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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al.,	)	
	)	
Petitioners,	)	Civil Case No. 2:16-cv-00285-SWS
	)	[Lead]
vs.	)	
	)	Consolidated with:
U.S. DEPARTMENT OF THE	)	
INTERIOR, *et al.*,	)	Case No. 2:16-cv-00280-SWS
	)	
Respondents	)	
	)	

AMERICAN PETROLEUM INSTITUTE'S AMICUS BRIEF IN SUPPORT OF PETITIONERS

Dated: October 10, 2017

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CORPORATE DISCLOSURE STATEMENT

Per Local Rule 83.6(d) and Fed. R. App. P. 29(a)(4)(A), *amicus curiae* American Petroleum Institute ("API") states (a) that it is a District of Columbia nonprofit trade organization that represents the U.S. oil and gas industry before the national executive, legislative, and judicial branches of government; (b) that it is an umbrella group for over 625 member companies involved in all aspects of the oil and gas industry; and (c) that it has no parent corporations and that no publicly held company owns any stock in it.

Dated: October 10, 2017

/s/ Keith S. Burron
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FED. R. APP P. 29(A)(4)(E) STATEMENT

Amicus curiae API states as follows: No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the amicus curiae its members or its counsel—contributed money that was intended to fund preparing or submitting this brief.

Dated: October 10, 2017

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STATEMENT OF INTEREST

API is a national trade association representing over 625 members from all aspects of America's oil and gas industry, including the exploration and production of oil and gas from federally-managed lands. API supports the arguments made in Petitioners' and Petitioner-Intervenors' opening briefs and supports Petitioners' request that this Court invalidate and set aside the Bureau of Land Management's ("BLM") Venting and Flaring Rule ("Rule").[1] In sum, the Rule is an impermissible attempt at environmental and climate regulation in the guise of "waste" prevention and natural resource conservation, and unlawfully alters the fundamental concept of "waste" as it applies to federal oil and gas leases. As the opening briefs explain, air quality is the *exclusive* province of the EPA and the states under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq*., and BLM is without authority to regulate in that arena. API does not repeat those arguments here.

The purpose of API's amicus brief is to further explicate for the Court how BLM's alteration of the concept of "waste" violates section 16 of the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 225. What constitutes "waste" is critical to demonstrating the extent to which the Rule exceeds BLM's authority to regulate venting and flaring under the MLA. API also highlights certain economic impacts of the Rule on lessees that BLM either failed to consider or failed to properly analyze. API members – including entities that are not also members of Petitioners Western Energy Alliance and Independent Petroleum Association of America – hold oil and gas leases issued or managed by BLM. The industry will be directly and profoundly damaged if BLM's rule, which seeks to arbitrarily limit – and in many cases outright

[1] BLM, "Waste Prevention, Production Subject to Royalties, and Resource Conservation" ("Venting and Flaring Rule" or "Rule"), 81 Fed. Reg. 83,008 (Nov. 18, 2016).

prohibit – the venting and flaring of economically unrecoverable gas from those leases is permitted to take effect.

SUMMARY OF ARGUMENT

This case concerns the scope of BLM's authority to limit the extent to which lessees may vent or flare gas that is uneconomic, impractical, or dangerous to capture from wells on BLM-issued oil and gas leases. Until BLM promulgated the Rule on November 18, 2016, lessees were permitted to vent or flare gas that was uneconomic to capture and market. BLM's historical test was straightforward: if it would cost more to capture and sell the gas than it would to vent or flare the gas, then venting and flaring was not considered "waste," and therefore was permitted. The lessee also would owe no royalties on vented or flared production to the federal government for the obvious reason that producing and marketing the gas would yield no net positive revenue. Now, for the first time since the 1920 MLA, BLM has impermissibly abandoned this fundamental economic principle of waste prevention and promulgated the Rule which requires lessees to capture and market gas *even if doing so results in an economic loss to the lessee*. What is more, the Rule subsumes *all* BLM oil and gas leases, even existing leases that have been operating under settled expectations for years. BLM's attempt to expand its authority from conserving federal mineral resources and preventing the "waste" of those resources, to now purportedly maximizing federal revenue, regulating air quality, or reducing methane emissions, is unprecedented and unsupportable.

BLM's regulatory overreach will have very real consequences for oil and gas operators across the nation. Requiring operators to capture and market unprofitable quantities of gas at a loss – and also to pay royalties on that gas – could render many operations that are currently profitable uneconomic, forcing operators to shut in or abandon currently productive wells and create true "waste" by precluding recovery of those resources. The Rule fails to account for key differences among oil and gas leases depending on the productivity of the wells involved, the volume and quality of gas associated with that lease or well's production, the proximity of the

lease or well to gas pipelines and transportation infrastructure, and numerous other factors related to lease or well operations and economics. The Rule could have the biggest impact on marginally-producing wells, which undisputedly comprise the vast majority of wells currently operating on BLM-managed lands. The BLM failed to consider these factors in assessing the economic impacts of the rule on variously-situated operators as required under the Administrative Procedure Act ("APA"), 5 U.S C. § 551 *et seq*.

ARGUMENT

I. THE RULE FLOUTS LONG-ESTABLISHED, LEASE-SPECIFIC ECONOMIC PRINCIPLES AND EXCEEDS BLM'S STATUTORY AUTHORITY TO PREVENT UNDUE WASTE.

BLM's attempt to suddenly impose a vastly expanded definition of "waste" on its lessees, to include virtually all "loss" of gas, is untenable because it is inconsistent with the prevailing understanding of that term for almost a century both by BLM and industry. While agencies normally reserve the discretion to alter their interpretations of statutory terms via notice and comment rulemaking, courts are skeptical of agency attempts to create new interpretations that conflict with interpretations adopted contemporaneously with the enactment of the statute and applied consistently for decades. As the Fifth Circuit just recently reinforced in rejecting another novel statutory interpretation after several decades of consistent application by BLM's sister agency the Bureau of Safety and Environmental Enforcement ("BSEE"), courts are not required to defer to an agency's reversal of its decades-long interpretation of a statutory term. *United States v. Moss*, No. 16-30561, 2017 WL 4273427, at * 19-20 (5th Cir. Sep. 27, 2017); *see Watt v. Alaska*, 451 U.S. 259, 272-73 (1981) ("persuasive weight" due to an agency's contemporaneous construction of applicable law and subsequent consistent interpretation). Reliance concerns marshalling against such changes are particularly heightened in the BLM leasing context, wherein BLM's Rule regulates entities with whom BLM is in contractual privity.

At bottom, oil and gas leases – including those between the federal government and its lessees – are enforceable contracts intended to ensure the *mutually profitable* development of the lease's mineral resources. *See Gerson v. Anderson-Prichard Prod. Corp.*, 149 F.2d 444, 446 (10th Cir. 1945) (". . . the purpose of the [oil and gas lease] contract is the mutual benefit of the lessor and the lessee"); *see generally* John S. Lowe, Oil and Gas Law In a Nutshell 212, (6th ed. 2014) (the fact that oil and gas leases remain in effect "as long as the lease produces in paying quantities" demonstrates that the lease is an "economic transaction" based on mutual profitability). Under an oil and gas lease, the lessor conveys to the lessee the rights to the mineral resources under the lease area, and reserves a royalty interest based on a specified percentage of the amount (production in-kind) or value of the production. *See* W L Summers & Nancy Saint-Paul, Oil and Gas, § 30:1 (3d ed.). From the inception of the oil and gas industry to the promulgation of the Rule, "waste" has had a lease-specific meaning intended to determine whether the operator of a given oil and gas lease was, under the circumstances, diligently developing the leased resources for the mutual benefit of the lessee and lessor.

Because the purpose of an oil and gas lease is to facilitate development of minerals for *mutual* profit, a balance must exist between the rights of the lessee and the lessor. In general, an operator that fails to expend reasonable and prudent efforts to capture and market oil and gas produced from the lease commits "waste," and is liable for any resulting loss. *See, e.g., Craig v. Champlin Petroleum Co.*, 300 F. Supp. 119, 125 (W.D. Okla. 1969), *aff'd*, 421 F.2d 236 (10th Cir. 1970). Although federal oil and gas lessees that commit such waste are obligated to pay royalty on the value of the wasted production volumes (s*ee* 30 U.S.C. § 1756), under the MLA committing "undue waste" can also provide grounds for lease termination. 30 U.S.C § 225. By the same token, a lessor may not compel a reasonable and prudent operator to engage in the

unprofitable gathering and marketing of lease production in the name of "waste" prevention. Under the principles of reasonable and prudent lease operation, intentionally taking a loss on production is not "reasonable." Accordingly, as BLM itself agreed for decades, venting or flaring unprofitable quantities of gas is simply not "waste."

For the purpose of limiting venting and flaring, "waste" is generally defined as "preventable loss of [oil and gas] the value of which exceeds the cost of avoidance." Stephen L. McDonald, Petroleum Conservation in the United States, An Economic Analysis, Johns Hopkins Press, 1971 (Reprinted in 2011 by Resources for the Future) ("Petroleum Conservation Economics"), at 129; *see also id*., at 117-18, 123-124, 128-129. Consistent with this fundamental principle, statutes and regulations prohibiting waste frequently incorporate the widely understood principle that any "waste" determination must take into account whether it makes economic sense for a prudent operator of the oil well in question to recover and sell the gas, or whether capturing and marketing the gas is uneconomic. *See, e.g.,* WYO. STAT. ANN. § 30-5-101 (defining "waste as that term is generally understood in the oil and gas industry," and exempting from the concept of waste "gas produced from an oil well pending the time when with reasonable diligence the gas can be sold or otherwise usefully utilized *on terms and conditions that are just and reasonable*") (emphasis added); N.M. ADMIN. CODE §§ 19.15.2.7 & 19.15.18.12 (adopting, without comment, the "ordinary" meaning of waste, and exempting from the definition of "waste" venting and flaring of casinghead gas (gas produced in association with oil) where "the gas flared or vented is of no commercial value"); Interstate Oil Compact Conservation Comm'n, Model Statute (1940, 1954, 1979) (excluding from the definition of "waste" "Gas produced from an Oil well or Condensate well pending the time when with

reasonable diligence the Gas can be sold or otherwise usefully utilized *on terms and conditions that are just and reasonable*") (emphasis added).

This understanding was so widely held throughout BLM, states, and the industry that most statutes defining "waste" make no express exemption for the venting and flaring of gas that is uneconomic to capture and produce. That is because it is presumed that, where individualized findings are made that it is uneconomic to market associated gas, venting or flaring is "necessary" and "reasonable," and therefore is not "waste." *See* McDonald, *supra*, at 124 ("In most states, no specific exception to the general prohibition [against waste] is made [for venting and flaring]; actual prohibition or exception in individual reservoirs is [generally] based on the immediate circumstances"). In such states, the imposition of general flaring prohibitions that are not based on individual lease or well economics – like BLM's Rule – is generally prohibited.

The MLA was enacted against this background. *See* Robert E. Sullivan, "The History and Purpose of Conservation Law," *Oil and Gas Conservation Law & Practice*, at 1 (Rocky Mtn. Min. L. Found. 1985). It adopted the prevailing oil and gas industry view that the concept of "waste" is inextricably tied to the reasonable and prudent operation of a lease. Accordingly, 30 U.S.C. § 187 requires all oil and gas leases to "contain provisions for the exercise of reasonable diligence, skill, and care" in the operation of the lease, and requires operators to comply with Departmental regulations "for the prevention of undue waste." The MLA additionally requires lessees to take all "reasonable precautions to prevent waste of oil and gas." *Id*. Although the MLA and its legislative history do not expressly define the term "waste," this term of art was commonly understood at the time, and no evidence indicates that Congress intended to eschew that established meaning. *Morissette v. United States.*, 342 U.S. 246, 263 (1952) (where Congress uses an established term of art, "it presumably knows and adopts the

cluster of ideas that [are] attached . . . . [the] absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.”).

BLM’s oil and gas lease form and regulations further formalize the basic concept that “waste” can only be assessed in light of the operator’s diligence given the circumstances of the lease. Section 2 of BLM’s lease form 3100-11 requires the lessee to pay royalty on oil or gas “lost or wasted . . . when such loss or waste is due to operator negligence . . . or a failure to comply with a regulation or order issued under [the Federal Oil and Gas Royalty Management Act (“FOGRMA”), 30 U.S.C. §§ 1701 *et seq*., or the MLA].” Section 4 of the lease form, which addresses issues of development, unitization, and drainage, similarly requires the lessee to exercise “reasonable diligence” in developing and producing from the lease, and requires lessees to prevent “unnecessary damage to, loss of, or waste of leased resources.”

The Rule at issue in this case did not substantively change BLM’s regulatory definition of “waste:”

> any act or failure to act by the operator that is not sanctioned by the authorized officer as necessary for *proper* development and production *and* which results in: (1) A reduction in the quantity of or quality of oil and gas ultimately producible from a reservoir *under prudent and proper operations*; or (2) *avoidable surface loss of oil and gas*.

43 C.F.R. § 3160.0-5 (emphasis added). The definition of “avoidably lost,” in turn, relates back to the prudent operation of the lease:

> venting or flaring of produced gas without the proper authorization . . . of the authorized officer and the loss of produced oil or gas when the authorized officer determines that such loss occurred as a result of: (1) negligence on the part of the operator; or (2) the failure of the operator to take all reasonable measures to prevent and/or control the loss; or (3) the failure of the operator to comply fully with applicable terms and regulations, applicable orders and

> notices, or the written orders of the authorized officer; or (4) any combination of the foregoing.

43 C.F.R. § 3160.0-5. Intentionally taking a loss on production is not "reasonable" or "prudent" lease operation.

Under the MLA, and as consistently implemented by DOI over the decades, whether a loss is deemed "avoidable" (and therefore whether a loss constitutes impermissible "waste") has turned on "whether it would have been economic [for the lessee] to market the gas from the well at issue." *Rife Oil Properties, Inc.*, 131 IBLA 357, 373-77 (1994) (interpreting the waste standard under the U.S. Geological Survey's Notice to Lessees 4A, Royalty or Compensation for Oil and Gas Lost ("NTL-4A"), 44 Fed. Reg. 76,600 (Dec. 27, 1979), which BLM replaced with the new Rule); *see* North Dakota Petroleum Council, *SDR No.* 922-15-07 (Feb. 11, 2016) (BLM North Dakota State Director Opinion reinforcing that, if recovering gas from a lease would not be economic, the loss is "unavoidable"); *see also Ladd Petroleum Corp.*, 107 IBLA 5 (1989) (explaining the need to allow operators to demonstrate that gas was not economically recoverable before "avoidability" finding could be made).

Courts have previously rejected attempts by DOI bureaus to substantially alter their longstanding interpretations of undefined statutory terms when the original interpretations were adopted contemporaneously with the statute and consistently applied for decades. *See Moss,* 2017 WL 4273427, at * 19-20 (rejecting BSEE's expansion of the Outer Continental Shelf Lands Act's ("OCSLA") enforcement provisions to contractors in part because BSEE and its predecessor agencies had, from the enactment of OCSLA through 2011, consistently interpreted those provisions to apply exclusively to lessees and operators); *Marathon Oil Co. v. Andrus*, 452 F. Supp. 548 (D. Wyo. 1978) (rejecting BLM's attempt to significantly alter its interpretation of "avoidably lost" because BLM and its predecessor agencies had, from the enactment of the MLA

through the 1970s, consistently interpreted the meaning of that term).[2] In this case, for almost a century since the enactment of the MLA in 1920, BLM has consistently applied the same concept of "waste" (and BLM's regulatory concept of "avoidable loss") to federal leases. Although BLM may retain limited discretion to alter its longstanding interpretation of "avoidable loss" and "waste," it should not be permitted to turn these concepts on their heads or deem losses of gas "avoidable" (and therefore "waste") without determining whether a reasonable operator would, given the circumstances, capture and market the gas.

But that is precisely what BLM's Rule does. In the context of venting and flaring, the interests of the lessee and lessor are typically aligned: mutually profitable production. Thus, operators tend to employ whatever reasonable means are currently available to maximize profitable gas capture. Accordingly, a finding that venting or flaring of a given quantity of gas is "avoidable" historically has been relatively rare. But the Rule would make virtually *all* venting and flaring an "avoidable loss," and therefore "waste," regardless of whether a reasonable and prudent operator would capture and market the gas.

This fundamental departure is evident throughout the Rule. For example, the new 43 C.F.R. § 3179.7 requires lessees to capture 85% of all monthly gas production in 2018 and 2019, and 98% of all monthly gas production by 2026 regardless of whether it would be reasonable and prudent to do so. Amounts vented or flared in excess of these arbitrary criteria are deemed "avoidable loss," and thereby subject to payment of royalty under 30 U.S.C. § 1756, even if the

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[2] The long-standing and continuing standard for what constitutes "avoidable loss," and therefore impermissible "waste," is also a fundamental term of all oil and gas lease contracts. Indeed, commission of impermissible waste is grounds for lease forfeiture (30 U.S.C. § 225), and therefore, is a material contractual term on which lessees are entitled to rely. *See Mobil Oil Prod. Southeast, Inc. v. United States,* 530 U.S. 604 (2000) (oil and gas leases with the federal government are contracts and enforceable as such); *Amber Resources Co. v. United States,* 68 Fed. Cl. 535 (2005) (same). Significantly altering the standards for "avoidable loss" and "waste" is not permitted by API members' lease contracts.

gas is captured and sold at a loss to the lessee. Sections 3179.201-3179.203 require all operations, regardless of size, to acquire and install new equipment designed to minimize loss of gas regardless of economic feasibility. The Rule treats emissions associated with noncompliant equipment also as "avoidable loss." Section 3179.11 "deems" venting and flaring from wells connected to pipelines "avoidable loss," even where there is insufficient pipeline capacity to accept and transport the captured gas (i.e., the operator is unable to get its gas into the pipeline). Thus, under the Rule, lessees are faced with a Hobson's choice: either build the necessary infrastructure to capture and market gas[3] at a loss (while also paying BLM royalties on that production),[4] or vent or flare the gas, pay royalties on the lost production, and face the possibility of lease cancellation for the commission of "undue waste."

BLM's so-called "alternative capture requirement" of § 3179.8, which would allow flaring only where gas capture would render the *entire lease* uneconomic *and* leave significant reserves in the ground, also is legally unsustainable. Under this test, the operator must demonstrate not only that the cost of capturing and marketing the gas exceeds the value of the gas as under the prior rule, but also that the cost of capture exceeds the value *of all the production from the lease* – including oil production – and that shutting in production would strand "significant" reserves.

Re-determining the threshold for "avoidable loss" as forced cessation of operations and abandonment of significant reserves is inconsistent with the straightforward economic test of "waste" as understood by the industry and BLM at the time the MLA was enacted and in the

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[3] In many circumstances, timely construction of additional gas pipeline capacity is not practical due to the numerous legal and regulatory hurdles associated with such projects.

[4] The propriety of charging royalties on gas produced, transported, and sold for a net loss is dubious.

decades since. The alternative capture requirement also exposes stripper wells and wells of marginal production – which are the vast majority of wells on BLM lands – to the greatest potential for shut in and abandonment. BLM also does not define or indicate what constitutes "significant" reserves. In any case, shutting in such wells, either individually or cumulatively, would result in its own type of "waste" by forcing the premature abandonment of wells that still have producible resources.[5] When these lessees entered into their leases, they did so in reliance on applicable BLM regulations like NTL-4A, which contained traditional "avoidable loss" criteria allowing these leases to be economically developed by permitting venting and flaring of associated gas that independently is uneconomic to capture and market. The Court should not allow BLM to upend this understanding completely to the detriment of federal lessees.

BLM represents that the proposed regulatory definition of "avoidable loss" does not deviate substantially from the current standard. In reality, the concepts of "waste" and "avoidable loss" reflected in the substantive provisions of the Rule bear little, if any, resemblance to the concept of "waste" as understood by Congress when enacting the MLA or as reflected by longstanding industry practice and BLM regulation. Under the mantra of "waste" prevention, BLM's proposal prohibits flaring in excess of certain arbitrary, *de minimis* volumes regardless of whether capture of the gas would be economic. The Rule also prohibits nearly all flaring on leases connected to pipelines, regardless of whether the lessee actually has pipeline access, and summarily "deems" certain losses from storage tanks and equipment to be "avoidable" regardless of whether capture is economic or even possible. Accordingly, the Court

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[5] BLM acknowledges that the rule will force significant underground waste of oil; the agency estimates that the Rule will reduce oil production from federal leases by up to 3.2 million barrels per year. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,014 (Nov. 18, 2016).

should invalidate the Rule because it exceeds BLM's authority to prohibit "undue waste" under Section 16 of the MLA.

II. BLM'S COST BENEFIT ANALYSIS IS FLAWED BECAUSE IT FAILS TO CONSIDER THE DISPARATE ECONOMIC IMPACTS OF THE RULE AND OVERESTIMATES ITS BENEFITS.

In reviewing an agency regulation under the APA, 5 U.S.C. § 706(2)(a), the court must "engage in a substantive review of the record to determine if the agency considered relevant factors and articulated a reasoned basis for its conclusion." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). To survive judicial review, BLM must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation and citation omitted). Courts must set aside agency rules as "arbitrary and capricious if the agency has relied on factors which congress has not intended it to consider, entirely failed to consider a significant aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of agency expertise." *Id.* Importantly, "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining the analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012).

General economic considerations and cost-benefit considerations clearly played a significant role in BLM's decision whether, and under what circumstances, to promulgate the Rule. *See* 81 Fed. Reg. at 83,009 (citing directives from DOI Office of Inspector General and the Government Accountability Office, and discussing preservation of "valuable" resources as one of the primary motivators for the Rule); *Id.* at 83,014 (citing loss of economic benefits as the most important impact of "waste and loss of gas"); *Id.* at 83,017 (citing government oversight

documents calling for limitations on venting and flaring to increase public revenues as impetus for the Venting and Flaring Rule). Ultimately, BLM concludes that based on its economic analysis, "the benefits of this rule outweigh the costs by a significant margin." *Id*. at 83, 069. But BLM's discussion of economic impacts in the preamble to the Rule clearly fails to account for, or arbitrarily minimizes, obvious economic impacts to its lessees.

BLM fails to consider the realistic direct impacts of the Rule on lessees' business and investment decisions. For example, BLM makes the blanket generalization that "the annualized compliance costs represent only a small fraction of the annual net incomes of companies likely to be impacted . . . . [t]herefore, we believe that the rule would not alter the investment or deployment decisions of the firms . . . ." *Id*. at 83,070. This statement completely ignores that an operator's investment decisions are based on the attractiveness of each individual prospect, lease, or project. Hence, comparing the annual costs of compliance with the net worth of an oil company cannot measure effects on investment or deployment decisions. Instead, historical experience shows that companies typically weigh the compliance costs associated with rules like this one – such as constructing infrastructure to capture and market gas at a loss, and installing expensive leak prevention hardware – against the potential profit associated with the lease or prospect in question.

Because the Rule would impose substantial costs to operators with no corresponding benefit, it is facially unsupportable to conclude that "the rule would not alter the investment or deployment decisions of [operators]." *Id.* at 83,070. Although reasonable minds might disagree regarding the *extent* to which the Rule would deter investment in BLM oil and gas leases, the issue never arises because the BLM simply assumes – without providing any rationale or support – that the Rule would have *no effect* on the business decisions of oil and gas operators.

BLM also fails to consider the disparate impacts the Rule would have on various types of federal lessees. For example, the economic analysis does not consider the potential impacts of the Rule on the majority of BLM lessees - marginal well operators. The analysis simply fails to contemplate the possibility of widespread lease abandonment due to the "alternative capture requirement," which permits flaring only where the costs of capture would make the entire lease uneconomic and cause the lessee to abandon "significant" reserves. *E.g.,* 81 Fed. Reg. at 83,012. Marginally producing wells are at the greatest risk of shut-in under this standard because the flaring volume and gas capture requirements are more than likely to render such wells and leases uneconomic to operate, and these leases are also least likely to individually contain reserves "significant" enough to avoid shut-in under the Rule. BLM's economic analysis completely fails to anticipate this issue, and makes no attempt to estimate the likelihood of, or economic impact associated with, potentially shutting in the majority of its oil well operators. Instead, it simply concludes that "[a]lthough the rule will affect a substantial number of small entities, the BLM does not believe these effects will be economically significant . . . the average reduction in profit margin for small companies will be just a fraction of one percentage point." *Id.* at 83,070. This surely will not be the case for entities operating marginal wells – particularly those that will likely be shut in – a factor that BLM entirely failed to consider.

Even more problematic is BLM's conclusion that the Rule will have an economic *benefit* to industry due to increased gas capture, sale, and collection of royalties – as though the Rule is for lessees' own good. 81 Fed. Reg. 83,013. The regulatory preamble concludes that "the cost savings the industry will receive from the recovery and sale of natural gas" would be $20-157 million per year. *Id.* at 83,014, 83,069, 83,070. But this assumes that BLM lessees are *not* already prudent operators, and are currently wasting on a massive scale otherwise profitably

recoverable gas. As explained above, if capturing and selling the gas were profitable, the lessees would already be doing so – not only because it makes business sense, but also because it made legal sense. Indeed, the former regulations and NTL-4A required capture in such profitable circumstances; in order to obtain permission from BLM to vent or flare, the operator had to demonstrate that the gas was not economically recoverable.

Where the Rule most departs from previously accepted practice is its new requirement that operators capture gas *at a loss* (i.e., it forces operators to capture and market gas that is *not* currently profitable to market). In other words, it adds no new provision that would net operators additional profit; it only imposes requirements that force them to incur new losses. Indeed, the Joint Brief of Petitioner-Intervenors North Dakota and Texas point out that, by BLM's own analysis, it will cost operators anywhere from $28-30 to prevent the waste of each dollar of gas. *See* Joint Opening Br. of the States of North Dakota and Texas, at 35. At a best-case cost-benefit ratio of 20:1, any representation by BLM that the Rule in any way economically *benefits* federal lessees through recovery of "wasted" production is unsupported.

CONCLUSION

BLM's Venting and Flaring Rule is inconsistent with BLM's statutory authority and decades of consistent practice. The Rule must be set aside and remanded as arbitrary, capricious, and not otherwise in accordance with law.

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Respectfully submitted,

___*/s/ Keith Burron*________________

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CERTIFICATE OF WORD COUNT

I hereby certify that this *amicus curiae* brief, complies with the type-volume limitation set forth in U.S.D.C.L.R. 83.6(c) because this brief contains 4,762 words, as computed by Microsoft Word, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: October 10, 2017 *_____/s/ Keith S. Burron_*

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2017, I electronically filed the Foregoing American Petroleum Institute's Amicus Brief In Support of Petitioners with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Keith S. Burron