLA's mandate to prevent waste of public resources: the precautions BLM adopted reduce the preventable loss of natural gas by reasonably relying on low cost measures that

have long formed the basis of existing state requirements and industry best practices.

C. Nothing in the MLA requires BLM to define "waste" solely based on what is profitable for a lessee.

Industry and amicus American Petroleum Institute ("API") ignore the foregoing, and argue that there is only one meaning for the term "waste" in the MLA—loss of gas that would otherwise be profitable for an operator to capture. Industry Br. 19; API's Amicus Br. in Supp. of Pet'rs 3–4 (Oct. 12, 2017), ECF No. 153 ("API Br."). BLM expressly rejected this view in favor of a definition that is consistent with the MLA's focus on preventing the avoidable loss of natural gas while protecting the interests of the United States and the public:

> A focus on oil development rather than gas capture may be a rational decision for an individual operator, but it does not account for the broader impacts of venting and flaring, including the costs to the public of losing gas that would otherwise be available for productive use, the loss of royalties that would otherwise be paid to States, tribes, and the Federal Government on the lost gas, and the air pollution and other impacts of gas wasted through venting and flaring. . . . Thus, *a decision to vent or flare that may make sense to the individual operator may constitute an avoidable loss of gas and unreasonable waste* when considered from a broader perspective and across an entire field.

81 Fed. Reg. 6616, 6638 (Feb. 8, 2016) (emphasis added); *see also* 81 Fed. Reg. at 83,038. Unsurprisingly given the MLA's public goals, Industry Petitioners and API do not point to anything in the statute to support their myopic focus solely on

industry's profits. Rather, they rely on an alleged "common understanding" based on a hodge-podge of sources that support no such understanding.

Instead of providing statutory support for this alleged "common understanding," Industry Petitioners selectively cite to oil and gas treatises. But even their preferred treatise recognizes that waste "is too broad and has too many meanings for a one- or two-sentence definition." Howard R. Williams & Charles J. Meyers, *Manual of Oil and Gas Terms* 1046 (14th ed. 2009). Petitioners completely ignore the primary meaning of waste—"the ultimate loss of oil or gas"—and a far more apposite definition of physical waste as "the loss of oil or gas that could have been recovered and put to use," including "the flaring of gas." *Id.* Instead, Industry Petitioners cherry pick one meaning that is explicitly an economist's (not a regulator's) definition of waste: loss of oil or gas the "value of which exceeds the cost of avoidance." Industry Br. 19 (citing Howard R. Williams & Charles J. Meyers, *Manual of Oil and Gas Terms* 1135 (16th ed. 2015) (citing Stephen McDonald, *Petroleum Conservation in the United States: An Economic Analysis* 235 (1971))); *see also* API Br. 4 (citing the same economist Stephen McDonald's definition). That narrow definition, however, is neither compelled by the MLA nor a reasonable construction of its terms—which require BLM to account for both private and public interests.

The MLA charges BLM with ensuring that leases use *all* reasonable precautions to prevent waste, not just those that will make industry money. Likewise, as discussed above, Congress enacted the MLA out of concern for "waste and other lax methods that have grown up in the administration of our public land laws," H.R. Rep. No. 65-1138, at 19, and specifically charged BLM with protecting the public welfare, 30 U.S.C. § 187. A narrow definition of waste focused exclusively on a private actor's bottom line would neither conserve resources nor protect the public and is therefore inconsistent with these purposes. *See Hackwell v. United States*, 491 F.3d 1229, 1233 (10th Cir. 2007) (noting that court can look to "statute's text, structure, purpose, [and] history" to determine Congress' intent).[4]

Statutes in oil- and gas-producing states likewise incorporate definitions of waste that focus on prevention of avoidable natural gas losses and not on an operator's economic profitability. Like the MLA's "reasonable precautions" standard, state statutes prohibit, for example, "unnecessary or excessive" "loss or destruction" of gas or oil, but none incorporate a specific economic definition. Mont. Code Ann. § 82-11-101(16)(a)(iii); *see also* Colo. Rev. Stat. § 34-60-

[4] Wyoming and Montana assert that "the Bureau has no statutory mandate to cure 'market inefficiencies.'" Wyoming Br. 18, 25. But addressing market inefficiencies—i.e., costs placed on the public that are externalized by private actors—is the essential purpose of government regulation. If markets internalized the MLA's "public interest" and "general welfare" goals, there would be no need for its waste prevention mandate.

103(11)-(13); N.D. Cent. Code § 38-08-02(19); N.M. Code R. § 19.15.2.7(W)(1); Utah Code Ann. § 40-6-2(27); Wyo. Stat. Ann. § 30-5-101. Indeed, the Wyoming Supreme Court has found that Wyoming's waste definition specifically *does not include* economic waste. *Larsen v. Oil & Gas Conservation Comm'n*, 569 P.2d 87, 92–93 & n.4 (Wyo. 1977) (finding Wyoming Oil and Gas Conservation Commission erred in applying a definition of waste that evaluated the "economic position of oil and gas producers and their internal financial ability or inability to drill all of the well locations" when establishing drilling units).

Under these waste prevention and resource conservation authorities, several states have adopted regulations containing similar standards to those in the Waste Prevention Rule. For instance, Petitioners Wyoming and Montana regulate venting and flaring under their resource conservation statutes, Wyo. Admin. Code Oil Gen. Ch. 3, § 39; Mont. Admin. R. 36.22.1221, and Petitioner-Intervenor North Dakota has established gas capture requirements under its resource conservation statute, N.D. Indus. Comm'n Order 24665 Policy/Guidance Version 102215, VF_0003048–50.

In the end, Industry Petitioners fail to identify *any* legal authority that mandates their preferred definition of waste. Indeed, their preferred definition is unreasonable and inconsistent with the broad public purpose of the MLA and must be rejected.

II. BLM's Waste Authority Is Wholly Independent of EPA's Air Quality Authority, and There Is No Conflict Between the Two.

Petitioners' argument hinges on their claim that the Waste Prevention Rule is not actually a rule for the prevention of waste, but instead an air quality regulation, which they allege is within EPA's exclusive authority. *E.g.*, Industry Br. 12–13. But repeatedly calling the Waste Prevention Rule an air quality rule does not make it so. Petitioners entirely ignore the distinct and compelling waste prevention benefits of the provisions they endeavor to cast as impermissible air quality controls. As this Court previously recognized, overlap between waste prevention provisions and air quality controls is inevitable because when it comes to natural gas the "product is also the pollutant." PI Order 7; *see also id.* at 15 ("[A] regulation that prevents wasteful losses of natural gas necessarily reduces emissions of that gas."). However, overlapping authority among federal agencies is commonplace and entirely lawful. Here, BLM exercised its independent authority appropriately and endeavored to ensure that the Waste Prevention Rule does not conflict with EPA's regulations.

A. BLM must fulfill its independent waste authority even where there is some potential for overlap with EPA's air quality authority.

The Supreme Court's decision in *Massachusetts v. EPA* is controlling. There, EPA argued that it did not have authority to "regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten

mileage standards, a job (according to EPA) that Congress has assigned to DOT [Department of Transportation]." 549 U.S. at 531–32. The Supreme Court disagreed:

> But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," a statutory obligation wholly independent of DOT's mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

Id. at 532 (citations omitted); *see also* PI Order 15–16 (citing *Massachusetts*, 549 U.S. at 532). The same is true here. Like the mileage standards at issue in *Massachusetts*, measures to prevent venting, flaring and leaking gas achieve two independent goals: reducing waste of natural resources and cleaning the air. BLM's obligation to reduce waste of publicly owned resources, however, is "wholly independent" of EPA's obligation to reduce emissions of dangerous pollutants, and there is no reason that BLM and EPA cannot both administer these obligations and yet avoid inconsistency.

The Rule clearly reflects BLM's independent authority to prevent waste of publicly owned resources. For example, a key feature of the rule is capture targets, which require lessees to capture increasingly higher percentages of the gas that they produce. 81 Fed. Reg. at 83,011. The Waste Prevention Rule also includes exemptions and off-ramps where its provisions would lead to the abandonment of

significant resources. *See id.* at 83,011–12. EPA's current regulation of new oil and gas sources has no analogues to these core features that are targeted at preventing waste. Rather, informed by the public health consequences of dangerous pollution, EPA's regulations set emissions limits focused on the technologies and practices that form the best system of emissions reductions to decrease that pollution. *See* 42 U.S.C. § 7411(b)(1)(B).

For those areas where there is the potential for overlap, the agencies did exactly what the Supreme Court instructed through a concerted effort to ensure that both agencies may fulfill their statutory mandates without undue duplication. *See* 81 Fed. Reg. at 83,010, 83,013 (recognizing the possibility of overlap and explaining how the final rule seeks to minimize overlap while ensuring that BLM's statutory duties are fulfilled). The fact that BLM and EPA met forty times in developing the Waste Prevention Rule simply demonstrates that they were applying in good faith the Supreme Court's direction.

B. There is no conflict between the Waste Prevention Rule and EPA regulations.

Petitioners allege two "conflicts" between BLM's exercise of its waste prevention authority under the MLA and EPA's regulations under the Clean Air Act. No such conflicts exist. Indeed, this Court should not read the statutory schemes to conflict where they can be read in harmony. *See Massachusetts*, 549 U.S. at 531–32; *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 88 (1990)

(Stevens, J., concurring) (utilities were "subject to the regulation of both the SEC and FERC" and such "overlap" was warranted given the differing "goals and expertise of the two agencies").[5]

Existing Wells. There is no conflict between BLM's Waste Prevention Rule and EPA's as-yet-unexercised authority to regulate existing oil and gas wells. First, the vast majority of existing oil and gas sources that would be subject to any EPA existing source regulation are not subject to the Waste Prevention Rule because they are not on federal or tribal leases. Exercising its authority under the Property Clause as proprietor of public lands and minerals, U.S. Const. art. IV, § 3, cl. 2, BLM may only regulate to prevent waste of *publicly owned* gas from oil and gas operators that exploit *publicly owned* minerals. In contrast, EPA's Clean Air

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[5] Petitioners have largely abandoned their broader attacks of preemption and implied repeal that they raised at the preliminary injunction stage, with good reason. As the Citizen Groups pointed out in their opposition to Petitioners' initial motions for preliminary injunction, there is no statutory text or established legal principle to support Petitioners' contention that the Clean Air Act precludes BLM's Waste Prevention Rule. Citizen Groups' Resp. to Mots. for a Prelim. Inj. 20–21 (Dec. 15, 2016), ECF No. 69 (First PI Resp.). There is no statutory language in the Clean Air Act precluding BLM from promulgating a waste prevention rule that reduces air emissions. Nor is this a case of field or conflict preemption because, among other reasons, "one federal statute cannot preempt another." *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1205 n.2 (10th Cir. 2007). Instead, as occurs throughout the administrative state, and as in *POM Wonderful LLC v. Coca-Cola Co.*, the two regulatory regimes "complement each other." 134 S. Ct. 2228, 2236–40 (2014) (concluding that the Federal Drug and Cosmetic Act's "comprehensive regulation of labeling" did not oust a claim under the Lanham Act alleging that Coca-Cola's labels were deceptive and misleading, but rather that the authorities were "complement[ary]").

Act authority derives from the Commerce Clause, *id.* art. I, § 8, cl. 3, and allows the agency to regulate oil and gas wells nationwide on both private and public land in order to control dangerous air pollution, *see* 42 U.S.C. § 7411.

Industry Petitioners point to the fact that BLM did not apply the factors that EPA must apply under the Clean Air Act, including assessing the cost of the requirements, before regulating existing wells. Industry Br. 14–15. But BLM is not implementing the Clean Air Act and so there is no reason for it to apply the Clean Air Act's factors. Under the MLA, the agency is charged with ensuring "reasonable precautions" are taken to prevent waste. In doing so, BLM *did* extensively consider the technical and economic feasibility of implementing the Rule's requirements, including for existing sources. *See supra* pp. 14–16.[6]

Second, even for the small percentage of all existing oil and gas sources that are subject to the Waste Prevention Rule, there is nothing more than the *potential* for future conflict because EPA has yet to exercise its authority. When it does, EPA can be expected to heed the Supreme Court's direction in *Massachusetts* by coordinating with BLM to avoid inconsistency, just as BLM did in promulgating the Waste Prevention Rule. BLM's decision to regulate waste from existing oil and gas wells under its jurisdiction despite the fact that EPA has not yet fulfilled its

[6] For example, BLM considered information about Colorado's and Wyoming's regulations, which both apply existing sources. 81 Fed. Reg. at 83,019; *see also* VF_0000467–69 (RIA at 21–23).

duty to control air pollution from all existing sources across the country is simply a reflection of BLM's "independent statutory mandate to prevent waste" from public and tribal lands. 81 Fed. Reg. at 83,019; *contra* PI Order 19 n.10. BLM's efforts reasonably account for the fact that waste from existing sources on federal and tribal leases is not already controlled, just as it recognized that there were gaps that needed to be filled with respect to state regulations in order to adequately prevent waste.

Variance. There is likewise no conflict between the Waste Prevention Rule's variance provision and the Clean Air Act. *Contra* Wyoming Br. 30–32. Indeed, BLM included the variance provision to *ease* compliance where state standards would result in the same or greater reduction in waste at the request of some of the petitioners here. *See* VF_0001079–80 (Response to Comments).[7]

When crafting the Rule, BLM was keenly aware of other federal, State, and tribal regulation of the oil and gas industry, and successfully minimized regulatory overlap. 81 Fed. Reg. at 83,034. The Rule's variance provision is a flexibility

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[7] This Court's concern that states would need to seek a variance for EPA standards where "EPA has approved enforcement authority to a state" is misplaced. PI Order 18. Where states have adopted EPA's regulations into their state implementation plans or EPA has otherwise determined that a state procedure is adequate and has delegated authority, *see* 42 U.S.C. § 7411(c), "compliance with those EPA requirements are deemed, under this rule, to be in compliance with the comparable BLM requirements," 81 Fed. Reg. at 83,013, and the state would not need to seek a variance.

mechanism included to prevent duplication for states with comparable existing programs that "perform at least equally well in terms of reducing waste of oil and gas." 43 C.F.R. § 3179.401(b). The variance provision does not intrude on a state's ability to implement or enforce its own regulations, nor does it implicate a state's existing authority under separate statutory frameworks like the Clean Air Act. *Id.* § 3179.401(f).

Petitioners express concern that BLM may attempt to enforce the Waste Prevention Rule through a variance "even if both the EPA and the state air pollution control agency already are taking action against those same violations," whereas absent the variance provision, BLM could only do so through a citizen suit. Wyoming Br. 31. As an initial matter, Citizen Groups have been unable to find this assertion in the public comments filed on the Rule and it is therefore not properly before this Court. *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1127 (10th Cir. 2009).

Moreover, a variance from BLM satisfies obligations with respect to the comparable provisions in the Waste Prevention Rule *only*—BLM is never acting under Clean Air Act authority or purporting to enforce currently non-existent state implementation plans under the Clean Air Act or its citizen suit provision. 42 U.S.C. § 7604(b). States retain all enforcement powers already delegated under those separate authorities, 43 C.F.R. § 3179.401(f), and regardless of whether a

variance has been granted, any enforcement of the Waste Prevention Rule is a separate action under BLM's distinct authority and has no interaction with the Clean Air Act's citizen suit provision or state plans implementing the Clean Air Act.

Finally, this assertion is wholly speculative—Petitioners do not point to anything that would suggest that BLM has (or would) use its limited enforcement resources in this extraordinarily inefficient way. Indeed, the Waste Prevention Rule specifically addresses potential conflict by providing that when its application "may adversely affect production" of non-federal minerals, "BLM will coordinate, on a case-by-case basis," with the relevant state agency. *Id.* § 3179.12. Accordingly, any concern about conflicting enforcement is not only speculative, but unlikely to occur. Despite decades of coexisting regulatory regimes, Petitioners cite to no instance in which BLM enforcement has conflicted with state enforcement.

There is no direct conflict between the Waste Prevention Rule and the Clean Air Act. Moreover, Petitioners' claims lack any limiting principle and would transform any "overlap" into an impermissible "overreach." PI Order 19. Ultimately, the Waste Prevention Rule stands solidly upon BLM's independent waste prevention authority.

III. The Waste Prevention Rule Is Not Arbitrary and Capricious.

BLM reasonably determined that the Waste Prevention Rule's requirements are "reasonable precautions" to prevent waste of publicly owned resources because they involve widely-available, proven technologies and techniques to reduce waste. *See supra* pp. 14–15. The direct aim of the Rule and the direct benefit that derives from the Rule is the significant reduction in waste of gas that is owned by the public. *See supra* p. 14. BLM also concluded that the direct costs of the Rule in the form of compliance expenditures were reasonable; some of the provisions of the Rule will pay for themselves and others entail costs that will have only minor impacts to even the smallest businesses. *See supra* pp. 15–16.

The MLA does not expressly require BLM to conduct a cost-benefit analysis. However, in compliance with Executive Order 12,866, BLM prepared an RIA, which considered the compliance costs to industry, cost savings to industry as a result of the recovery and sale of natural gas, and the environmental benefits from reducing emissions of the powerful greenhouse gas methane. *See* 81 Fed. Reg. at 83,013–14; VF_0000455 (explaining that RIAs are required by Executive Order 12,866). BLM's RIA complied with all relevant guidance. Executive Order No. 12,866 requires agencies to consider "environmental, public health and safety, and other advantages" of a rule. Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993); *see also* Exec. Order No. 13,563 § 1(a), 76 Fed.

Reg. 3821, 3821 (Jan. 18, 2011) (agency must measure the "actual results of regulatory requirements"). The Office of Management and Budget's Circular A-4 also instructs agencies to "look beyond the direct benefits and direct costs of your rulemaking and consider any important ancillary benefits and countervailing risks." VF_0007668. BLM did exactly that in considering both the benefits of waste reduction measures in the form of cost savings *and* the important benefits of reducing greenhouse gas emissions.

Not only is BLM's consideration of economic damages from climate change consistent with federal policies regarding regulatory impacts, it is also mandated by the MLA, FLPMA, and the National Environmental Policy Act ("NEPA"). The MLA directs BLM, when it regulates, to "protect[] … the interests of the United States and ... safeguard[] … the public welfare." 30 U.S.C. § 187.[8] FLPMA expressly requires BLM to consider impacts to "the quality of … air and atmospheric values" and prevent "unnecessary or undue degradation" of public

[8] The same is true for the Indian Mineral Leasing Act. The Interior Department owes a fiduciary trust obligation to tribes, which requires it to consider "the best interests of the Indian lessors." *Woods Petroleum Corp. v. U.S. Dep't of the Interior*, 18 F.3d 854, 859 (10th Cir. 1994). These interests include economic, environmental, social, and cultural effects on tribes. 25 U.S.C. § 2103(b). The Rule serves this trust obligation both by increasing the royalties that will accrue to tribal governments *and* protecting the environment from the harmful impacts of methane and other pollutant emissions. 81 Fed. Reg. at 83,020–21 (noting the number of tribal members who raised concerns about living near oil and gas development including toxic air pollution and excessive noise and light pollution from flares); Decl. of Lisa DeVille ¶¶ 3–7 (Nov. 30, 2016), ECF No. 27-12; Decl. of Sarah Vogel ¶¶ 12, 15 (Dec. 13, 2016), ECF No. 69-5.

lands." 43 U.S.C. §§ 1701(a)(8), 1732(b); *see also* PI Order 15 (recognizing that FLPMA "arguably directs BLM to consider any impact to the quality of air and atmospheric values" in determining how to minimize waste (quotation omitted)). By including analysis of the benefits of reducing greenhouse gas emissions, BLM is not considering a "factor[] which Congress has not intended it to consider." *Contra* Industry Br. 24 (quoting *State Farm*, 463 U.S. at 43). Rather, BLM is fulfilling its explicit statutory mandates to safeguard the public welfare and protect the quality of air and atmospheric values.[9]

Under NEPA, BLM must also consider the environmental benefits of reducing greenhouse gas emissions. NEPA proclaims that it "is the continuing responsibility of the Federal Government to use all practicable means ... to improve … Federal plans, functions, programs and resources" to, among other things, "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." 42 U.S.C. § 4331(b)(1). To fulfill this obligation, BLM must take a "hard look" at the effect of its actions on the environment. *Id.* § 4332. In doing so, federal agencies cannot "put a thumb on the scale by undervaluing the

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[9] Because of the difficulty in quantifying them, BLM did not include in its cost-benefit analysis the many other indirect benefits of the Rule that are relevant to its statutory mandate, including increasing worker and community safety by eliminating venting, reducing the visual and noise nuisance to nearby communities from flaring, and reducing local pollutants that endanger human health. 81 Fed. Reg. at 83,014, 83,020. However, BLM discussed these impacts in the final rule, *id.*, and its NEPA analysis, VF_0000677–83.

benefits [by ignoring the benefits of greenhouse gas emission reductions] and overvaluing the costs." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198–99 (9th Cir. 2008) (holding that NHTSA's "fail[ure] to include in its analysis the benefit of carbon emissions reduction," which it found to be "the most significant benefit of more stringent [fuel economy] standards," was arbitrary and capricious); *see also High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (holding it is arbitrary and capricious for agencies to willfully ignore the costs of burning fossil fuels, as quantified by the social cost of carbon, while quantifying the benefits of increased fossil fuel development on the economy). Thus, far from rendering BLM's decision arbitrary, BLM's consideration of climate benefits is mandated by BLM's statutory authorities.

Petitioners attempt to turn a virtue into a vice by contending that the Waste Prevention Rule is arbitrary and capricious because the majority of the monetized indirect benefits do not end up in the pockets of oil and gas lessees in the form of cost savings, but rather accrue to the public at large through reducing the risks posed by climate change. Industry Br. 24 (complaining that "[o]il and gas operators will only realize a fraction of the benefits"); Wyoming Br. 30 (suggesting that the only "benefits" that should be counted are those where "industry would have a significant profit incentive to implement them"). But, as explained above,

supra p. 11 & n.2, the MLA and FLPMA direct BLM to consider both public *and* private interests. *See N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009) (recognizing it "is past doubt that [FLPMA's] principle of multiple use does not require BLM to prioritize development over other uses").

While the Petitioners try to divide the benefits of the rule into "waste" benefits and "air pollution" benefits, the labels do not hold—both industry cost savings and methane emissions reductions are indirect benefits of reducing waste, one accruing to operators and one to the public. Nothing about the MLA's waste prevention mandate suggests that only the former count as "waste" benefits.

Several federal appellate courts have recently rejected arguments almost identical to those made here. In *Zero Zone, Inc. v. United States Department of Energy*, the Department of Energy ("DOE") had "considered the environmental benefits of … [energy efficiency] standards when determining whether the [standards were] economically justified," employing "an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year, known as the Social Cost of Carbon." 832 F.3d 654, 677 (7th Cir. 2016) (quotation and citation omitted). The challengers there contended that the Energy Policy and Conservation Act ("EPCA") "does not allow DOE to consider environmental factors," and that DOE's regulation was arbitrary and capricious. *Id.* The court disagreed, concluding that EPCA's direction to consider the "[n]eed

of the [n]ation to [c]onserve [e]nergy" encompassed "potential environmental benefits." *Id.* ("To determine whether an energy conservation measure is appropriate under a cost-benefit analysis, the expected reduction in environmental costs needs to be taken into account.").

The same is true here. Like EPCA, the MLA's waste prevention mandate is directed at energy conservation. Like EPCA, the MLA does not explicitly mandate consideration of the environmental effects of waste regulation, but contains broad purposes regarding the need to prevent waste (i.e., conserve energy) for the benefit of the public. And as with the regulation at issue in *Zero Zone*, "to determine whether the energy conservation measure is appropriate under a cost-benefit analysis, the expected reductions in environmental costs needs to be taken into account." *Id.*

Similarly, the D.C. Circuit recently rejected an arbitrary and capricious challenge based on an agency's consideration of indirect benefits, concluding that EPA was "free to consider potential co-benefits that might be achieved" from the regulation because the statutory "text does not foreclose the Agency from considering co-benefits and doing so is consistent with the [Clean Air Act's] purpose." *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 625 (D.C. Cir. 2016). So too here, the text of the MLA certainly does not foreclose BLM from considering all of

the benefits of preventing waste. In fact, doing so is fully consistent with the MLA's purposes.

Indeed, federal courts have held agency regulations to be arbitrary and capricious when they *do not* fully assess the benefits. *See Ctr. for Biological Diversity*, 538 F.3d at 1198–99. Notably, the Ninth Circuit did not distinguish between fuel economy benefits, i.e., costs savings to consumers, and air pollution benefits, rather both stemmed from the fuel economy standards.

Contrary to Petitioners' claims, the Supreme Court's decision in *Michigan v. EPA* is not to the contrary. *See* Wyoming Br. 26–28. In fact, *Michigan* actually *supports* the reasonableness of BLM's regulation. In *Michigan*, the Supreme Court faulted EPA for *not* considering a relevant factor that was not explicitly listed in the statute—in that case, cost—concluding that the statutory provision's "broad reference to appropriateness encompasses *multiple* relevant factors." 135 S. Ct. 2699, 2709 (2015). The Court directed EPA not just to consider the direct costs of compliance, but also any indirect costs that might result from regulation, including any harms to human health or the environment. *Id.* at 2707; *see also Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1051–52 (D.C. Cir. 1999), *rev'd on other grounds*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (holding that EPA must consider the indirect health impacts of reducing a pollutant); *Corrosion Proof*

Fittings v. EPA, 947 F.2d 1201, 1225 (5th Cir. 1991) (requiring EPA to consider indirect safety harm of regulation).

There is no principled basis to distinguish between the need to consider indirect *benefits* and the need to consider indirect *costs*. And just like the statutory term "appropriate"—which the Supreme Court concluded granted EPA broad authority to consider costs in *Michigan*—the MLA's use of the word "reasonable" in the waste prevention mandate also suggests that BLM should broadly consider the effects of its precautions to prevent waste. Accordingly, *Michigan* supports BLM's responsibility and authority to consider all of the benefits attributable to the Waste Prevention Rule.

Nor is the Rule arbitrary and capricious because, in monetizing benefits, BLM relies on the best available evidence of the economic damages attributable to additional methane emissions, known as the Social Cost of Methane. *Contra* Industry Br. 24–25. The Social Cost of Methane was approved for use in regulatory analyses by an interagency working group consisting of the federal Office of Management and Budget and eleven other federal agencies; has been used to assess the benefits associated with several other major rulemakings; is based upon peer-reviewed analysis that adheres closely to the widely-used interagency working group methodology for the Social Cost of Carbon; and rests upon an extensive body of peer-reviewed literature as well as models that have

been subject to several rounds of public comment. VF_0000477–83; *see* Decl. of Michael Hanneman ¶¶ 15–17 (Dec. 14, 2016), ECF No. 69-1 (describing process for adopting the Social Cost of Methane). In addition, federal courts have upheld the use of the interagency working group's protocols for assessing the social cost of greenhouse gases. *See, e.g.*, *Zero Zone*, 832 F.3d at 677 (rejecting a nearly identical challenge to DOE's use of the social cost of carbon).

In sum, the Waste Prevention Rule is consistent with BLM's statutory mandates to prevent waste and protect public welfare, and the agency's consideration of all the costs and benefits of the Rule did not render it arbitrary and capricious.

IV. BLM Reasonably Concluded that it Has Authority to Regulate All Minerals Subject to Federal Communitization and Unitization Agreements.

For decades, BLM has entered into communitization and unitization agreements with non-federal mineral owners in order to prevent waste of federal minerals that are commingled with, and therefore cannot be developed separately from, the non-federal minerals. Yet North Dakota and Texas (collectively, "North Dakota") argue that BLM lacks authority to prevent waste of federal minerals once they are pooled with non-federal minerals. N.D. Br. 24–32. There is no support for this argument.

BLM's authority to regulate pooled federal and non-federal minerals derives from the MLA. 30 U.S.C. § 226(m). For example, the MLA provides authority to enter into communitization agreements that include state or private lands:

> When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease … may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement … when determined by the Secretary of the Interior to be in the public interest.

Id. BLM must approve such agreements and determine that they are in the public interest. *Id.*

Once the resources are pooled "operations or production pursuant to such an agreement shall be deemed to be operations or production as to each such lease committed thereto." *Id.*; *Sanguine, Ltd. v. U.S. Dep't of the Interior*, 736 F.2d 1416, 1417 (10th Cir. 1984) (explaining that communitization agreements "pool[] . . . all oil and gas production from leases within an area … provid[ing] that production anywhere within the unit is deemed produced from each lease within the unit"). Accordingly, waste from anywhere within the unit is waste of federal minerals. To prevent waste of federally owned minerals that are pooled with—and are therefore indistinguishable from—privately or state owned minerals, BLM reasonably applied the Waste Prevention Rule to all minerals within units and

communitized areas. *See* 81 Fed. Reg. at 83,039.[10] Absent such authority, BLM would be unable to prevent the waste of large amounts of federal minerals.

Federal communitization agreements also expressly provide that all mineral owners will abide by BLM's waste prevention regulations. Mineral owners agree that the Secretary of the Interior "shall have the right of supervision over all fee and State mineral operations within the communitized area to the extent necessary to . . . assure that no avoidable loss of hydrocarbons occurs."[11] The Waste Prevention Rule defines what constitutes avoidable loss of hydrocarbons, or waste.

North Dakota concedes that BLM has authority "to regulate state and private oil and gas interests in pooled or communitized units [pursuant to] 30 U.S.C. § 226(m) (2016) and from the consent of owners and lessees." N.D. Br. 28. But it

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[10] BLM's reasonable interpretation of 30 U.S.C. § 226(m) is entitled to *Chevron* deference, despite North Dakota's claim that the Rule exceeds BLM's Congressionally-delegated authority over federal minerals. N.D. Br. 22–24. The case North Dakota and Texas rely on for their deference argument rejects exactly such a "faux-federalism" argument against *Chevron* deference. *City of Arlington*, 569 U.S. at 305. As the Court explained, even where a party alleges federalism concerns by arguing that a federal law supplants a state's authority, *Chevron* deference still applies to an agency's interpretation of the federal law in question. *Id.*

[11] Model Form of a Federal Communitization Agreement, BLM Manual 3160-9, App. 1 at 9 (1988), https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual3160-9.pdf, ("BLM Manual 3160-9"); *see also* 43 C.F.R. § 3186.1 at § 16 (model unit agreement) ("Operations hereunder and production of unitized substances shall be conducted to provide for the most economical and efficient recovery of said substances without waste, as defined by or pursuant to State or Federal law or regulation.").

argues that such authority is "limited . . . to protect[ing] the federal government as a fellow owner of mineral interests." *Id.*; *see also id.* at 37 (arguing BLM may regulate if it relates to the agency's "proprietary interest in the federal minerals"). But that is exactly what BLM has done in the Waste Prevention Rule by preventing waste of pooled federal minerals. In fact, North Dakota concedes that "BLM's authority in pooled arrangements" includes "avoiding the 'waste' of federal mineral interests." N.D. Br. 28; *see also id.* at 31–32 ("The waste prevention provisions in the unitization agreements exist to prevent waste in the form of … inefficient management of the oil field, for the equal benefit of all the owners—public and private."). The Waste Prevention Rule fulfills that purpose.

North Dakota attempts to paint BLM's decision to regulate waste from state and private land subject to federal communitization agreements as an arbitrary and unexplained change in position. N.D. Br. 35–42.[12] It is not. As BLM has already explained to this Court, there has been no change in the agency's position. *See* Fed. Resp'ts' Consol. Opp'n to Pet'rs' & Pet'r-Intervenor's Mots. for Prelim. Inj.

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[12] Because neither North Dakota nor Texas raised this argument in their comments on the proposed rule, they have failed to exhaust their administrative remedies, and the Court should deem it waived. *Ariz. Pub. Serv. Co.*, 562 F.3d at 1127. North Dakota's comment noted only that it had many communitized areas within its state boundaries. VF_0033630; *see Ariz Pub. Serv. Co.*, 562 F.3d at 1127 (petitioners "cannot rely on general or vague commentary now to avoid the established principles of waiver"). The Citizen Groups could not find any comments submitted by Texas in the record.

48 (Dec. 15, 2016), ECF No. 70. Indeed, North Dakota fails to identify a single time where BLM has stated that it has no legal authority to regulate waste from state or private minerals that are pooled with federal interests.[13] In fact, the opposite is true. As discussed above, federal communitization agreements expressly provide BLM with the authority to regulate waste on state and private lands. Likewise, BLM's previous waste regulation, NTL-4A, applied to all "[o]il production . . . produced and sold . . . under the terms of an approved communization or unitization agreement," with no exception for production from state or private lands. NTL-4A at § I, 44 Fed. Reg. at 76,600; *see also Plains Expl. & Prod. Co.*, 178 IBLA 327, 329, 340 (2010) (explaining that NTL-4A allows

[13] Neither of North Dakota's citations even addresses waste. *See* N.D. Br. 37. In the preamble to the FOGRMA implementation regulations that North Dakota cites, BLM responded to a comment urging BLM to change its definition of lease because it was broad enough to include state and private lands included in federal units. 49 Fed. Reg. 37,356, 37,357 (Sept. 21, 1984). BLM refused, recognizing that because all leases in a communitized area or unit share in production BLM "*must have* some limited authority to obtain needed data and to inspect non-Federal and non-Indian sites *to assure that the Federal and Indian interests are protected*." *Id.* (emphasis added). This explanation confirms BLM's view that it has authority to regulate state and private lands to the extent necessary to protect federal and tribal interests, which is exactly what it has done in the Waste Prevention Rule. North Dakota's reliance on Onshore Order No. 1 is equally unavailing. That BLM determined it was not "appropriate" to extend rules for approving applications for permits to drill on state and private lands within federally communitized areas says nothing about the extent of BLM's legal authority or whether it extends to preventing waste. 72 Fed. Reg. 10,308, 10,312–13 (Mar. 7, 2007); *see also* 81 Fed. Reg. at 83,039 (BLM supporting this argument).

royalty-free use of gas produced from a communitized tract that includes private minerals, even if the gas is used outside the boundaries of a federal lease, so long as it is used within the boundaries of the communitized area).[14]

North Dakota also points to BLM's choice to apply some, but not all, of its regulations and policies to communitized state or private mineral interests. N.D. Br. 29–30, 40. For example, BLM's regulations specifically provide that oil and gas regulations relating to "site security, measurement of oil and gas, reporting of production and operations, and assessments of penalties for non-compliance with such requirements, are applicable to all wells and facilities on State or privately owned lands committed to a unit or communitization agreement." 43 C.F.R. § 3161.1(b). Contrary to North Dakota's claims, N.D. Br. 40, this regulation *confirms* BLM's legal authority to regulate state and private lands where federal interests are at stake. As BLM stated in adopting this provision:

> The fact that Federal or Indian lands are committed to agreements for the purpose of drilling and development of those lands in the most benefic[ial] manner is all that is needed to establish the responsibility of [BLM] to ensure that the intent of [FOGRMA] and other mineral leasing laws as to royalty accountability is carried out on those lands.

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[14] BLM Manual 3160.9, cited by North Dakota, N.D. Br. 31 n.14, provides further support that NTL-4A applied to state and private lands subject to federal communitization agreements, BLM Manual § 3160-9.11(R). For example, the Manual states that wells drilled on state or private land that are only later communitized with federal minerals are subject to NTL-4A—indicating that NTL-4A also applied to state and private lands subject to federal communitization agreements *prior* to drilling. *Id.*

52 Fed. Reg. 5384, 5386 (Feb. 20, 1987). The same is true for BLM's duty to prevent waste under the MLA. To fulfill its legal obligation to prevent waste of federally owned minerals that are pooled with state and private minerals, BLM chose to regulate waste on state and private lands that is commingled with federal minerals and subject to federal communitization agreements.

CONCLUSION

Because the Waste Prevention Rule is well within BLM's statutory authority and is not arbitrary and capricious, Petitioners' petitions should be dismissed.

Respectfully submitted on December 11, 2017,

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CERTIFICATE OF COMPLIANCE WITH RULE 83.6(c)

1. This brief complies with the type-volume limitation of D. Wyo. Civ. R. 83.6(c) & Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,559 words, excluding the parts of the brief exempted by D. Wyo. Civ. R. 83.6(c) & Fed. R. App. P. 32(f).

2. This brief complies with the typeface and style requirements of D. Wyo. Civ. R. 83.6(c) & Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Word 2016 in 14 point font size and Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on December 11, 2017, I filed the foregoing **CITIZEN GROUPS' RESPONSE BRIEF** using the United States District Court CM/ECF which caused all counsel of record to be served by electronically.

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