Robin Cooley, CO Bar #31168
(Admitted Pro Hac Vice)
Rumela Roy, CO Bar # 53505
(Admitted Pro Hac Vice)
Earthjustice
633 17th Street, Suite 1600
Denver, CO 80202
Phone: (303) 623-9466
rcooley@earthjustice.org
rroy@earthjustice.org

Hector Balderas
Attorney General of New Mexico
William Grantham, NM Bar #15585
(Admitted Pro Hac Vice)
Assistant Attorney General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
Phone: (505) 717-3520
wgrantham@nmag.gov

Xavier Beccera
Attorney General of California
David A. Zonana, CA Bar #196029
(Admitted Pro Hac Vice)
Supervising Deputy Attorney General
George Torgun, CA Bar #222085
(Admitted Pro Hac Vice)
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Phone: (510) 879-1002
George.Torgun@doj.ca.gov

Additional Signatory Counsel set forth below

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

STATE OF WYOMING, et al. Petitioners, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al. Respondents, and WYOMING OUTDOOR COUNCIL, et al.; STATE OF CALIFORNIA and STATE OF NEW MEXICO, Respondent-Intervenors.	Civil Case No. 2:16-cv-00285-SWS [Lead] [Consolidated With 2:16-cv-00280-SWS] Assigned: Hon. Scott W. Skavdahl **CITIZEN GROUPS AND STATE RESPONDENTS' SUPPLEMENTAL RESPONSE BRIEF**

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. This Court Must Base its Decision on the Waste Prevention Rule's Rationale and Administrative Record, Not on BLM's Post-Hoc "Confession of Error." 2

II. BLM's Post-Hoc Litigation Positions Are Legally Flawed 6

A. BLM Has Legal Authority to Adopt the Waste Prevention Rule 7

B. The Waste Prevention Rule is Not Arbitrary or Capricious 15

1. BLM fully supported its decision to regulate marginal wells 16

2. BLM fully supported its use of the social cost of methane 21

3. BLM fully supported the gas capture requirements 23

III. The Waste Prevention Rule is Severable 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Alvarado v. J.C. Penney Co., Inc.,
997 F.2d 803 (10th Cir. 1993) 6

Aposhian v. Barr,
958 F.3d 969 (10th Cir. 2020) 3, 4

Ashland Oil, Inc. v. FTC,
548 F.2d 977 (D.C. Cir. 1976)....................4

Bridger Coal Co./Pac. Minerals, Inc. v. Dir., Office of Workers' Comp. Programs, 927 F.2d 1150 (10th Cir. 1991)....................12

Bus. Roundtable v. SEC,
905 F.2d 406 (D.C. Cir. 1990)....................3

California v. Bernhardt,
No. 4:18-CV-05712-YGR, 2020 WL 4001480 (N.D. Cal. July 15, 2020) ....*passim*

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984)....................2, 3

City of Arlington, Tex. v. FCC,
569 U.S. 290 (2013)....................12

Council for Urological Interests v. Burwell,
790 F.3d 212 (D.C. Cir. 2015)....................3

Dep't of Homeland Sec. v. Regents of the Univ. of California,
140 S. Ct. 1891 (2020)....................2, 4, 6

Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives,
920 F.3d 1 (D.C. Cir. 2019)....................3

Marsh v. Or. Nat. Res. Council,
490 U.S. 360 (1989)....................19

Massachusetts v. EPA,
549 U.S. 497 (2007)....................8, 12

Mexichem Specialty Resins, Inc. v. EPA,
787 F.3d 544 (D.C. Cir. 2015)....................5

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983)....................15, 19

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 981 (2005)....................7

Nat'l Parks Conservation Ass'n v. Salazar,
660 F. Supp. 2d 3 (D.D.C. 2009)....................5, 6

Olenhouse v. Commodity Credit Corp.,
42 F.3d 1560 (10th Cir. 1994)....................3

SEC v. Chenery Corp.,
332 U.S. 194 (1947)....................2

Sibron v. New York,
392 U.S. 40 (1968)....................5

Sierra Club, Inc. v. Bostick,
787 F.3d 1043 (10th Cir. 2015)....................12

W. Watersheds Project v. BLM,
721 F.3d 1264 (10th Cir. 2013)....................18

Woods Petrol. Corp. v. Dep't of Interior,
47 F.3d 1032 (10th Cir. 1995)....................3

Wyoming v. U.S. Dep't of the Interior,
No. 2:16-CV-0285-SWS, 2017 WL 161428 (D. Wyo. Jan. 16, 2017)....................*passim*

Young v. United States,
315 U.S. 257 (1942)....................5

Zero Zone, Inc. v. U.S. Dep't of Energy,
832 F.3d 654 (7th Cir. 2016)....................23

Interior Board of Land Appeals Cases

Rife Oil Properties, Inc.,
131 IBLA 357 (1994) 14

Statutes

5 U.S.C. § 706 3

30 U.S.C. § 187 ....10, 12

30 U.S.C. § 225 12

43 U.S.C. § 1701 10

43 U.S.C. § 1732 10

Federal Register

44 Fed. Reg. 76,600 (Dec. 27, 1979) 14

58 Fed. Reg. 51,735 (Oct. 4, 1993) 22, 23

81 Fed. Reg. 6,616 (Feb. 8, 2016) 9

81 Fed. Reg. 83,008 (Nov. 18, 2016) ....*passim*

Federal Regulations

43 C.F.R. § 3103.3-1 26

43 C.F.R. subpart 3178 26

INTRODUCTION

For more than three years, the benefits of the Waste Prevention Rule—reduced waste, increased royalty payments, and decreased climate and air pollution—have not been realized while the Trump administration's Bureau of Land Management (BLM) pursued serial, unlawful actions to delay and frustrate its implementation. Most recently, the Northern District of California vacated BLM's final rule rescinding all the waste reducing measures of the Waste Prevention Rule (Rescission). *California v. Bernhardt*, No. 4:18-CV-05712-YGR, 2020 WL 4001480, at *44 (N.D. Cal. July 15, 2020). The court held the "rulemaking process resulting in the Rescission was wholly inadequate. In its haste, BLM ignored its statutory mandate under the Mineral Leasing Act, repeatedly failed to justify numerous reversals in policy positions previously taken, and failed to consider scientific findings and institutions relied upon by both prior Republican and Democratic administrations." *Id.* at *1. The court ordered vacatur of the Rescission, but stayed its order for 90 days to allow the parties to determine appropriate next steps before this Court. *Id.* at *44.

Now, having failed three times to lawfully remove the protections of the Waste Prevention Rule, BLM tries once more to circumvent the administrative process and achieve the same result. This time, BLM does so by advocating post-hoc litigation positions unsupported by the record in this Court. This attempt must

also fail. This Court's review is limited to BLM's rationale and the facts set forth in the 2016 Waste Prevention Rule administrative record, not post-hoc litigation positions articulated for the first time in this case in a response brief. This Court should dismiss the petitions for review because BLM's 2016 rationale and record fully support the Waste Prevention Rule as a lawful exercise of BLM's broad mandate to prevent waste of publicly owned oil and gas.

ARGUMENT

I. This Court Must Base its Decision on the Waste Prevention Rule's Rationale and Administrative Record, Not on BLM's Post-Hoc "Confession of Error."

"It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020) (internal quotations and citation omitted); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). This Court must rely solely on the agency rationales and supporting record evidence provided at the time BLM promulgated the Waste Prevention Rule, and not the post-hoc "confessions of error" that BLM advances now.

As this Court previously recognized, and as BLM admits, BLM's contemporaneous interpretation in the Waste Prevention Rule of its own authority is entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*,

467 U.S. 837 (1984). *Wyoming v. U.S. Dep't of the Interior*, No. 2:16-CV-0285-SWS, 2017 WL 161428 at **5-6, 12 (D. Wyo. Jan. 16, 2017); Fed. Resp'ts' Suppl. Merits Resp. Br. (BLM Resp.) 18-23, ECF No. 278; *cf. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 21-23 (D.C. Cir. 2019) (*Chevron* standard of review must be applied where appropriate, even over protestations by agency); *Aposhian v. Barr*, 958 F.3d 969, 982 n.6 (10th Cir. 2020) (suggesting that *Chevron* is a standard of review that cannot be waived). BLM does not, and cannot, claim that its new interpretation of its statutory authority is entitled to deference. In applying *Chevron*, courts only "look to what the agency said at the time of the rulemaking." *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015); *see Bus. Roundtable v. SEC*, 905 F.2d 406, 417 (D.C. Cir. 1990) (holding *Chenery* principle applies to *Chevron* statutory analysis).

Likewise, this Court has recognized that its review under the Administrative Procedure Act (APA) is limited to the Waste Prevention Rule's record. *Wyoming*, 2017 WL 161428 at *4 (citing *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994)); *see also* 5 U.S.C. § 706 (requiring review based on the record); *Woods Petrol. Corp. v. Dep't of Interior*, 47 F.3d 1032, 1041 (10th Cir. 1995) ("Under the APA, a reviewing court must rely on the administrative record to assess the validity of the agency action."). Post-hoc explanations

provided by agencies and their counsel are "impermissible." *Regents of the Univ. of California*, 140 S. Ct. at 1909; *see Aposhian*, 958 F.3d at 980 (holding courts must rely on reasoning set forth in the administrative record and disregard post-hoc rationalizations); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 981 (D.C. Cir. 1976) ("No principle of administrative law is more firmly established than that a court must review discretionary actions in terms of the rationale on which the agency acted, rather than accept appellate counsel's post hoc rationalizations.") (internal quotations and citation omitted).

As described more fully herein, BLM's new claims that it lacked legal authority to adopt the Waste Prevention Rule and that its rulemaking was arbitrary and capricious are directly contrary to the basis articulated by the agency itself when it took it the action and are unsupported by the Rule's administrative record. *See infra* pp. 6-26. BLM instead relies on rationales asserted in the vacated 2018 Rescission, but that rule and its record are not before this Court. Moreover, since BLM now advances the same rationales with respect to its statutory authority that the *California* court has already rejected, its argument is particularly unpersuasive. *See* 2020 WL 4001480, at **10-14. To the extent BLM disagrees with that court's rulings, the proper course is to appeal, and not to confess error in this Court.

BLM has unlawfully attempted to prevent the Waste Prevention Rule's benefits from being realized three times since 2017. *See* BLM Resp. 6 n.4, 8. Now,

having failed to lawfully rescind the Rule, BLM is attempting to do through "confessions of error" what it could not achieve through rulemaking. Courts routinely give no weight to an agency's claimed confession of error where, as here, it would allow the agency to circumvent the APA's requirements. *See, e.g.*, *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557-58 (D.C. Cir. 2015) (declining to grant stay or vacatur of final rule despite agency confessing error, and holding that courts "should not uncritically accept[] an agency's concession of a significant merits issue" because "[i]f an agency could engage in rescission by concession, the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter"); *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (declining to vacate agency's final rule based on federal defendants' confession of error, because vacatur would allow federal defendants to "do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits").[1] This is consistent with well-established principles of administrative law: considering

[1] BLM incorrectly suggests that courts give "great weight" to an agency's confession of error. BLM Resp. 9 (citing *Sibron v. New York*, 392 U.S. 40, 58 (1968) (quoting *Young v. United States*, 315 U.S. 257, 258 (1942)). *Sibron* and *Young* concern governmental confessions of error in the context of criminal law, where confessions may be necessary to prevent miscarriage of justice. *See Young*, 315 U.S. at 258. Even there, courts conduct independent review of the error confessed. *Sibron*, 392 U.S. at 58; *Young*, 315 U.S. at 258.

contemporaneous explanations of agency actions, and declining consideration of agencies' new reasons that are asserted without first satisfying procedural requirements, promotes agency accountability to the public and instills confidence in the rule of law. *See Regents of the Univ. of California*, 140 S. Ct. at 1909. Accordingly, in reviewing the Waste Prevention Rule, this Court should reject BLM's latest attempt to circumvent the APA and should look only to the administrative record and the rationales articulated by the agency therein.

II. BLM's Post-Hoc Litigation Positions Are Legally Flawed.

As full parties to this litigation, Respondent-Intervenors may continue—and do continue—to defend the Waste Prevention Rule despite BLM's confessions of error. *See Alvarado v. J.C. Penney Co., Inc.*, 997 F.2d 803, 805 (10th Cir. 1993) ("[W]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party.") (citation omitted); *Nat'l Parks Conservation Ass'n*, 660 F. Supp. 2d at 5 (allowing intervenor to continue defense of rule after agency confessed error).[2] BLM's post-hoc litigating positions are legally flawed and unsupported by the record.

---

[2] *See also* Order Granting Mot. to Intervene as Resp'ts, ECF No. 56; Order Granting California and New Mexico's Mot. to Intervene as Resp'ts, ECF No. 76; Citizen Groups' Mot. to Intervene as Resp'ts, ECF Nos. 27 to 27-12 (including declarations); Intervenor-Applicants California and New Mexico's Mot. to Intervene as Resp'ts, ECF Nos. 62, 63 to 63-2) (including declarations); Exs. 1-3 (Citizen Groups' supplemental declarations).

A. BLM Has Legal Authority to Adopt the Waste Prevention Rule.

As this Court previously held—and no party disputes—the Mineral Leasing Act (MLA) and the Federal Oil and Gas Royalty Management Act "unambiguously grant BLM authority to regulate the development of federal and Indian oil and gas resources *for the prevention of waste*." *Wyoming*, 2017 WL 161428 at *6. Further, this Court held "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." *Id.*; *see also id.* at *10 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) for the proposition that "under step two of *Chevron,* [a] court [is] required to accept agency's construction of statute even if agency's reading differs from what court believes is best interpretation").[3] In 2016, based on the full administrative record, BLM concluded that the Waste Prevention Rule constituted "economical, cost-effective, and reasonable measures . . . to minimize gas waste." 81 Fed. Reg. 83,008, 83,009 (Nov. 18, 2016). This determination was reasonable because, consistent with the MLA and other statutes, each challenged provision of the Rule limits the amount of publicly owned natural gas product that is vented,

[3] This Court, the *California* court, and BLM all agree that the question of whether BLM has properly exercised its authority to regulate waste should be analyzed under *Chevron* step 2. *See Wyoming*, 2017 WL 161428 at **5-9; *California*, 2020 WL 4001480, at **11-12; BLM Resp. 19-20.

burned, or leaked and therefore not put to productive use. *See* Citizen Groups' Resp. Br. (Citizen Resp.) 14, ECF No. 175 (citing VF_562, 81 Fed. Reg. at 83,010-14); State Resp'ts' Opp. to Pet'rs' Br. in Supp. of Pets. for Review of Final Agency Action (State Resp.) 10, ECF No. 174 (citing 81 Fed. Reg. at 83,014-15).

In the record and previous briefing in this case, BLM justified its adoption of the Waste Prevention Rule as a reasonable exercise of its authority under the MLA, Federal Land Policy and Management Act (FLPMA), and other statutes. 81 Fed. Reg. at 83,019-21; Fed. Resp'ts' Consolidated Opp'n to Pet'rs' and Pet'r-Intervenor's Mots. for Prelim. Inj. (BLM PI Resp.) 18-19, ECF No. 70. But BLM now claims that its prior interpretation of its legal authority is not a "permissible" interpretation of the MLA and therefore runs afoul of *Chervon* step 2. BLM Resp. 19.[4] This Court must grant deference to BLM's contemporaneous, record-based conclusion that the Waste Prevention Rule was authorized and not its post-hoc "confessions of error." *See supra* pp. 2-6.

---

[4] Notably, BLM does not support Petitioners' claims that the Waste Prevention Rule is fundamentally an air quality regulation, within the purview of EPA and not BLM. Respondent-Intervenors previously showed how the Waste Prevention Rule's provisions may have air quality benefits, but they are "independently justified" as waste prevention measures—something this Court previously recognized as within BLM's MLA authority. *Wyoming*, 2017 WL 161428 at *9; *see* Citizen Resp. 13-17, 21-23; State Resp. 9-17. Furthermore, attempting to define the extent of BLM's authority based on EPA's authority conflicts with the Supreme Court's clear direction in *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), that agencies must fulfill their independent statutory obligations even where overlap occurs.

BLM now claims, consistent with its position *rejected* by the *California* court, that the Waste Prevention Rule imposes "uneconomical 'waste prevention' requirements that . . . do not comport with the 'prudent operator' standard applicable to operators of federal oil and gas leases." BLM Resp. 2. In 2016, however, BLM expressly considered and rejected a definition of waste focused solely on whether the loss of gas would be profitable for an operator to capture. As BLM concluded, "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 [including loss of royalties and the air pollution and other impacts of wasted gas] and across an entire field." 81 Fed. Reg. 6,616, 6,638 (Feb. 8, 2016). This Court must make its decision based on this contemporaneous rationale. *See supra* pp. 2-6.

Likewise, BLM's claim that the Waste Prevention Rule provisions are "uneconomical" is based entirely on BLM's new and unlawful definition of waste. In the record, BLM determined that the Waste Prevention Rule is "economical" and "cost-effective," and will impact even the smallest operator's bottom lines by only, on average, 0.15%. 81 Fed. Reg. at 83,009, 83,068-69; *see also* Citizen Resp. 14-15 (explaining that the Rule's requirements are modeled on measures that are already widely deployed in leading states and by leading companies). BLM also incorporated accommodations for individual operators "to make compliance more

feasible and less costly," including phasing in capture targets and allowing for exemptions where the requirements "would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease." 81 Fed. Reg. at 83,011; *Wyoming*, 2017 WL 161428 at *11 (acknowledging the exemptions). Given the low costs and these accommodations, BLM's post-hoc claim that the Waste Prevention Rule would "require an operator to render its operations uneconomical" is false and unsupported by the record. BLM Resp. 20.

But even if this Court considers the claim that BLM must myopically focus on the marginal profits of operators and ignore public benefits, this position conflicts with the plain language and intent of the MLA and FLPMA. In fact, the *California* court struck down the very same definition of waste that BLM now advances: "The statutory language demonstrates on its face that any consideration of waste management limited to the *economics* of individual well-operators would ignore express statutory mandates concerning BLM's public welfare obligations." 2020 WL 4001480, at *12. The court pointed to BLM's duties under the MLA to "prevent[] undue waste" and "protect[] the interests of the United States . . . and . . . safeguard[] . . . the public welfare," 30 U.S.C. § 187, and under FLPMA to "protect . . . air and atmospheric" resources and "prevent unnecessary of undue degradation of the [public] lands," 43 U.S.C. §§ 1701(a)(8), 1732(b). *California*,

2020 WL 4001480, at *12; *see also* Citizen Resp. 11-12, 17-20; State Resp. 6-7, 15-16, 21-22. These are the very same provisions BLM previously and correctly cited as supporting the Waste Prevention Rule, but despite the *California* court's order, BLM now refuses to even acknowledge any of its statutory obligations beyond the duty to prevent waste.

As the *California* court held, the legislative history "corroborates a broad statutory approach, contradicting BLM's attempt to limit the definition of waste to one related solely to the economics of the operators." 2020 WL 4001480, at *13. The court noted that Congress' intent was to encourage development of oil and gas, but also to ensure "conservation and conduct in the public interests." *Id.* at **10, 13. "In essence, the MLA establishes the government's *regulation* of the development of natural resources on public lands." *Id.* at *13 (quoting legislative history); *see also* Citizen Resp. 11-12, 19 (same); State Resp. 5-6, 9-10 (discussing congressional intent of MLA). Nothing limits that regulation to measures that will be profitable for industry. *California*, 2020 WL 4001480, at *13. BLM again ignores the *California* court's order, and fails to acknowledge the legislative history indicating Congress had "myriad" objectives, including protecting the public from unregulated development of public resources. *Id.* at *11.

BLM also offers no textual support for its claim that the MLA definition of "waste" is limited by the "'prudent operator' standard." BLM Resp. 20. In fact, as

the *California* court held, the MLA includes "separate and distinct" requirements—"*operators* must use 'reasonable diligence, skill, and care' and *BLM* must employ rules to 'prevent[] undue waste.'" 2020 WL 4001480, at *13 (citing 30 U.S.C. § 187). If BLM could require only those steps that a reasonably prudent operator must already take, the requirement to control waste would be redundant. *See Bridger Coal Co./Pac. Minerals, Inc. v. Dir., Office of Workers' Comp. Programs*, 927 F.2d 1150, 1153 (10th Cir. 1991) ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.").

BLM also claims that the Waste Prevention Rule "improperly elevates modern concerns about air quality and the environment above Congress' intent." BLM Resp. 22. In fact, the MLA broadly requires BLM to ensure operators take "all reasonable precautions to prevent waste," 30 U.S.C. § 225, and to protect the "public welfare," *id.* § 187. As BLM previously recognized, when Congress speaks in "capacious terms" like these, it shows an intent to "enlarge[] agency discretion" and allow the agency to "fill in the gaps." BLM PI Resp. 18 n.7 (quoting *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1057 (10th Cir. 2015) and *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013)); *see also Massachusetts*, 549 U.S. at 532 (holding the use of broad statutory language indicates Congress' intent to provide

"regulatory flexibility" to adapt to "changing circumstances and scientific developments").

BLM's final post-hoc claim is that the Waste Prevention Rule is inconsistent with its "longstanding practice" of taking "operator economics into account." BLM Resp. 22. However, BLM fully addressed its departure from its prior 40-year old policy, Notice to Lessees and Operators 4A (NTL-4A), in the record. BLM found "there is no statutory or jurisprudential basis for the [claim] that the BLM must conduct an inquiry into a lessee's economic circumstance before" determining that a loss amounts to waste. 81 Fed. Reg. at 83,038. Additionally, BLM found that NTL-4A did "not reflect modern technologies, practices, and understanding of the harms cause by venting, flaring, and leaks of gas," was not "particularly effective in minimizing waste," and was "subject to inconsistent application." *Id.* at 83,015, 83,017, 83,038. BLM provided ample justification for moving from an inconsistent case-by-case determination under NTL-4A to a consistent regulatory approach under the Waste Prevention Rule.

Moreover, BLM's post-hoc claim that its "longstanding practice" is to regulate loss of gas only where capturing it would be marginally profitable is false. NTL-4A did not base approval to vent or flare solely on whether the operator would profit, as BLM now claims it must. Rather, BLM could only approve

venting or flaring under NTL-4A if it was justified by "an evaluation report supported by engineering, geologic, and economic data which demonstrates" *both*:

> that the expenditures necessary to market or beneficially use such gas are not economically justified *and* that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be recovered if the venting or flaring were permitted to continue . . .

44 Fed. Reg. 76,600, 76,601 (Dec. 27, 1979) (emphasis added). NTL-4A further specified that BLM must take into account "the total leasehold production, including both oil and gas, as well as the economics of a fieldwide plan" to determine "whether the *lease* can be operated successfully if it is required that the gas be conserved." *Id.* at 76,601 (emphasis added). In other words, to demonstrate that conserving gas was not "economically justified," operators needed to evaluate the marginal cost of curtailing venting or flaring against the "total leasehold production," considering economics broadly, not against the marginal profits from conserving the gas. *See Rife Oil Properties, Inc.*, 131 IBLA 357, 377 (1994) (considering whether waste-preventing requirement would make "*production* uneconomic") (emphasis added)). And even that was not sufficient: operators also needed to show that it would lead to premature abandonment of recoverable resources.

Finally, BLM repeats its false assertions that the Waste Prevention Rule did not take "operator economics into account." BLM Resp. 22, *see supra* p. 13.

Indeed, by including exemptions from all of its requirements where compliance would lead operators to abandon resources, 81 Fed. Reg. at 83,011, the Waste Prevention Rule takes economics into account in a manner quite similar to NTL-4A. It is BLM's post-hoc litigating position that is inconsistent with NTL-4A. Accordingly, there is no merit to BLM's claims that its waste definition is a return to its historic practice, or that such a return to historic practice is required.

In sum, this Court should uphold BLM's adoption of the Waste Prevention Rule as a reasonable exercise of its authority under the MLA, and disregard its post-hoc confession of error.

B. The Waste Prevention Rule is Not Arbitrary or Capricious.

BLM incorrectly claims that it did not adequately explain or justify the Waste Prevention Rule. BLM Resp. 10. In fact, BLM fully justified the Waste Prevention Rule's requirements as "reasonable precautions to prevent waste" under the MLA. *See supra* p. 12. In a post-hoc attempt to undermine the Waste Prevention Rule, BLM nitpicks supposed procedural deficiencies in its own analysis, without even acknowledging its statutory mandate to prevent waste. In developing the Waste Prevention Rule, BLM "examine[d] the relevant data and articulate[d] a satisfactory explanation" for its decision to adopt reasonable waste prevention measures. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *contra* BLM Resp. 10.

1. BLM fully supported its decision to regulate marginal wells.

BLM's post-hoc assertion that it failed to consider impacts on marginal, or low production, wells ignores BLM's contemporaneous rationale and large swaths of the record. BLM Resp. 11-14. BLM thoroughly supported the Waste Prevention Rule's application at marginal wells, and its belated quibbles with an exemption from the Rule's leak detection and repair ("LDAR") program do not render the Waste Prevention Rule arbitrary.

BLM determined that not regulating marginal wells "would have a significant negative effect on the waste reduction benefits of [the Waste Prevention Rule]." 81 Fed. Reg. at 83,029-30. BLM supported this determination with "recent peer-reviewed studies" showing high gas losses from marginal well sites and emissions calculations from data reported to EPA and the EPA Greenhouse Gas Inventory showing "83 percent of the total methane emissions from oil and gas wells was attributable to low production wells." *Id.* at 83,029.

BLM carefully evaluated the concerns raised by industry commenters, *see* BLM Resp. 11, and found that they failed to provide data or evidence that would

substantiate foregoing waste regulation at marginal wells.[5] In particular, while industry commenters argued that marginal wells do not have significant leaks and therefore the costs of LDAR would not be meaningfully offset by recouping the value of the lost gas, BLM found that these comments did not provide any supporting data or refute the findings of the peer-reviewed studies showing significant gas losses from marginal wells. 81 Fed. Reg. at 83,029-30. As a result, BLM determined that it "simply [could not] conclude that low-production sites pose low leak risks and therefore merit exclusion from semi-annual LDAR." *Id.* And while BLM explained that it analyzed reducing LDAR frequency at marginal wells in the 2016 Regulatory Impact Analysis (RIA), it did not find that approach to be among the "most viable in reducing waste of gas." VF_536.

In addition to finding that reducing gas losses from marginal wells was critical for overall waste reduction, BLM also considered the implications of

---

[5] BLM now cites commenter cost estimates for a variety of Waste Prevention Rule provisions, BLM Resp. 11 (citing VF_1032-33 (costs for storage vessels), VF_1170 (costs for artificial plunger lifts for liquids unloading), VF_1220 (costs for LDAR surveys)). These commenter cost estimates are inapposite. As this Court noted, each of these requirements is subject to an "economic exemption[] where an operator shows, and BLM concurs, that compliance with the Rule's requirements 'would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease.'" *Wyoming*, 2017 WL 161428 at *11 (citations omitted). Moreover, BLM explained that marginal wells are "highly unlikely" to have equipment that would subject them to requirements like those for storage tanks, VF_1222, and that installation of artificial plunger lifts was not required by the Rule, VF_1170).

regulation for marginal well operation. BLM explained that it did not "anticipate a significant number of individual well shut-ins or any leasewide shut-ins as a result of the LDAR requirements, even with respect to low production wells" because "[a]s discussed in the RIA, third-party providers offer LDAR services at a relatively modest cost, and operators may recoup some of the costs of the program through the saved gas." 81 Fed. Reg. at 83,030; *see also* VF_533, 536 (explaining that BLM utilized particular cost estimates in the RIA because they were the most detailed, but "the actual results [of the cost-benefit analysis] likely understate the benefits of the BLM provisions, and may substantially understate them," and recognizing "that if we used per-facility or per-inspection cost data from other sources then that the result would show lower compliance costs"). These contemporaneous, record-based conclusions are owed substantial deference. *See W. Watersheds Project v. BLM*, 721 F.3d 1264, 1273 (10th Cir. 2013) (holding "deference is most pronounced" with respect to technical determinations within the agency's expertise) (internal quotations and citations omitted)).

BLM ignores its previous findings underpinning its decision to require standards at marginal wells. Instead, BLM now focuses solely on an exemption from the Rule allowing for a less effective LDAR program, intended as a final option for flexibility in the Rule to avoid any possibility of well shut-ins and the loss of significant recoverable reserves. *See* BLM Resp. 12-14. But BLM's post-

hoc allegations of flawed analysis ring hollow, and certainly do not meet the high threshold for setting aside agency action as arbitrary. *See State Farm*, 463 U.S. at 43.[6]

BLM recognizes that the shut-in exemption was intended as a "fail-safe" but asserts that that it did not conduct any analysis of the provision or its administrative costs. BLM Resp. 13. That is untrue. In the RIA, BLM *did* estimate the administrative costs associated with applications for the exemption for both industry (approximately $50,000 in total per year) and BLM (approximately $70,000 in total per year), based upon the expertise of BLM program staff. VF_544, 548). This technical analysis by an expert agency is entitled to deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) ("[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts.").

BLM also now objects to the standard for qualifying for the exemption—if the Rule's LDAR program would result in abandonment of "significant recoverable oil or gas reserves under a lease," 81 Fed. Reg. at 83,030—

[6] BLM repeatedly refers to its unlawful rescission of Waste Prevention Rule requirements in an apparent attempt to substantiate its allegations here with respect to marginal wells. BLM Resp. 11 n. 5, 14 n. 9. Those findings are extra-record here, and were squarely rejected by the *California* court, which noted that "on its face, [BLM's] analysis [of compliance costs at marginal wells in the Rescission] lacks economic rigor" and "the assumptions contained therein are facially faulty." *California*, 2020 WL 4001480 at *22.

complaining that it did not "define" the standard. BLM Resp. 13 & 13 n.8. But BLM omits its own clear elucidation of the test, which was applicable to multiple economic-based exemptions in the Rule: "the operator must make a showing that the cost of complying with the capture requirements would cause the operator to shut in the wells on the lease under current market conditions and for the reasonably foreseeable future, taking into account uncertainty regarding the long-term recoverable potential of the lease and reservoir." 81 Fed. Reg. 83,052 ("In other words, the showing should illuminate whether compliance would cause the operator to be deprived of the value of the lease, not simply cause a reduction in profit.");[7] *see also* VF_1034 (BLM "recognizes that the term 'significant' is a qualitative rather than quantitative metric" but "determined that setting a quantitative threshold, such as number of days of production lost, would be arbitrary and ineffective. Moreover, the BLM has a history of reviewing and evaluating requests based on similar qualitative criteria.").

In the Waste Prevention Rule, BLM provided a reasoned explanation, grounded in the record evidence before the agency, for applying requirements to

---

[7] BLM now attempts to downplay this explanation, noting it was in the context of the Rule's capture requirements, but the record is clear that BLM intended for the same principles to govern assessment of "significant recoverable reserves" across the Rule's economic-based exemptions. *See* VF_1034 (BLM explaining assessment of abandonment of "significant recoverable" reserves in evaluation of multiple exemptions).

marginal wells, and this Court must defer to that explanation, *supra* pp. 2-6. BLM's post-hoc objections do not render its 2016 decision to regulate marginal wells arbitrary.

2. BLM fully supported its use of the social cost of methane.

There is no merit to BLM's next post-hoc assertion that the Rule's RIA failed to separately consider the domestic costs and benefits pursuant to OMB Circular A-4. BLM Resp. 14-16. As discussed in Respondent-Intervenors' responses, BLM's RIA properly relied upon the "social cost of methane," which represents the best available method of calculating the impacts from changes in methane emissions. State Resp. 19-22; Citizen Resp. 36-37; VF_477-83 (BLM explaining use and application of social cost of methane in RIA). This approach was based upon the work of an Interagency Working Group ("IWG") that was specifically organized to develop a single, harmonized value regarding greenhouse gas emissions for use in federal agency rulemaking RIAs pursuant to Executive Order 12,866. *See* VF_18758. The IWG developed its global social cost of methane estimate over several years through robust scientific and peer-reviewed analyses and public processes. VF_18738, 18761.

The IWG, which included both the Department of the Interior and the Office of Management and Budget ("OMB"), determined that a *global*—rather than a *domestic*—measure is appropriate because "emissions of most greenhouse gases

contribute to damages around the world and the world's economies are now highly interconnected." VF_18893; *see* VF_18740; VF_18772 ("[T]he IWG (including OMB) determined that a modified approach [considering the global value] is more appropriate in this case because the climate change problem is highly unusual in a number of respects."); VF_18898 ("OMB . . . supports the working group's recommendations regarding . . . the focus on global damages."). Moreover, as BLM explained in the record, "suitable methodologies for estimating domestic damages do not currently exist." VF_1194; *see* VF_18898 (IWG stating that "good methodologies for estimating domestic damages do not currently exist").

In addition to explicit approval from OMB, the use of a global social cost of methane approach is consistent with OMB Circular A-4 and Executive Order 12,866. First, these orders provide that federal agencies should consider "all costs and benefits" of regulatory actions, including environmental and health effects. *See* E.O. 12,866, §§ 1(a), 1(b)(6), 1(b)(7), 6(a)(3)(C)(ii), 58 Fed. Reg. 51,735, 51,736, 51,741 (Oct. 4, 1993); VF_7661, 7668 (agency's economic analysis should encompass "all the important benefits and costs likely to result from the rule" including "any important ancillary benefits"). OMB Circular A-4 also specifically anticipates the consideration and reporting of "effects beyond the borders of the United States." VF_7661. Moreover, these orders state that agencies should use the best available scientific and economic information. *See* E.O. 12,866, § 1(b)(7), 58

Fed. Reg. at 51,736; VF_7662. BLM does not dispute that the IWG's approach represents the best available science on this issue. *See* VF_18747, 18757; *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677-79 (7th Cir. 2016) (upholding federal agency's use of IWG approach).

BLM's new claim that it did make a domestic-only "calculation in the 2018 Revision Rule notwithstanding any methodological limitations," BLM Resp. 15, is the very definition of a post-hoc rationalization, and ignores the fact that the *California* court specifically found that BLM's attempt to do such a calculation was "riddled with flaws," had been "soundly rejected by economists as improper and unsupported by science," and ultimately was "arbitrary and capricious." 2020 WL 4001480, at **27-28. Moreover, as even BLM admitted, its domestic-only approach was not required by law, but simply represented a "policy choice." *California*, No. 4:18-CV-05712-YGR, Defs.' Cross Mot. for Summ. J. and Resp. to Pls.' Mots. for Summ. J. 38, ECF No. 123.

In sum, BLM's use of the social cost of methane represented the best available method of calculating the costs and benefits of the Rule, was adequately explained in the record, and should be upheld.

3. BLM fully supported the gas capture requirements.

BLM's post-hoc attempt to critique the Rule's analysis of its gas capture requirements is also unsupported by the record. These requirements reduce waste

by requiring operators to capture—rather than burn—85% of their adjusted total volume of produced gas each month, which gradually increases to 98% over a nine-year period. 81 Fed. Reg. at 83,011. BLM now claims that it "offered no evidence that this new requirement was consistent with historical practice or that it had conducted any quantitative analysis to ensure that the gas capture percentages were themselves reasonable," and provided no explanation as to why "the nine-year phase in period was reasonable." BLM Resp. 17. These assertions conflict with the record in myriad ways.

As an initial matter, BLM modeled the gas capture target after North Dakota's existing rules, which BLM, at the urging of commenters, found would allow operators to achieve flaring limits with significantly lower costs than simply requiring flaring reductions alone. 81 Fed. Reg. at 83,023, 83,025. Additionally, the record reflects that BLM conducted an extensive analysis of data "of sales, on lease use and flaring volumes month-by-month for operators within a state" in order to set the capture targets. *Id.* at 83,026. Further, BLM analyzed the costs and savings of the gas capture requirement in the RIA, which BLM itself notes in its supplemental brief. *See* BLM Resp. 17 (citing VF_487-495). Following this analysis, BLM ultimately found that the gradual, phased-in structure of the capture targets, as well as allowing operators to average flaring volumes across multiple leases or areas to achieve capture requirements, would make the requirements

more achievable for operators, while still minimizing waste. 81 Fed. Reg. at 83,024-25.

BLM's other arguments are similarly contradicted by the record. For example, BLM claims that "there was no clear explanation" concerning the approval criteria for alternative capture percentages for operators who are unable to achieve the capture targets. BLM Resp. 17. However, BLM explained that operators must show that compliance would "cause the operator to be deprived of the value of the lease, not simply cause a reduction in profit" and demonstrate a more significant impact than "normal fluctuations" of the market. 81 Fed. Reg. 83,052; *see* VF_862-74; *supra* p. 20. Moreover, BLM noted that it has a history of reviewing requests based on "similar qualitative criteria" and that this evaluation would not be a departure from prior practice. 81 Fed. Reg. at 83,051.

BLM also argues that the capture requirements were not adequately analyzed because the RIA finds that the costs of implementing the gas capture provision may exceed the cost savings achieved for some operators. BLM Resp. 17-18. But BLM's post-hoc assertion that its legal authority is limited to ensuring each measure is marginally profitable for the operator is wrong. *See supra* pp. 9-11. While the record acknowledges that there will be costs associated with the gas capture requirements, BLM reasonably concluded that implementing these provisions would minimize the waste of public resources and increase natural gas

production in a way that was both technologically and economically feasible for operators. *See* 81 Fed. Reg. at 83,024; VF_495, 553, 571. Thus, the record provides ample support for the Rule's gas capture requirements, and BLM's post-hoc arguments are without merit.

III. The Waste Prevention Rule is Severable.

For the foregoing reasons and those set forth in Respondent-Intervenors' responses, the Waste Prevention Rule should be upheld, and the petitions for review vacated. Even if this Court disagrees, Respondent-Intervenors agree with BLM that provisions of the Waste Prevention Rule are severable. These include the unchallenged provisions that BLM identifies. BLM Resp. 25 (citing 43 C.F.R. subpart 3178 and 43 C.F.R. § 3103.3-1). Additional provisions are also severable. For example, if this Court were to find that there was impermissible overlap with EPA's regulations, such a ruling would not apply to the capture requirements because EPA does not regulate flaring of associated gas from oil wells. 81 Fed. Reg. 83,010. Furthermore, even if the Court were to accept BLM's post-hoc definition of waste, which was rejected by the *California* court, it would not affect the pneumatic controller requirements, for which the value of the gas conserved is more than the cost of replacing the devices. *See* VF_501-503.

CONCLUSION

This Court should uphold the Waste Prevention Rule based on the 2016 administrative record and BLM's broad statutory authority to regulate waste and protect taxpayers and the environment. BLM assured the *California* court on August 14, 2020, that it is poised to implement the Rule on October 13 and did not identify any implementation concerns. *California*, No. 4:18-CV-05712-YGR, Defs.' Rep. on the Compliance Process for the 2016 Waste Prevention Rule & Decl. of Rebecca A. Good, ECF Nos. 178 to 178.1. This Court should allow the Waste Prevention Rule's benefits of reduced waste, increased royalties, and decreased pollution finally to be realized.

Respectfully submitted on August 25, 2020,

/s/ Robin Cooley
Robin Cooley, CO Bar #31168
Rumela Roy, CO Bar # 53505
Earthjustice
633 17th Street, Suite 1600
Denver, Colorado 80202
Phone: (303) 623-9466
rcooley@earthjustice.org
rroy@earthjustice.org

Attorneys for Respondent-Intervenors Natural Resources Defense Council, Sierra Club, The Wilderness Society, and Western Organization of Resource Councils

Susannah L. Weaver, DC Bar #1023021
Donahue, Goldberg, & Weaver, LLP

1008 Pennsylvania Ave. SE
Washington, DC 20003
Phone: (202) 569-3818
susannah@donahuegoldberg.com

Attorney for Respondent-Intervenor Environmental Defense Fund

Melissa Hornbein, Mont. Bar #9694
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
Phone; (406) 204-4852
hornbein@westernlaw.org

Erik Schlenker-Goodrich, NM Bar No. #03-196
Western Environmental Law Center
208 Paseo del Pueblo Sur, #602
Taos, New Mexico 87571
Phone: (575) 613-4197
eriksg@westernlaw.org

Attorneys for Respondent-Intervenors Center for Biological Diversity, Citizens for a Healthy Community, Diné Citizens Against Ruining Our Environment, Earthworks, Montana Environmental Information Center, National Wildlife Federation, San Juan Citizens Alliance, WildEarth Guardians, Wilderness Workshop, and Wyoming Outdoor Council

Rachel Granneman, IL Bar #6312936
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
Phone: (312) 673-6500
rgranneman@elpc.org

Attorneys for Respondent-Intervenor Environmental Law & Policy Center

Darin Schroeder, KY Bar #93828

Ann Brewster Weeks, MA Bar #567998
Clean Air Task Force
114 State St., 6th Floor
Boston, MA 02109
Phone: (617) 624-0234
dschroeder@catf.us
aweeks@catf.us

Attorneys for Respondent-Intervenor National Wildlife Federation

Lisa McGee, WY Bar #6-4043
Wyoming Outdoor Council
262 Lincoln Street
Lander, WY 82520
(307) 332-7031
lisa@wyomingoutdoorcouncil.org

Local Counsel for Respondent-Intervenors

Xavier Beccera
Attorney General of California
David A. Zonana, CA Bar #196029 (*admitted pro hac vice*)
Supervising Deputy Attorney General

/s/ George Torgun
George Torgun, CA Bar #222085 (*admitted pro hac vice*)
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1002
Facsimile: (510) 622-2270
E-mail: George.Torgun@doj.ca.gov

Reed Zars
910 Kearney Street
Laramie, WY 82070
Phone: (307) 760-6268
Email: reed@zarslaw.com

Attorneys for the State of California,
by and through the California Air Resources Board

Hector Balderas
Attorney General of New Mexico

/s/ William Grantham
William Grantham, NM Bar #15585 (*admitted pro hac vice*)
Assistant Attorney General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
Telephone: (505) 717-3520
Facsimile: (505) 827-5826
E-Mail: wgrantham@nmag.gov

Attorneys for the State of New Mexico

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of this Court's July 28, 2020 Order on Expedited Merits Briefing Schedule (Dkt. No. 276) because this brief contains 6,341 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type style requirements of D. Wyo. Local 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 2010 in 14 point font size and Times New Roman.

Date: August 25, 2020 *<u>/s/ Robin Cooley</u>*
Robin Cooley

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2020 a copy of the foregoing **CITIZEN GROUPS AND STATE RESPONDENTS' SUPPLEMENTAL RESPONSE BRIEF** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Robin Cooley
Robin Cooley