JEAN E. WILLIAMS
Deputy Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice
MARISSA PIROPATO (MA 651630)
P.O. Box 7611
Washington, DC 20044-7611
Tel.: (202) 305-0470/Fax: (202) 305-0506
marissa.piropato@usdoj.gov
CLARE BORONOW, admitted to MD Bar
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
Tel.: (303) 844-1362 / Fax: (303) 844-1350
clare.boronow@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

DAVID BERNHARDT, *et al.*,

Defendants.

No. 4:18-cv-05712-YGR

(Consolidated With Case No. 4:18-cv-05984-YGR)

DEFENDANTS' REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

Hearing: January 14, 2020 at 10:00 a.m.

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INTRODUCTION

The question before the Court is not whether the 2016 Rule represents a better or worse policy choice than the Revision Rule. It is whether BLM, the expert agency entrusted by Congress with the complicated task of administering oil and gas development on public lands, engaged in reasonable and rational decisionmaking in issuing the Revision Rule. Plaintiffs' reliance on citations out of context and unsupported allegations of post hoc rationalization, and their refusal to look at how the Revision Rule as a whole operates, should not distract the Court. In the Revision Rule, BLM returned to its longstanding practice of accounting for the economics of waste prevention, reasonably determining that a Congress concerned with promoting mineral development did not expect a company to lose money on resource conservation. Separately, the agency made a reasonable choice based on current guidance documents and its review of the science to use the domestic social cost of methane to monetize the Revision Rule's costs and benefits as required by Executive Order. Plaintiffs' efforts to undermine BLM's technical and scientific judgments with their own conflicting (and flawed) technical and scientific judgments improperly ask this Court to adjudicate between conflicting expert analyses. That is not the Court's role. Because BLM has explained its position, supplied its reasons, and provided supporting facts and data, its decision withstands scrutiny under the Administrative Procedure Act's ("APA") deferential standard of review and this Court should uphold it.

ARGUMENT

An agency's decision to reduce regulation is not subject to a more stringent standard than its decision to impose additional regulations. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). BLM fully explained its reasons for revising the 2016 Rule, supported those reasons with data and facts, and took a hard look at the impacts of the Revision Rule under NEPA. No more is required.

I. BLM's Interpretation of "Waste" and Its Own Statutory Authority Comports with the Mineral Leasing Act and Is Owed Deference.

A. "Waste" is Ambiguous Under *Chevron* Step One

Under the first step of *Chevron*, the Court asks "whether Congress has directly spoken to

the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). If the statute is ambiguous, the Court proceeds to step two of the *Chevron* analysis and must defer to the agency's interpretation so long as that interpretation is reasonable. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). Here, the Mineral Leasing Act ("MLA") is plainly ambiguous. The statute does not define "waste." Although it uses the term four times, the MLA never explains what constitutes "waste," let alone "undue waste." *See* Defs.' Mot. 10-11. Indeed, the statute uses the term in varying contexts, suggesting that the word "waste" may have different meanings or nuances depending on how it is used and the particular mineral resource at issue.[1] For example, in Section 225, which is in the portion of the MLA addressing the regulation of oil and gas in particular, the statute references the "waste of oil or gas developed in the land." 30 U.S.C. § 225. In contrast, Section 187, which is in the portion of the MLA laying out general terms applicable to all mineral leases, refers generally to "undue waste," which could encompass the waste of the extracted resource, other resources used in its extraction (like water), money expended on extraction, and any other profligate use of resources. In situations where the statute is vague but involves an area of technical complexity, a court properly defers to the expertise of the agency. *Chevron*, 467 U.S. at 865 (deferring to EPA's interpretation of "stationary source" in Clean Air Act in part because "the regulatory scheme is technical and complex" and "the decision involves reconciling conflicting policies").

Plaintiffs claim the term "waste" is unambiguous. Yet they are unable to provide an alternative definition based on the text of the statute. Their inability to do so demonstrates that the meaning of the term is not clear from the face of the statute.

The cases Plaintiffs cite to support their step one argument serve only to highlight the ambiguity here. In *Wilderness Society v. Fish and Wildlife Service*, the court held that a project related to commerce was a "commercial enterprise" within the meaning of the Wilderness Act even though the Act did not define that term. 353 F.3d 1051, 1061-62 (2003). The court relied

[1] In addition to oil and gas, the MLA applies to federal leasing of coal, phosphates, oil shale, sodium, sulphur, potash and tar sands deposits. *See* 30 U.S.C. §§ 181, 201-287.

on the dictionary definition of "commercial" and "enterprise," the fact that the proposed commercial fishing enhancement project was "literally a project relating to commerce," and that the statute was designed to "keep commerce out" of wilderness, which it defined as a place "untrammeled by man." *Id.* In *Tovar v. Sessions*, the court concluded that a visa applicant's "age" in Section 1151 of the Immigration and Nationality Act should be calculated in accordance with the formula provided in Section 1153 of the Act. 882 F.3d 895, 900-01 (9th Cir. 2018). In contrast, here there is no simple, clear-cut dictionary definition, as "waste" has a range of general meanings; and, more to the point, meanings specific to various mineral production industries.[2] *See, e.g.*, 8 William & Meyers, *Oil and Gas Law Scope*, W Terms (2019) (noting "[t]he term ['waste'] is too broad and has too many meanings for a one- or two-sentence definition" and explaining that the term encompasses both "physical waste" and "economic waste"). Likewise, the structure and purpose of the MLA do not explain the meaning of waste—there is not a definition of waste anywhere in the statute and the definition is not elucidated by comparison to other provisions of the statute as in *Wilderness Society* and *Tovar*. Nor does the legislative history define "waste," though it does demonstrate Congress's concern for economic waste and operator finances. *See* Defs.' Mot. 13-15. In similar circumstances, courts have routinely found the statute ambiguous and moved on to step two of the *Chevron* analysis. *See, e.g., Exxon Corp. v. Lujan*, 970 F.2d 757, 760-62 (10th Cir. 1992) (holding term "natural gas" in MLA ambiguous where term has a variety of dictionary definitions and definition "within the industry" and legislative history is not definitive); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 773-76 (9th Cir. 2011) (holding "areas under Federal jurisdiction" in Endangered Species Act ("ESA") ambiguous under *Chevron* step one where term is not defined by the statute, "jurisdiction" can have many meanings, and legislative history does not signal Congress's "clear intent" and

[2] Merriam Webster has four definitions of waste, not including sub-definitions. https://www.merriam-webster.com/dictionary/waste. Notably, at least one definition expressly supports BLM's interpretation: "waste" is "the state of being wasted," where "wasted" means "unprofitably used, made, or expended." *Id.*; https://www.merriam-webster.com/dictionary/wasted.

1 thereby preclude agency's interpretation); *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053,
2 1066 (9th Cir. 2018). The Ninth Circuit reached this same conclusion, in the context of the
3 Clean Water Act, when it held that "waste product" in reference to oil and gas related activities is
4 an ambiguous term. *Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 603-04 (9th Cir. 2008).
5 Without statutory text or legislative history to support their position, Plaintiffs turn to
6 broad policy arguments, alleging that "waste" must be viewed through Congress's intent to
7 "protect[] the public from private operators only focused on their profits." CG Br. 5. But reading
8 the term through this lens alone improperly excludes Congress's unambiguous intent to promote
9 oil and gas production by private companies and protect operator investments. *See* Defs.' Mot.
10 12-15. Indeed, despite correctly noting that the Court must read the term "waste" within the
11 greater context of the MLA, *see Valencia v. Lynch*, 811 F.3d 1211, 1214 (9th Cir. 2016),
12 Plaintiffs ignore the vast majority of the statute, which is aimed at leasing public resources to
13 promote mineral production. *See, e.g.*, 30 U.S.C. §§ 181 (all minerals owned by the United
14 States, except those specifically excluded "shall be subject to disposition"); 226(a)-(b)(1)(A)
15 (requiring quarterly lease sales of public lands containing oil or gas deposits); 226(b)(1)(C)
16 (allowing internet based bidding on leases "to diversify and expand the Nation's onshore leasing
17 program . . ."). Congress focused both on protecting public safety and resources from speculators
18 and monopolizing companies *and* encouraging oil and gas development and return on investment
19 would intend to take the cost of conservation into account in defining waste.
20 Congress's use of the term "undue" before "waste" in Section 187 and its requirement
21 that lessees use "reasonable precautions" to prevent waste in Section 225 do not indicate
22 otherwise.[3] Citizen Groups argue that "[i]f a loss of gas is only 'waste' when it is cheaper for a
23 particular operator to capture it than to release it into the air, it is difficult to see when waste
24 might not be 'undue' or when a precaution would not be 'reasonable.'" CG Br. 5. Because this
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[3] Citizen Groups incorrectly claim that the word "waste" is qualified by the term "[un]reasonable" in Section 225 of the MLA. CG Br. 5. Section 225 requires that lessees "use all reasonable precautions to prevent waste." 30 U.S.C. § 225. "Reasonable" therefore qualifies "precautions" and Plaintiffs' attempt to suggest otherwise is inaccurate and misleading.

argument merely attacks BLM's definition rather than helping elucidate Congress's alleged clear intent, it is a step-two argument. *See Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 490 (9th Cir. 2007) (An "unambiguous expression of congressional intent" is necessary to "remove the agency's discretion at *Chevron* step one."). Nonetheless, the argument is readily rebutted, as it reflects Plaintiffs' failure to view the Revision Rule as a whole. Like NTL-4A and the 2016 Rule, the Revision Rule prevents "undue waste" by imposing royalties on avoidable losses. *Compare* 43 C.F.R. § 3179.5 *with* AR 983, 3011; *see also* Defs.' Mot. 16-17 (explaining BLM's longstanding approach of regulating waste by imposing royalties on certain losses). Avoidable losses are those that are unauthorized or result from operator negligence; a failure to take reasonable precautions to prevent or control the loss; and a failure to comply with applicable lease terms, regulations, or other BLM orders. 43 C.F.R. § 3179.4(a)(i)-(iii); *see also* AR 983 (similar provisions in 2016 Rule). Plaintiffs' reading of BLM's approach to the regulation of "undue waste" as purely economic ignores the factors for avoidable loss in § 3179.4. To the extent Plaintiffs are frustrated by the fact that BLM's definition of "waste" accounts for the concept of "undue" and thus cannot be directly plugged into the MLA, they miss the point. BLM's obligation is to administer the MLA, including developing regulations that effectuate Congress's intent while also filling the gaps left by Congress. *See Chevron*, 467 U.S. at 844-45. It is not to develop a glossary for the statute. The Revision Rule fulfills the MLA's mandate of requiring "reasonable precautions" and preventing "undue waste" by imposing royalties not on all lost oil and gas but on lost oil and gas that meets specific criteria (i.e., uneconomic to conserve and unauthorized or the result of negligence, inadequate precautions, etc.).

Plaintiffs' strained effort to claim that "waste" is unambiguous when they themselves cannot identify the meaning of that term within the MLA must be rejected. *See Valencia*, 811 F.3d at 125.

B. BLM's Definition of "Waste" Is Reasonable Under *Chevron* Step Two and Owed Deference.

If, as here, "the statute is silent or ambiguous with respect to the specific issue, the question for the court" under step two of *Chevron* "is whether the agency's answer is based on a

permissible construction of the statute." *Chevron*, 467 U.S. at 843. If it is, the agency's interpretation is owed deference by the Court. *Id.* As explained at length in Defendants' opening brief, BLM's interpretation of "waste" accords with the MLA's purpose and legislative history and with historical practice and is therefore owed deference. Defs.' Mot. 12-18.

Plaintiffs' primary retort is that BLM's definition ignores the public interest. *See* CG Br. 7-8, 12, 17-19. This argument improperly attempts to place Plaintiffs' interpretation of the public interest above that of the agency. BLM is the agency tasked with administering the MLA and it is its interpretation of the statute that is owed deference. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666-67 (2007). The statutory framework, legislative history, and historical practice demonstrate that the agency's interpretation of "waste" is consistent with the MLA's requirement that BLM "safeguard[] . . . the public welfare." 30 U.S.C. § 187.

Plaintiffs argue anachronistically that the MLA's reference to "safeguarding the public welfare" means preventing the waste of oil and gas regardless of the cost of conservation and for the purpose of protecting human health and the environment from air emissions.[4] On the contrary, the MLA's reference to "public welfare" comes amongst various provisions for ensuring miner safety and fair returns on public minerals. 30 U.S.C. § 187. Elsewhere, the MLA uses "public interest" in the context of the subdivision of coal leases so as to encourage "the mining of all coal which can be economically extracted." *Id.* § 201(a)(1). The statute does not support Plaintiffs' attempt to define "public welfare" in a 1920 statute to elevate modern concerns above commercial development of the minerals. In contrast, BLM's interpretation

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[4] Citizen Groups cite *Michigan v. EPA*, 135 S. Ct. 2699 (2015), alleging that "[j]ust as the Supreme Court found EPA's failure to consider cost was impermissible in *Michigan*, . . . this Court should find BLM's failure to consider the public interest is impermissible here." CG Br. 8. *Michigan* dealt with the EPA's interpretation of when regulation of a power plant is "appropriate and necessary" under the Clean Air Act. The Court held that the broad terms "appropriate and necessary" required consideration of compliance costs because "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits." 135 S. Ct. at 2707. Plaintiffs' contention that BLM should ignore compliance costs in imposing waste prevention regulations contradicts this reasoning.

aligns with the statute's goal of encouraging mineral production.

The legislative history[5] provides additional support. The congressional hearings and reports are clear that Congress wanted to protect the investment of prospectors and operators to encourage production. *Exploration for & Disposition of Coal, Oil, Gas, etc.*, H. Rep. No. 64-17, at 5 (Jan. 4, 1916) (listing as "objects of bill" "(1) To free both producer and consumer from monopoly; (2) to insure competition; (3) to prevent speculation and secure in its stead bona fide prospecting; (4) to protect the prospector; (5) to reward the prospector who does the drilling; (6) to insure an adequate supply of fuel oil for the Navy . . . ."). There is no indication that Congress expected the cost of conservation to exceed the value of the resource; in fact, the legislative history refers to expenditure in excess of the value of the resource as "waste." *Mineral Land Leasing Bill, Hrg. Before H. Comm. on Public Lands on S. 2775*, at 67 (Oct. 6-8, 1919) ("[T]hey wasted that $8,000,000 to get about $3,000,000 worth of oil . . . ."). Moreover, the terms "public welfare" and "public interest" are used repeatedly in the legislative history in reference to the public's interest in "secur[ing] competition in the oil business." *Id.* at 42; *see also Leasing of Oil Lands, Hrg. Before S. Comm. on Public Lands on H.R. 406*, at 32 (Feb. & Mar., 1916) ("I think it fair to assume that the public interest is not subserved by monopoly.").

Plaintiffs decry Defendants' citations to the legislative history as "cherry-picked" and "selective" and yet they cite nothing to support their claim that Congress intended to require uneconomical waste prevention and to protect the public from associated health and environmental impacts. In fact, the only piece of legislative history that Plaintiffs cite in their opposition/reply briefs supports BLM's position. That House Report states that "provisions

[5] California and New Mexico mistakenly contend that Defendants' citation to legislative history is an impermissible post hoc rationalization. St. Br. 13 n.6. The States seem to believe that counsel cannot cite to any authorities not already provided by the agency in its rulemaking. Such a rule would transform an agency's rulemaking into a legal brief that must predict every possible argument in future litigation. Explanations of the agency's own reasoning and the identification of additional legal support for that reasoning are not only acceptable, they are necessary since the agency cannot, and has no obligation to, provide every possible applicable citation in its rulemaking. *See Nat'l Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1204 (D.D.C. 1996); *see also Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1165 (9th Cir. 1998).

1 relative to continued development to prevent waste and speculation are inserted in the bill that
2 *will not work too great a hardship on the developer* and that will at the same time practice
3 conservation of this resource." CG Br. 9 n. 9 (quoting H. Rep. No. 64-17 (Jan. 4, 1916)
4 (emphasis added). Congress's concern for the developer's welfare suggests that it would not
5 expect the developer to lose money on waste prevention. Thus, the impermissible interpretation
6 is Plaintiffs' reading of "waste" in the LMPA in a purely modern context divorced from the
7 statute and its legislative history, *see, e.g.*, *id.* at 8 (citing affidavit regarding noise and visual
8 impacts of flaring and referring to "devastating impacts" of mineral development on "nearby
9 residents"), divorced from the statute and its legislative history that is impermissible. *See*
10 *Oregon ex rel. Div. of State Lands v. BLM*, 876 F.2d 1419, 1427 (9th Cir. 1989) (rejecting
11 agency's interpretation of statute as "anachronistic and inconsistent with contemporaneous
12 interpretations"); *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014).
13 Furthermore, BLM's interpretation also comports with longstanding practice. *See* Defs.'
14 Mot. 15-17; *see also* 8 Williams & Meyers, *Oil and Gas Law Scope*, W Terms (2019) (noting
15 that a 1971 treatise on oil and gas defined waste as "a preventable loss the value of which
16 exceeds the cost of avoidance" (quoting McDonald, *Petroleum Conservation in the United*
17 *States: An Economic Analysis* 235 (1971))). California and New Mexico complain that some of
18 the historical sources relied upon by BLM, such as the *Brewster* case, "predate the Mineral
19 Leasing Act by 15 years." St. Br. 5. But that is precisely the point: the fact that these decisions
20 were in existence prior to the MLA makes them relevant to the industry standards Congress was
21 likely to have in mind at the time it enacted the statute.
22 Recognizing that BLM's prior regulation, NTL-4A, demonstrates the agency's
23 longstanding practice of considering the economics of conservation, Plaintiffs attempt to
24 distinguish the Revision Rule from NTL-4A. NTL-4A and the Revision Rule both provide a set
25 of circumstances in which limited venting and flaring is presumptively permitted, 43 C.F.R. §§
26 3179.4(b), 3179.101-104; AR 3012, as well as a provision under which an operator can request
27 permission to vent or flare beyond those pre-approved circumstances, 43 C.F.R. § 3179.201(c);
28 AR 3013. Plaintiffs' arguments focus on the latter provision. *See* CG Br. 11. First, Plaintiffs

1 note that NTL-4A allowed BLM to approve additional venting or flaring if conservation was
2 "not economically justified" *and* "conservation, if required, would lead to the premature
3 abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy
4 than would be recovered if the venting or flaring were permitted to continue." *Compare* AR
5 3013 (NTL-4A § IV.B) *with* 43 C.F.R. § 201(c)(1). But the fact that NTL-4A imposed a second
6 requirement in addition to demonstrating that conservation was uneconomical does not take
7 away from NTL-4A's explicit and longstanding requirement that BLM consider operator
8 economics. Moreover, under the Revision Rule, BLM still must consider the possibility of
9 abandonment when deciding whether to allow additional venting or flaring; the Revision Rule
10 just phrases that requirement differently. 43 C.F.R. § 3179.201(d)(1) (In deciding whether to
11 approve request for additional venting or flaring, BLM must "determine whether the operator can
12 economically operate the lease if it is required to market or use the gas . . . ."). Second, Plaintiffs
13 try to distinguish NTL-4A by claiming that it focused on the economics of an entire lease. CG
14 Br. 11. But the provision they cite from NTL-4A has a nearly identical equivalent in the
15 Revision Rule: when deciding whether to permit additional royalty-free venting or flaring, BLM
16 must "determine whether the operator can economically operate the lease if it is required to
17 market or use the gas, considering the total leasehold production, including both oil and gas, as
18 well as the economics of a field-wide plan." *Compare* 43 C.F.R. § 3179.201(c)-(d) *with* AR
19 3013 (NTL-4A § IV.B). Equally important, Plaintiffs cite nothing in NTL-4A or otherwise to
20 support their allegation that BLM cannot look at economic impacts of individual regulatory
21 requirements on a single well given that the agency has found that operators make decisions on
22 the scale. AR 2, 4-5; *see* CG Br. 10. All of Plaintiffs' attempts to distinguish NTL-4A rely on
23 ignoring large swathes of the Revision Rule and the greater context of both sets of regulations.
24 They also all overlook the bigger picture—for well over 30 years, BLM has consistently
25 considered operator economics in regulating waste.

26 Plaintiffs also point to BLM's definition of waste of oil or gas at 43 C.F.R. § 3160.0-5,
27 which does not include an economic component, to claim that BLM did not historically consider
28 economics in defining waste. The definition in § 3160.0-5, which addresses oil and gas

development generally rather than the surface waste of oil and gas specifically, dates to 1982. 47 Fed. Reg. 47766 (Oct. 27, 1982). It therefore post-dates NTL-4A, which was issued in 1980. NTL-4A, which specifically regulated the venting and flaring of gas indisputably takes the cost of capture into account in determining whether an operator can vent or flare beyond certain preauthorized situations. AR 3013. And the Federal Register notice containing § 3160.0-5 was clear that its regulations were intended to be read in conjunction with NTL-4A. 47 Fed. Reg. at 47764. As the Revision Rule replaces NTL-4A, it makes sense that it would incorporate NTL-4A's economic concerns. Plaintiffs' focus on the definition in § 3160.0-5 does not provide an accurate picture of BLM's historical practice.

Having failed to provide any evidence that BLM's definition of waste is unreasonable based on the traditional tools of statutory interpretation, Plaintiffs resort to a scattershot of additional arguments.[6] California and New Mexico make much of BLM's statement in the 2016 Rule that it found "'no statutory or jurisprudential basis for the commenters' position that the BLM must conduct an inquiry into a lessee's economic circumstances before determining a loss of oil or gas to be 'avoidable.'" St. Br. 4, 9. First, they ignore that BLM found no requirement that it "*must*" consider a lessee's economic circumstances, not that it could not choose to consider them. Second, they fail to quote the following sentence which confirms that it has been BLM's longstanding practice to consider an operator's economic circumstances: "Although the BLM's practice under NTL–4A has generally been to engage in case-by-case economic assessments before making avoidable/unavoidable loss determinations, the BLM has not always

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[6] Plaintiffs attack as an impermissible "post hoc" interpretation Defendants' construction of the MLA's "reasonable diligence, skill, and care" provision in Section 187. CG Br. 11 n.7. But an agency may respond to novel legal arguments with a more thorough explanation. *See Nat'l Oilseed Processors*, 924 F. Supp. at 1204-05. It cannot be seriously disputed that "the exercise of reasonable diligence, skill, and care" on a lease would include "the safety and welfare of the miners" and "the prevention of undue waste." 30 U.S.C. § 187. Moreover, the legislative history cited by California and New Mexico confirms that Congress saw the various provisions in Section 187 as falling within a broad umbrella of "reasonable diligence, skill, and care": "This section also contains provisions," i.e., the laundry list of provisions in Section 187, "to prevent waste *and* to insure the exercise of reasonable diligence, skill, and care in operating the property." St. Br. 5 (quoting H. Rep. No. 65-563, at 26).

done so and is not legally required to do so." AR 939.[7]

Plaintiffs claim that BLM's interpretation of waste is unreasonable because the Revision Rule does not achieve the goals underlying BLM's definition—allegedly, the production of additional resources and royalties. This argument conflates the freestanding definition of waste, which has no operative effect in the Revision Rule, with the operative provisions of the Rule. Whether BLM's interpretation of "waste" is reasonable under *Chevron* in light of the tools of statutory interpretation is a separate question from whether the Revision Rule, as a whole, when implemented in practice, achieve the goals of the MLA and represent a reasonable policy choice.

Furthermore, Plaintiffs' allegations oversimplify the impact of the Rule and ignore the costs of conserving those additional resources. Plaintiffs focus on the 299 Bcf of gas that would have been conserved over a ten year period under the 2016 Rule but which is lost under the Revision Rule. But the 2016 Rule would also have caused operators to defer development of 18.4 million barrels of oil and 22.7 Bcf of natural gas. AR 91. The Revision Rule reverses those results and thus encourages the immediate production of oil and gas that would have otherwise been deferred. That is, BLM has made a choice to facilitate oil production in the present but forgo gas production later. This balancing of production goals comports with the MLA's goal of encouraging development and is well within the discretion conferred by that statute upon BLM. Moreover, Plaintiffs ignore that operators would have lost between $736 million and $1.01 billion if they had conserved the additional gas under the 2016 Rule. AR 3. As explained *supra*, Congress did not expect operators to lose money on conservation.

Similarly, Plaintiffs point to BLM's conclusion that the Revision Rule will increase small operator profits by 0.19% as evidence that its interpretation of waste does not achieve the goals

[7] California and New Mexico also claim there is no basis in the record for Defendants' assertion that the 2016 Rule itself "'recognized that its interpretation of waste was a significant departure from past practice.'" St. Br. 9. But the quoted sentence specifically acknowledges that BLM has historically taken economics into account. *See also* AR 3 ("The concept of 'waste' underlying the 2016 rule constituted a drastic departure from the concept of 'waste' applied by the Department of the Interior over many decades of implementing the MLA."). Defendants inadvertently provided the incorrect AR page number for this statement in their motion.

underlying the MLA. As BLM explained in the Regulatory Impact Analysis ("RIA"), this estimate is likely low. AR 100. But regardless of the precise number, this argument assumes that it is reasonable to require operators to lose money conserving uneconomical oil and gas simply because the loss may not be sufficient to put the company out of business. While Plaintiffs may be happy to impose compliance costs on operators that exceed the value of the resource, BLM is the expert agency directed to administer the MLA and its determination that the MLA does not require operators to lose money on conservation, even if they could absorb those losses (perhaps by shutting in a marginal well, AR 4), is reasonable given Congress's goal of encouraging economical production.

Citizen Groups' reliance on a 1949 Texas case to inform their interpretation of the 1920 MLA demonstrates their struggle to find any law that contradicts BLM's interpretation of waste.[8] A 1949 Texas opinion on the validity of a Texas regulation has no bearing on the MLA. Moreover, the case does not find that operators should be expected to lose money on gas conservation but that they cannot necessarily expect to "profit" from waste prevention. *R.R. Comm'n of Tex. v. Flour Bluff Oil Corp.*, 219 S.W.2d 506, 508 (Tex. App. 1949). Despite Plaintiffs' attempts to conflate the two concepts, they are different. BLM's policy is not a "profit policy," as Plaintiffs allege; it is an economic rationality policy that comports with Congress's goal of promoting oil and gas development. It avoids imposing burdensome requirements that

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[8] The two Supreme Court cases cited by Citizen Groups are inapposite. In both *Henderson Co. v. Thompson*, 300 U.S. 258 (1937), and *Cities Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950), the Court reviewed the constitutionality of allegedly discriminatory state laws under the Commerce, Due Process, and Equal Protection Clauses. The constitutionality of state laws is irrelevant to the reasonableness of BLM's interpretation of the MLA. Moreover, neither case suggests that a company can be expected to spend more money to conserve oil or gas than the resource is worth. Rather, both dealt with situations where the current market undervalued the resource, leading to the "waste" of gas on "inferior" uses. *Henderson*, 300 U.S. at 262-65; *Cities Serv.*, 340 U.S. at 185-86. Thus, the "waste" at issue was not the loss of the resource; it was the use of the resource for a purpose that the state felt was less valuable. Both cases also expressly contemplate an operator profiting on gas captured, *Henderson*, 300 U.S. at 262; *Cities*, 340 U.S. at 185-86, and *Cities* goes so far as to refer to the sale of gas at unreasonably low prices as "economic waste," demonstrating that the broad term "waste" does indeed have an economic component. *Cities Serv.*, 340 U.S. at 186.

would cause an operator to abandon a potential development opportunity.

Plaintiffs also cite to a 1919 Texas statute that defines waste. CG Br. 13. Plaintiffs tellingly refrain from quoting the law, which defines waste as, among other things, the "escape of natural gas in *commercial quantities* into the open air . . . ." 1919 Tex. Gen. L. ch. 155 (emphasis added). Clearly, the Texas legislature did not consider all losses to be "waste" but took into account the commercial viability of the lost gas, in line with BLM's interpretation.

California and New Mexico renew their allegation that BLM's interpretation of waste in the MLA is owed no deference because it was advocated by the Office of Information and Regulatory Affairs ("OIRA"). In fact, the record shows BLM planned to revise the 2016 Rule to prevent the imposition of compliance costs that exceed the value of the resource conserved long before it consulted OIRA. *See, e.g.*, AR 177491-92. But even if the definition of waste included in the Revision Rule was initially drafted by OIRA as part of the consultation process mandated by Executive Order 12,866, 58 Fed. Reg. 51,735 § 2(b), it was adopted by BLM and included in BLM's rulemaking and is therefore owed deference. The D.C. Circuit reached this same conclusion in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, where it held that a Department of Justice regulation that adopted proposed guidelines drafted by another agency was nevertheless owed *Chevron* deference because "the doctrine of deference is based primarily on the agency's statutory role as the sponsor of the regulation, not necessarily on its" role in drafting the text. 117 F.3d 579, 585 (D.C. Cir. 1997), *abrogated on other grounds by Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015). Just as in *Paralyzed Veterans*, here "[o]nce [OIRA's] language was put out by [BLM] as its own regulation, it became, as the statute contemplates, the [BLM's] and only the [BLM's] responsibility." *Id.*; *see also Bortone v. United States*, 110 Fed. Cl. 668, 676 (2013) ("[C]ourts will give deference to an agency's interpretation of regulations drafted by another agency where, as here, the interpreting agency adopts and administers the subject regulations.").[9]

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[9] California and New Mexico also incorrectly assert that BLM's suspension of the 2016 Rule was found to be arbitrary and capricious. St. Br. 7. While the court in that case found a likelihood of success on the merits in its consideration of plaintiffs' preliminary injunction

Plaintiffs' remaining arguments are easily dismissed as they make numerous allegations that are directly rebutted by the record. They claim the Revision Rule "offers no basis for contradicting BLM's 2016 finding that the [2016] Rule represented 'economical, cost-effective, and reasonable measures that operators can take to minimize waste.'" St. Br. 10. BLM specifically addressed this statement in the preamble to the Revision Rule. AR 7. They claim BLM ignored the 2016 Rule's exemptions that would have allegedly avoided shut-ins that abandoned significant recoverable reserves. St. Br. 10. BLM addressed those exemptions in both the final rule and RIA. AR 3-4, 23, 105. They claim BLM "cannot show where in the administrative record it provided the reasoned explanation" for its policy shift. St. Br. 11. BLM explained its reasons for changing its position in the final rule. *See, e.g.*, AR 2-7. And they claim Defendants' statements regarding BLM's discretion under the Federal Land Policy and Management Act ("FLPMA") are improper post hoc rationalizations, St. Br. 10, even though the agency itself explained that FLPMA gives it discretion to "balance potentially degrading uses, such as mineral extraction, with conservation of the natural environment so as to ensure valuable uses of the lands in the future." AR 6.

California and New Mexico also allege that BLM's definition of avoidable loss "is not, and has never been," based entirely on economic because avoidable losses include losses resulting from a "failure to fully comply with the applicable lease terms and regulations." St. Br. 11. The test for avoidable loss has never been purely economic. *See* 43 C.F.R. § 3179.4(a) (listing factors for avoidable loss); AR 3011 (same for NTL-4A). But neither has it ever been totally "independent of any economic test." St. Br. 12. BLM's regulations have consistently considered the ability to economically conserve lost oil or gas as part of the determination of whether a loss is avoidable and thus royalty-bearing. *See* 43 C.F.R. § 3179.3; AR 3013; *Ladd*

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motion, the case was dismissed as moot before the court reached the merits. *California v. BLM*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018). A prior district court's conclusions regarding the likely merit of BLM's earlier postponement and suspension rulemakings is irrelevant; meritorious or not, those rulemakings evidence that BLM was reconsidering its statutory authority for the 2016 Rule long before it consulted with OIRA on the Revision Rule. *See* Defs.' Mot. 12 n.5.

1 *Petroleum Corp.*, 107 IBLA 5, 9 (1989) (holding gas not avoidably lost under NTL-4A if it was
2 not economically recoverable); *Rife Oil Props., Inc.*, 131 IBLA 357, 374 (1994) ("To the extent
3 that BLM read NTL-4A as barring the venting of gas from a producing oil well without regard to
4 whether it was avoidably lost, i.e., whether it was economic to market the gas, we find that BLM
5 misread NTL-4A."); *Maxus Expl.*, 122 IBLA 190, 198-99 (1992) (finding of avoidable loss
6 under NTL-4A requires consideration of economics of conservation). The States cannot separate
7 the law from economics when the law accounts for economics.[10]

8 At step two of *Chevron*, the Court's job is not to "decid[e] between two plausible
9 statutory constructions" but rather to "evaluat[e] an agency's interpretation of a statute under
10 *Chevron*." *Morales-Izquierdo*, 486 F.3d at 492. "[I]f the implementing agency's construction is
11 reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute,
12 even if the agency's reading differs from what the court believes is the best statutory
13 interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980
14 (2005). BLM's interpretation accounts for Congress's concern for operator economics and
15 aligns with historical practice both within the agency and industry, and it fulfills the MLA's
16 mandate that the agency prevent not all waste, but "undue waste." As such, it is owed deference.

17 **C. BLM Has Not "Selectively Applied" Its Interpretation of Waste**.

18 Plaintiffs renew their argument that even if BLM's interpretation of waste is reasonable,
19 the agency has applied it in an arbitrary manner by rescinding the 2016 Rule's low-bleed
20 controller requirements. CG Br. 13-15; St. Br. 15-16. This argument boils down to a claim that
21 once an agency has set forth a policy, it must apply that policy universally regardless of whether
22 other factors militate against application in a particular scenario. But a no-exceptions approach
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[10] Finally, Plaintiffs' claim that the Wyoming court's decision holding the 2016 Rule may exceed BLM's authority under the MLA is irrelevant is wrong. St. Br. 15; *see* AR 2-3. The court questioned the scope of BLM's waste prevention authority under the MLA and whether air pollution benefits could justify the substantial costs imposed by the 2016 Rule on industry in light of that authority. *Wyoming v. U.S. Dep't of Interior*, 2017 WL 161428, at *8-10 (D. Wyo. Jan. 16, 2017). Plaintiffs cannot credibly claim that a federal court's concerns regarding both the scope of BLM's MLA authority and the use of benefits other than the value of the gas to justify expensive compliance requirements provide no support for the Revision Rule.

to regulation is itself arbitrary. While the agency's interpretation of waste suggested that the low-bleed controller requirement be retained because its compliance costs were less than the value of the gas conserved, the agency found additional evidence that supported rescission. Low bleed controllers are already prevalent—they make up 89% of pneumatic controllers in the industry—and will become even more prevalent over the next 10-15 years as older high-bleed controllers are replaced with low-bleed controllers pursuant to both EPA and state regulations and industry's own efforts.[11] AR 12, 43, 63, 88-89. BLM's decision not to regulate is reasonable where the market and existing regulations are already achieving the desired outcome.

To bolster their allegations, Citizen Groups resort to hyperbole claiming that whenever the gas savings of a requirement outweigh its costs, BLM "will" nevertheless avoid imposing the requirement by claiming that the requirement is "unnecessary in light of the behavior of the regulated community." CG Br. 15 (quoting Defs.' Mot. 22). But, other than low-bleed controllers, Plaintiffs provide not a single example of BLM's decision not to impose a requirement whose gas savings outweigh its costs. Instead, Plaintiffs confusingly complain that BLM *kept* several provisions of the 2016 Rule that place time and volume limits on royalty-free venting and flaring, suggesting that these provisions might result in costs greater than their gas savings in tension with BLM's definition of waste. *Id.* Plaintiffs ignore BLM's specific statutory authority — independent of its "waste" prevention authority under the MLA — to assess royalties on flared gas. *See* 30 U.S.C. § 1756; AR 6. Further, time and volume

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[11] Citizen Groups criticize BLM's conclusion that, where operators have continued to use high-bleed controllers, it is because they have "(1) 'have a functional need' for high-bleed controllers or (2) have lower-than-average production or are marginal" rendering replacement cost-prohibitive, AR 88-89, on the ground that some states require low-bleed controllers on all wells "without adverse consequences." CG Br. 15 n.10. Plaintiffs ignore that most of the cited regulations have limited application and/or exceptions for situations when a low-bleed controller is infeasible, thus proving BLM's point that the exceptions to widespread voluntary adoption of low-bleed controllers represent situations in which their use is not feasible. *See, e.g.*, Colo. Air Quality Control Comm'n Reg. 7.XVIII.C.1.c (allowing operators to retain high-bleed controllers for "safety and/or process purposes"); Wyo. Dep't of Envtl. Quality ch. 8 § 6(f) (applies only Upper Green River Basin). Plaintiffs also ignore that the 2016 Rule itself contained exceptions for when a high-bleed controller "is required based on functional needs" or installation of a new controller would impose costs that would force abandonment of the well. AR 986.

restrictions on royalty-free venting and flaring do not require new equipment or specific conduct whose "compliance costs" may be balanced against the gas conserved. Rather, they merely place an end point on venting and flaring; they do not require new equipment or resources. Plaintiffs' unsupported assumptions about the agency's future conduct fail to support a finding that the agency behaved arbitrarily and capriciously. *See Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1022 (N.D. Cal. 2019).

D. BLM Explained Its Change in Position as to "Waste" in the Revision Rule.

Citizen Groups allege that BLM failed to address its "change in position" regarding MLA's mandate to "safeguard the public welfare" and "whether there was a need to curb venting, flaring, and leaks." CG Br. 17-19. These arguments ignore that BLM stated in the Revision Rule that it was changing position largely because the 2016 Rule exceeded its statutory authority.[12] AR 2-3. BLM can regulate only within the limits of its authority, as defined by Congress, regardless of whatever policy goals BLM may wish to accomplish. In addition, BLM explained that it made a policy decision to return to its historic practice of regulating "waste" with an eye towards resource conservation economics. Plaintiffs can dispute the extent of BLM's statutory authority, but they cannot dispute that BLM explained its change of position.

II. The Revision Rule Is a Reasonable Exercise of BLM's Waste Prevention Authority Under the MLA and Reflects Rational and Well-Supported Policy Choices.

A. BLM Has Not "Delegated" or "Abdicated" Its Duty to Prevent Undue Waste.

Plaintiffs' contention that BLM has "abdicated" its duty to prevent waste by deferring to state regulations is really an argument that BLM *must* impose federal regulations to regulate waste, no matter the efficacy of existing state regulations. This is not what the MLA requires. The MLA requires that each lease contain a provision to prevent "undue waste" and be conditioned on the lessee's use of "all reasonable precautions to prevent waste." 30 U.S.C. §§ 187, 225. So long as BLM ensures that each lease and lessee meet these conditions, it is

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[12] Moreover, as explained *supra*, unlike Plaintiffs' interpretation, BLM's definition of waste aligns with the MLA's text, legislative history, and historical practice regarding the "public welfare" as that term was used in 1920. *Supra* 7-8.

fulfilling its statutory duty under the MLA to prevent waste. One way to meet these conditions is to impose federal regulations that govern venting and flaring. Another way is to examine existing state regulations, determine that those regulations already adequately prevent waste, and decide that no additional prescriptive federal regulations are needed. BLM chose the latter approach. It reached this conclusion after analyzing the regulations of the ten states that account for 99% of federal oil production and 98% of federal gas production and concluding that those regulations effectively prevent waste and better account for "regional differences in production, markets, and infrastructure." AR 19-20, 26-29, 340-45.[13] Where state regulations adequately prevent waste, avoiding additional federal regulations "simplifies an operator's obligations." AR 19. BLM did precisely what it is supposed to do under the APA—it considered two different means of achieving the same result, chose the option that it deemed best, and explained its reasons why. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Plaintiffs' allegation that BLM should have chosen another approach is an impermissible attempt to second-guess the expert agency. *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 788, 796 (9th Cir. 2012) (It is not the role of the court to "second –guess" an agency's policy judgments" and "the belief that another approach might have been wiser is not a valid basis for jettisoning an agency action as arbitrary and capricious.").

Plaintiffs' specific allegations, supported primarily by hyperbolic rhetoric, are also incorrect. The Revision Rule and RIA's analysis of existing state regulations belie any claim that BLM acted "blindly." AR 19-20, 26-19. The allegation that BLM has "abdicated" its responsibility to prevent waste likewise ignores the efficacy of state regulations and wrongly suggest that the Revision Rules does nothing to prevent waste.[14] The Revision Rule imposes

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[13] Plaintiffs continue to mention the length of BLM's analysis of state regulations, as though the number of pages is a proxy for substance. CG Br. 15. It is not. Plaintiffs' page count ignores the additional pages in the RIA and the Revision Rule discussing this issue. AR 19-20, 26-29.

[14] Citizen Groups cite *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n* to support their "abdication" argument but omit that that case dealt with an agency's obligations under NEPA, which are not at issue in Plaintiffs' "delegation" arguments. 449 F.2d 1109, 1122-23 (D.C. Cir. 1971). Because the court's decision was based on the purpose of NEPA, it is irrelevant to Plaintiffs' non-NEPA arguments. *See id.* at 1123. Moreover, here BLM carefully

1 federal regulations that apply regardless of overlapping state regulations that prohibit venting in
2 most circumstances, 43 C.F.R. § 3179.6; impose time and volume restrictions on venting and
3 flaring during key steps of oil and gas production, *id.* §§ 3179.101-104; impose royalties on
4 avoidably lost gas, *id.* § 3179.4; require measuring and reporting of vented and flared gas, *id.* §
5 3179.301; and require BLM authorization for any other venting and flaring where state
6 regulations do not apply, *id.* § 3179.201. BLM defers to state regulations only as to the venting
7 and flaring of oil-well gas not already regulated by the rest of the Rule. *Id.* § 3179.201(a).

8 Plaintiffs claim that the deference provision allows states to "define what constitutes
9 waste" and fails to explain whether state regulations adequately address "waste" as BLM has
10 defined that term. CG Mot. 16-17. This is false. BLM explained that while "many of the State
11 regulations [BLM] analyzed are not as stringent as the capture percentage requirements of the
12 2016 rule," "after reviewing the State regulations for the 10 states producing approximately 99
13 percent of Federal oil and gas, the BLM believes that these regulations require operators to take
14 reasonable precautions to prevent undue waste" as required by the MLA.[15] AR 19-20; *see also*
15 AR 61-63. Thus, BLM reasonably determined state regulations met the MLA's requirements
16 and thereby rendered additional federal regulation unnecessary.[16] AR 20.

17 Plaintiffs next claim that NTL-4A's standard—that no royalties are owed on gas vented
18 or flared pursuant to the rules, regulations, or orders of the appropriate state regulatory agency
19 when said rules, regulations, or orders have been ratified or accepted by BLM—is substantively
20 different from the Revision Rule. CG Br. 17. BLM engaged in the same review, and acceptance
21 of state regulations envisioned by NTL-4A; it did it upfront rather than on a case-by-case basis.
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23 reviewed state regulations and determined that they met the agency's own obligations under the
24 MLA. *Cf. id.*

[15] This statement contradicts California and New Mexico's allegations of post hoc rationalization
25 claiming that "[n]owhere in the record does BLM make a determination that 'the regulations for
26 the ten states that produce 99% of federal oil and gas prevent 'waste' as BLM now defines it.'"
St. Br. 27 (quoting Defs.' Mot. 25).

27 [16] That is not to say that state regulations cannot be stricter than the MLA: stricter state
28 requirements have no impact on the fact that the existence of the state regulations make
additional regulation by BLM unnecessary under the MLA.

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See AR 19-20, 26-29, 340-45. Plaintiffs make the same mistake when they claim that the 2016 Rule set "a federal floor" requiring state regulations to meet federal standards for waste prevention. CG Br. 17. The Revision Rule does the same thing; the difference is the timing of the determination of the sufficiency of state regulations. Plaintiffs' contention that an upfront review of state regulations is somehow less valid than a case-by-case approach is unsupported, mistakes form for substance, and improperly second guesses the expert agency. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 969 F. Supp. 2d 1211, 1214 (E.D. Cal. 2013) ("Courts should defer to the agency on matters within the agency's expertise unless the agency completely failed to address a factor that was essential to making an informed decision.").[17]

Although Plaintiffs may be dissatisfied with the agency's decision not to impose duplicative federal regulations, it is not evidence of an APA violation. *See Nat'l Med. Enterprises, Inc. v. Sullivan*, 957 F.2d 664, 669 (9th Cir. 1992).[18]

B. BLM Adequately Explained Its Change in Position on Marginal Wells and EPA's Regulations.[19]

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[17] Plaintiffs complain that there is "no mechanism" in the Revision Rule for BLM to reconsider whether state regulations are sufficient. CG Br. 17. The mechanism is BLM's rulemaking authority, by which it can amend, revise, or rescind the Revision Rule at any time. AR 20.

[18] Plaintiffs' kitchen-sink approach to briefing means that they have included many one-sentence allegations with little explanation and no support. For example, at the end of their section arguing that the Revision Rule is not duplicative of federal and state regulations, California and New Mexico allege in a single sentence that "nowhere does BLM explain how the [Revision Rule] will fulfill its statutory trust responsibilities with respect to the development of Indian oil and gas interests." St. Br. 27-28. In fact, 43 C.F.R. § 3179.201(b) states that "[w]ith respect to production from Indian leases, vented or flared oil-well gas will be treated as royalty free pursuant to paragraph (a) of this section only to the extent it is consistent with the BLM's trust responsibility." AR 30. And under § 3179.401, a tribe "may seek approval from the BLM" to have its own rules or regulations apply to lands and minerals within its jurisdiction, including rules that are more stringent than the Revision Rule. AR 31.

[19] Plaintiffs largely abandon their argument that BLM ignored various GAO reports in their reply briefs. Citizen Groups state only that BLM "fails to acknowledge that the GAO expressly found that the Rescission would 'adversely affect . . . efforts to implement [its] recommendations.'" CG Br. 19 (quoting ECF No. 110-4 at 112). In fact, the GAO said that "recent regulatory actions addressing methane emissions and oil and gas measurement . . . *may* adversely affect the agency's past efforts to implement our recommendations." ECF No. 110-4 at 112 (emphasis added). The GAO concluded that it is "uncertain whether these revisions will be consistent with

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1. BLM's Concerns About the 2016 Rule's Impacts on Marginal Wells Are Reasonable and Supported by Data and Analysis.

Plaintiffs' renewed attacks on BLM's analysis of the impacts of the 2016 Rule on marginal wells rely on misrepresentation and distortion. First, Plaintiffs misrepresent Defendants' brief by alleging that it "concede[s] that the data in the [Revision Rule] represent the 'upper limit of the 2016 Rule's potential impact' on marginal wells." CG Br. 24 (quoting Defs.' Mot. 28). That statement was made in the context of explaining how BLM accounted for the costs of plunger lifts in its marginal well analysis. As BLM explained in the 2018 RIA, the 2016 RIA "assumed that the 2016 rule's requirements would compel operators to install a plunger lift on a well that would otherwise conduct liquids unloading by venting to the atmosphere." AR 70. The 2016 Rule itself acknowledged that this assumption "likely overstated" the costs of the 2016 Rule "since the liquids unloading requirements of the 2016 rule did not actually require the installation of a plunger lift" and because "it is possible that operators have already installed lift systems on wells where the installations are feasible and that installations would not be made at the remaining wells." *Id.* Nevertheless, in the 2018 RIA for the Revision Rule, BLM "decided to maintain that assumption, for consistency" with the 2016 RIA, "and report the impacts accordingly in Section 4." *Id.* Accordingly, the marginal well analysis in section 4 of the RIA assumed, consistent with the 2016 RIA, that marginal gas wells will have to install plunger lifts. *See* AR 70, 103. BLM did not assume that marginal oil wells would require plunger lifts. *See* AR 180479 (see comment on cell D4 in marginal oil tab including as costs only pneumatic pumps, pneumatic controllers, and LDAR). The RIA specifies that liquids unloading — the procedure necessitating plunger lift installation or its equivalent — is a gas-specific concern. AR 52. Notably, BLM also estimated the impacts of the Revision Rule "with an alternate baseline, where the 2016 rule would not have compelled the installation of plunger lifts." AR 70; *see also* AR 136 (table of costs without plunger lift assumption).

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our prior work and provide reasonable assurance that the federal government is receiving the royalties it is due." *Id.* at 112-113. Plaintiffs' partial quotation misleadingly suggests a definitive GAO finding regarding the Revision Rule when there is none.

Plaintiffs' allegations that BLM "artificially inflated" the impact of the 2016 Rule on marginal wells are attacks on BLM's reasonable decision to maintain an assumption made by the 2016 RIA for consistency—an assumption that BLM fully disclosed and used not only in its marginal well analysis but also in its analysis of all impacts of the 2016 Rule. Plaintiffs' attacks are particularly hollow given that they themselves have relied on the 2016 RIA's estimates of the costs and benefits of the 2016 Rule in their briefing, with no acknowledgement that those numbers rely on a plunger lift assumption and may be over- or understated.[20] *See, e.g.*, St. Br. 8 n.4 (citing 2016 RIA's royalty estimates); CG Mot., ECF No. 109 at 21, 39 (same). Where the expert agency has disclosed its methodology and reasonable assumptions, it has not violated the APA. *Lands Council v. McNair*, 537 F.3d 981, 998 (9th Cir. 2008); *Ctr. for Biological Diversity v. BLM*, 833 F.3d 1136, 1148 (9th Cir. 2016) (even if BLM's analysis "could be improved" that is "not sufficient grounds for rejecting the analysis of agency experts").

Second, Plaintiffs continue to claim that BLM improperly compared total compliance costs over a ten-year period with one year of revenue. CG Br. 25-26. As explained in Defendants' motion, this is not true. Defs.' Mot. 29. In the RIA, BLM compared marginal wells' per-well annual revenue to "total costs imposed by select requirements in the 2016 Rule" and to "annualized costs imposed by select requirements in the 2016 Rule" over a 1-year period. AR 103-05. BLM took this approach because operators—who were required to come into compliance with the 2016 Rule within one year of its issuance, AR 909—had to make immediate upfront capital expenditures to comply with many requirements of the 2016 Rule but could choose to spread some costs over time by delaying implementation or financing the costs over time. *See* AR 1071. Thus, both of BLM's calculations reflect annual compliance costs—they just reflect the difference in whether an operator pays for those costs upfront in year one or

[20] In addition to the plunger lift assumption, the 2018 RIA identified other assumptions made by the 2016 RIA that would affect the costs and benefits of that Rule. *See* AR 37, 93 (2016 RIA's assumptions may have overstated royalties); AR 71-73 (explaining how BLM addressed 2016 RIA's LDAR assumptions in Revision Rule).

spreads them out over a ten year period.[21]

Rather than acknowledging that point, Plaintiffs make a series of arguments that are directly rebutted by the record. Plaintiffs allege BLM "buried" the annualized costs, but in fact it directly addressed them in the RIA. AR 103-05. Plaintiffs allege that BLM claims that annualized costs are "significant for operators" for the first time in its brief when in fact BLM stated in the RIA, "These values [per-well revenue reductions] are reduced when using annualized costs, however, the reductions in revenue are still substantial." AR 103. Plaintiffs claim that WEA's allegation that plunger lifts account for only 3% of the 2016 Rule's *overall* costs undermines BLM's findings of harm to marginal wells, CG Br. 25 n.15, but ignore that BLM was examining the *per-well* costs in its marginal gas well analysis and found that the 2016 Rule would cause significant revenue drops. AR 70, 112, 180479. And Plaintiffs claim that BLM is wrong to focus on per-well impacts in its analysis when they themselves acknowledge that operators, including large companies, make decisions about whether to shut-in an individual well based on the costs and expected revenue of that individual well. *See* CG Br. 21-22 ("Over time, oil and gas wells experience production declines and become 'marginal' and, depending on the price of oil and gas and the costs of operating the well, operators will eventually make a decision to 'shut in' the wells until market conditions improve."). "[A]n agency's predictive judgments about the likely economic effects of a rule are entitled to deference" so long as "such judgments [are] based on some logic and evidence, not sheer speculation." *California v. Azar*, 385 F. Supp. 3d 960, 1005 (N.D. Cal. 2019) (quoting *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014). BLM's discussion of marginal wells met that standard here.

Third, Plaintiffs attack BLM's decision not to rely on the 2016 Rule's exemptions from requirements that could cause a marginal well to shut-in. CG Br. 26. BLM explained that it found the exemptions insufficient to protect marginal wells because there was no full exemption from LDAR requirements and "it was not clear what would constitute significant recoverable

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[21] The RIA acknowledged the possibility of up-front capital expenditures for the 2016 Rule. AR 1071.

1 reserves for purposes of determining whether an operator would qualify for an exemption or an
2 alternative LDAR program." AR 4. Plaintiffs claim that the "significant recoverable reserves"
3 standard in the 2016 Rule was the same standard used in NTL-4A and thus would not be difficult
4 to apply. CG Br. 26 n.16. This is false. The NTL-4A standard to which Plaintiffs refer required
5 that an operator demonstrate that compliance would lead to "premature abandonment of
6 recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be
7 recovered if venting and flaring were permitted to continue." AR 3013 (NTL-4A § IV.B). The
8 term "significant recoverable reserves" is substantially more ambiguous as it is not clear what
9 counts as "significant" and there is no follow-up requirement regarding the total loss of energy
10 necessary for an exemption. *See, e.g.*, AR 1456, 1582 (comments on 2016 Rule asserting
11 "significant recoverable reserves" is "unclear"). Plaintiffs also note that the 2016 Rule allowed
12 operators to request an alternative LDAR program if the required program "would impose such
13 costs as to cause the operator to cease production and abandon significant recoverable oil or gas
14 reserves under the lease." AR 989. However, an alternative program that has to be "as effective
15 as possible," *id.*, may reduce but will certainly not eliminate LDAR compliance costs for
16 marginal wells. BLM examined a range of possible LDAR programs in the RIA and found none
17 were cost-effective. AR 73. Even putting aside compliance costs, BLM determined that the
18 LDAR exemption process in the 2016 Rule would cost BLM over $1 million and over 20,000
19 hours of BLM time per year. AR 122.

20 Fourth, Plaintiffs argue that even if the 2016 Rule burdened marginal wells, that does not
21 justify BLM's rescission and revision of the 2016 Rule as to non-marginal wells. CG Br. 27.
22 This argument ignores that BLM's concerns about marginal wells are only one of the reasons for
23 the Revision Rule.[22] BLM also determined that the 2016 Rule exceeded the agency's authority
24 under the MLA, its costs outweighed its benefits, it imposed burdensome administrative
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[22] Plaintiffs' argue that BLM justified its cost-benefit analysis by looking to the definition of waste. CG Br. 26 n.17. Their argument appears to be moored to the semantics of Defendants' brief, not to the Revision Rule or RIA. *See, e.g.,* AR 2-4 (listing waste prevention authority and cost-benefit analysis as two independent reasons for Revision Rule).

1 requirements, and it overlapped with state and EPA regulations. AR 2-5. As marginal wells
2 make up the majority of wells (73%) on BLM-administered leases, AR 2, BLM reasonably
3 decided to consider the 2016 Rule's impacts on marginal wells. Rather, Plaintiffs' suggestion
4 that BLM craft its rulemaking around that 27% minority of non-marginal wells is unreasonable.

5 Concerns about marginal wells are not new, as demonstrated by the 2016 Rule's
6 numerous exemptions and exceptions for wells that could not absorb additional compliance
7 costs. *See* AR 984-89 (former 43 C.F.R. §§ 3179.8(a) (capture), 3179.102(c) (well completion),
8 3179.201(b)(4) (pneumatic controller), 3179.202(f) (pneumatic diaphragm pump),3179.203(c)(3)
9 (storage vessel), 3179.303(c) (LDAR)). BLM's decision in the Revision Rule to scrap a
10 burdensome exemption process when the majority of wells on public lands are marginal and
11 likely to incur substantial drops in revenue under the 2016 Rule was reasonable.

12 **2. BLM Reasonably Explained Its Change in Position as to EPA's**
13 **Regulations**.

14 California and New Mexico once again resort to allegations of post hoc rationalization to
15 attack BLM's change in position on EPA regulations. St. Br. 26-27. BLM stated in the Revision
16 Rule that it changed its position on the 2016 Rule's overlap with EPA regulations both because
17 (1) that regulatory overlap was "unnecessary . . . in light of EPA's Clean Air Act authority and
18 its analogous regulations that similarly reduce losses of gas," and (2) the 2016 Rule exceeded
19 BLM's statutory authority and arguably impinged on the authority of EPA, "the agency with the
20 experience, expertise, and clear statutory authority" to regulate air emissions. AR 8. While
21 Plaintiffs are correct that EPA regulations apply only to "new, reconstructed, and modified
22 sources," as BLM explained, "over time, as existing well sites are modified or reconstructed and
23 new well sites come online, the EPA's regulations at 40 CFR part 60, subparts OOOO and
24 OOOOa, will displace the BLM's regulations, eventually rendering certain emissions-targeting
25 provisions of the 2016 rule entirely duplicative." *Id.* BLM provided specific examples to
26 support its conclusion: "[A]ssuming a pneumatic controller equipment life of 15 years, we would
27 expect the EPA's subpart OOOO regulations to entirely duplicate the 2016 rule in 8 years (or by
28 2026) since those requirements have been in effect for 7 years." *Id.* And "[w]ith respect to

LDAR, an existing well would fall under EPA's subpart OOOOa regulations if any of the existing wells on the wellsite are modified or reconstructed, or if a new well is added to the wellsite." *Id.* Plaintiffs' conclusory allegation that this overlap is "greatly exaggerated" and that EPA standards "exclude the vast majority of U.S. oil and gas operations" is unsupported by the record, including the specific pages they cite, and does nothing to undermine BLM's logical and fact-based explanation. *See* St. Br. 27 (citing AR 60-61).

EPA's more recent proposed rule to amend its OOOOa regulations is inapposite as it was issued *after* BLM published the final Revision Rule. *See* Defs.' Mot. 34 n.12, 55; *infra* 43; *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (APA review is based on "the administrative record at the time the agency made its decision." (quotation omitted)). It is also narrowly-tailored and has no effect on EPA's OOOO regulations which apply to many of the same sources regulated by the 2016 Rule, including storage vessels, fracked gas well completions, and continuous bleed pneumatic controllers. *See* Defs.' Mot. 56; AR 5.

C. BLM Reasonably Determined Based on Available Data and Accepted Methodologies that the Costs of the 2016 Rule Outweighed Its Benefits.

Plaintiffs' challenge to BLM's cost-benefit analysis for the Revision Rule boils down to a disagreement over methodology. But Plaintiffs' hyperbole cannot overshadow that BLM is entitled to deference as the expert agency in decisions about methodology. *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993) (In an economic analysis, the court must "defer to agency expertise on questions of methodology unless the agency has completely failed to address some factor."). BLM used a domestic metric for the social cost of methane ("SCM")—not a global one as Plaintiffs say it must—to calculate the cost of methane emissions as part of its evaluation of the costs and benefits of the Revision Rule.[23] BLM reasonably

[23] California and New Mexico implausibly argue that BLM is not expert in economic matters based on its limited authority under MLA to limit waste. St. Br. 24. As explained *supra*, Congress expected BLM to take economics into account under the MLA. But regardless, a statutory limitation on an agency's authority does not mean the agency lacks technical expertise in a given subject matter. BLM regularly engages in rulemaking calling for economic expertise,

rejected a global metric, thoroughly explaining the basis for this decision in the RIA.[24] AR 74-6, 128-34. BLM's use of the domestic SCM is owed deference and should be upheld.

1. BLM Reasonably Utilized a Domestic Methodology.

Plaintiffs' argument against BLM's reliance on domestic metric is a disagreement with BLM's departure from the global metric employed in the 2016 Rule. There are at least four problems with this argument.

First, the foundation for the 2016 Rule's SCM estimates is no longer effective. For the 2016 Rule, BLM relied on the technical support documents produced by Interagency Working Group ("IWG"). AR 475-77 & n.35. In 2017, those technical support documents were withdrawn. AR 7, 74. BLM reasonably elected not to rely on these withdrawn materials. *California v. BLM*, 286 F. Supp. 3d 1054, 1069-70 (N.D. Cal. 2018). While it is true that the IWG estimates were peer-reviewed and subject to public comment, that does not outweigh the fact that they were withdrawn.

Second, under Executive Order 13783, agencies must harmonize their cost-benefit analyses of rulemakings with OMB Circular A-4, AR 1874, which states that an agency's analysis should "focus on benefits and costs that accrue to citizens and residents of the United States" and should report costs and benefits to the United States separately from those that accrue globally. AR 7598; *see California*, 286 F. Supp. 3d at 1069 (finding OMB Circular A-4 does not require consideration of global impacts). Estimates of the global SCM reflect only global impacts as a whole; they do not indicate the specific impact on the United States. *See generally* AR 8945-52. Plaintiffs do not dispute this key point.

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as demonstrated by the RIAs for the 2016 Rule and Revision Rule. It has on its staff expert economists.

[24] California and New Mexico contend that BLM's use of a domestic metric was a "policy choice." St. Br. 20. This makes plain that California and New Mexico do not understand how Integrated Assessment Models ("IAM") work. The Interagency Working Group uses IAMs to "estimate the economic consequences of CO_2 emissions." AR 22720. IAMs incorporate multiple models across disciplines that consider demographic, economic, and political inputs. *Id.* In other words, the choice of metric is both a policy question and a technical one.

1 Citizen Groups nonetheless press that the global metric is consistent with OMB direction
2 because it captures effects on United States' citizens living abroad and multinational
3 corporations as well as geopolitical concerns. CG Br. 30-31. Even if Plaintiffs offered some
4 proof that the OMB guidance extended to foreign nationals and multinational corporations or
5 was meant to embrace geopolitics—which they do not—they fail to establish that a potential
6 impact on some U.S. citizens living outside of the United States or multinational corporations
7 warrants a purely global analysis.
8 Moreover, while California and New Mexico emphasize that OMB Circular A-4 also
9 directs agencies to report effects "beyond the borders of the United States" separately, AR 7598,
10 they point to no credible error in BLM's inclusion of the updated global values from the 2016
11 Rule in the 2018 RIA and its comparison of that estimate with the domestic only estimate in the
12 Revision Rule. AR 137.[25] And as the National Academies of Sciences' ("NAS") report and the
13 IWG both acknowledge, "[u]nder current OMB guidance contained in Circular A-4, analysis of
14 economically significant proposed and final regulations from the domestic perspective is
15 required, *while analysis from the international perspective is optional.*" AR 22770 (emphasis
16 added). BLM's decision to estimate domestic impacts, as required by Circular A-4, was
17 therefore neither arbitrary nor capricious.
18 Third, Citizen Groups' argument that the BLM's use of a domestic metric is inconsistent
19 with the NAS's recommendations is without merit. CG Br. 22. As an initial matter, there is no
20 inconsistency between the NAS report and the RIA for the 2018 Rule. The RIA explicitly relies
21 on NAS models, referring the reader to the NAS report for a "more detailed discussion of each
22 model and the harmonized input assumptions." AR 131, 134. Further, Plaintiffs' challenge to the
23 domestic metric is wholly theoretical. Beyond disputing BLM's use of a domestic metric,
24 Plaintiffs do not point to any specific flaws in BLM's analysis of the SCM. Citizen Groups
25 instead quote *their own brief* in arguing that the NAS report concluded that a domestic only
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27 [25] California and New Mexico incorrectly suggest that BLM simply "restated" the 2016
28 estimates. St. Br. 21. BLM updated the 2016 estimates and then *compared* them to the 2018
estimates. AR 137.

metric is not possible.[26] Plaintiffs want the Court to find *as a general matter* that BLM can never rely on a domestic metric because of the NAS report. But the NAS report's conclusions are nuanced. The NAS report noted that that the IWG had provided a provisional domestic metric but that a domestic SCM is complicated "as an empirical matter" because of the lack of country-specific data. AR 22771. The NAS report concluded "[e]stimation of the net damages per ton of CO2 emissions to the United States alone, beyond the approximations done by the IWG, is feasible in principle" but that "existing modeling methodologies were a limiting factor."[27] AR 22771-2. The report therefore discussed limitations, not impossibility.

Fourth, Plaintiffs' arguments suggesting that the agency's selected metric must be "peer-reviewed" or in a "formal publication" are transparent efforts to impose new requirements on an agency's technical findings. CG. Br. 28-30; St. Br. 22; *see Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.,* 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination. . . a reviewing court must generally be at its most deferential."). Plaintiffs offer no support for their claim that agencies may only rely on "peer reviewed" methodology in a regulatory impact analysis, and the Ninth Circuit has rejected this contention. *Lands Council v. Martin*, 529 F.3d 1219, 1226 (9th Cir. 2008) ("We find no legal requirement that a methodology be "peer-reviewed or published in a credible source."). And while the Citizen Groups call the domestic estimate "speculative" and "slapdash," the basic architecture is the same for the 2016

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[26] Plaintiffs' complaint that the federal government has yet to produce a final domestic SCM is a red herring. CG Br. 30 n.19. The interim domestic measure BLM applied in its assessment of costs and benefits is part of this record and before this Court; a future prospective analysis is not. *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.,* 100 F.3d 1443, 1450 (9th Cir. 1996).

[27] Citizen Groups take a quote from the NAS report out of context in an effort to shore up their argument that the NAS report only supports a global metric. Specifically, the report notes that the IWG determined that it could estimate domestic effects by adjusting the global estimate by 7% to 23%. AR 22771. The IWG described this particular estimate as "approximate, provisional, and highly speculative" and noted that climate damages should consider trans-boundary effects. AR 22771-72. However, the NAS report states that "there are reasons to consider a global" SCM and "what constitutes domestic impact in the case of a global pollutant." AR 22772. And while Plaintiffs claim that specialists are not expressing differing views on this issue, the NAS report explains that "some commentators have asserted that domestic damage estimates have received inadequate attention." AR 22771.

1 and 2018 estimates: BLM calculated the domestic SCM based on the same peer-reviewed IAMs
2 that the IWG's estimates employed.[28] *Compare* AR 128-134 *with* AR 7564-7583. Further,
3 Plaintiffs conflate uncertainty with speculation. Both the 2016 and 2018 assessments of the
4 SCM involved judgment calls by the expert agency concerning data that involved uncertainty.[29]
5 AR 130-131, 1101. BLM's judgment call on which metric to employ is entitled to deference.

6 **2. BLM's Cost-Benefit Analysis Is Well-Supported.**

7 Plaintiffs challenge BLM's cost-benefit analysis by arguing that BLM must show
8 "significant" impacts on operators' "bottom lines," and the market more generally, before
9 rescinding the 2016 Rule. CG Br. 20-21. Plaintiffs offer no precedent for this heightened
10 standard for assessing an agency's cost-benefit analysis. They also ignore what BLM actually
11 found. BLM concluded that the 2016 Rule would unduly burden operators, particularly
12 operators of marginal and low producing wells, by imposing a net loss of $736 million and $1.09
13 billion over a ten year period. AR 3. The Revision Rule, on the other hand, would generate cost
14 savings of about $72,000 per regulated entity annually. AR 41. These savings would provide
15 relief to small operators, which represent the overwhelming majority of operators of Federal and
16 Indian leases. Plaintiffs' challenge to BLM's cost-benefit analysis therefore fails at the outset.

17 First, Citizen Groups challenge BLM's conclusion that the 2016 Rule would add
18 "*regulatory burdens* that unnecessarily encumber energy production, constrain economic growth,
19 and prevent job creation," AR 41, on the ground that the Revision Rule will reduce natural gas
20 production by 299 billion cubic feet. AR 22, 91. But this ignores the question BLM was
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23 [28] Plaintiffs also fault BLM for relying on IWG's estimate for inputs and modeling while at the same time not utilizing the global SCM because of the withdrawal of the IWG report. CG Br. 31; St. Br. 22. But Plaintiffs ignore why BLM relied on the IWG modeling in the first place: to provide "discrete alternative scenarios" where the IWG numbers provided the best federal estimates of "social costs." AR 130. There is no inconsistency in rejecting the IWG's global metric as conflicting with OMB Circular A-4 while employing certain IWG inputs and modeling for estimates to support certain "discrete alternative scenarios." *Id.*
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27 [29] California and New Mexico suggest that BLM admitted the domestic model was unreliable. St. Br. 22. BLM made no such admission but rather acknowledged the presence of uncertainty for both the 2016 and 2018 assessments.
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answering: did the 2016 Rule add unwarranted regulatory burdens that unnecessarily encumbered growth, not whether the 2016 Rule or the Revision Rule will have a net positive effect on natural gas output. BLM concluded that the 2016 Rule would unnecessarily add regulatory burdens additional administrative costs and be duplicative federal and state requirements, likely resulting in the shut-in of marginal wells. AR 1-7, 41, 102-06, 116, 120-27. BLM also found that the additional 299 Bcf of gas produced under the 2016 Rule would be offset by the deferral of 18.4 million barrels of crude oil and 22.7 Bcf of natural gas. AR 91. The Rule will thus lead to more near-term crude oil production. *See supra* 11. Plaintiffs are wrong when they suggest that the Revision Rule will negatively impact energy production.

Second, Plaintiffs place undue emphasis on BLM's Regulatory Flexibility Act ("RFA") analysis in an effort to show that the 2016 Rule will not have a significant impact on small operators' profits or employment decisions. CG Br. 20-21. But Plaintiffs compare apples and oranges. As an initial matter, "[t]he analyses required by the RFA are essentially procedural hurdles" to imposing regulations that may burden small businesses. *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003). But here, there is no burden on small businesses: the Revision Rule deregulates venting and flaring and therefore no analysis under the RFA was necessary. It was against this backdrop that the agency concluded that the final rule will not have a "significant economic impact on a substantial number of small entities," as that phrase is used in 5 U.S.C. § 605. AR 116. BLM thus assessed whether the Revision Rule imposed economic burdens on small businesses that required a regulatory flexibility analysis, not whether the Rule lifted regulatory burdens that promoted growth. *Id.*[30] Plaintiffs' attempt to draw broad conclusions about the Rule's impact on regulatory burdens and energy production by looking at the Rule's relative impact on profit margins is a clear misstep. AR 41. Further, the RFA

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[30] BLM found that the 2016 Rule did not require an RFA analysis. BLM concluded in 2018 that it had underestimated the costs of the 2016 Rule as borne out by discussions with those who were charged with implementing the Rule. BLM concluded: "After further consultation with BLM state and field offices, the BLM made the determination that the previous estimates of administrative burdens presented in the RIA in the 2016 rule were underestimated." AR 73.

assesses the impacts on profit margins of "small entities" as defined by the Small Business Administration— i.e., businesses with under 1,000 employees and tax receipts less than $38.5 million. AR 23. A significant number of businesses in the oil and gas sector have less than 20 employees. AR 65. Thus, BLM's analysis for the RFA provides little insight into the impact of either the 2016 Rule or Revision Rule on operators falling well below the 1,000-employee threshold. AR 115.

Third, Plaintiffs find fault with BLM's consideration of the costs resulting from the shut-in of marginal wells, reasoning that well shut-in is an inevitable part of the lifecycle of the well. CG Br. 21-22. But this misses the point. BLM was concerned with the *premature* shut-in of wells due to unnecessary regulatory burdens. AR 2, 5, 22. A regulation does not promote energy production or job growth—and is thus not consistent with the Executive Order—if it precipitates the closure of a well before the end of its useful life. Plaintiffs gloss over the potential for premature well closure altogether and instead argue that BLM has not shown how the 2016 Rule would "burden any operator."[31] CG Br. 22. Plaintiffs ignore the record. BLM found that the compliance costs associated with the 2016 Rule represented 24 percent of the revenues of the *highest-producing* marginal oil well and 86 percent of the revenues of the *highest-producing* marginal gas wells. AR 4. BLM thus reasonably concluded that "full compliance with the 2016 rule could have jeopardized the economic operations of many marginal wells" and that exceptions to the 2016 Rule would be unduly costly and time consuming on the operators and the agency itself given the prevalence of marginal wells. *Id.*

[31] Relying on a document their own consultant produced, Plaintiffs focus on the number of wells and revenue of operators in 2012 to depict them as large companies with sizable profits. CG Br. 21-22. BLM could not replicate the data in this report and thus concluded that it could not rely on it. AR 113-14. But, as discussed above, most operators have under twenty employees, rendering the picture more complex than depicted by Plaintiffs. AR 65. Nor does the fact that operators report a certain level of revenue for each well mean that these wells are profitable. The revenue each well generates gives an incomplete picture of whether an operator may shut it down should regulatory burdens become too onerous. Again, Plaintiffs cite data shorn of its context in an effort to buttress their arguments.

Fourth, California and New Mexico's arguments that Executive Order 13783 provides no basis for the Revision Rule merely parrot their arguments in other sections of their briefs as to the invalidity of the Revision Rule while ignoring the Executive Order's focus on *prudent* development of the nation's resources.[32] AR 1871. The Order is explicit that it is in the national interest to "promote clean and safe development while at the same time avoiding regulatory burdens" and that the "prudent development" of the Nation's energy resources "is essential to ensuring the Nation's geopolitical security." *Id.* There is no dispute that the Revision Rule is a deregulatory measure. Plaintiffs instead attack the Rule's efficacy at promoting economic growth and the extent of BLM's analysis. St. Br. 17-18. Plaintiffs' arguments fail.

California and New Mexico continue to press that the Revision Rule does not sufficiently promote energy production or job growth. *Id.* But again Plaintiffs take BLM's conclusions and data out of context in order to shore up their arguments. Plaintiffs' argument that BLM failed to support its conclusion that the Revision Rule would promote jobs and energy production is premised on the conclusion that a *potential* positive effect on jobs is not enough. St. Br. 18. There is no such requirement in the Executive Order or elsewhere. Here, BLM's conclusion that the reduction of compliance costs will likely have a positive impact on both energy production and job creation is consistent with the Executive Order. AR 22-23. And while BLM recognized that the "investment and employment" required by the 2016 Rule would potentially create jobs, it also noted that the Revision Rule would likewise precipitate positive "competiveness impacts," particularly for marginal wells. AR 99. Balancing these two considerations, BLM concluded

[32] California and New Mexico argue that BLM did not contest their argument that an Executive Order cannot supersede or "impair" a "statutory mandate." St. Br. 17. Defendants addressed this argument in their opening brief, explaining why the Revision Rule is consistent with BLM's mandate under the MLA to reduce waste. Defs.' Mot. 9-18. Regardless, Plaintiffs' argument is frivolous. The Executive Order is explicit that it "shall be implemented consistent with applicable law," AR 1874, rendering baseless any suggestion that it "impair[s]" any law. *See* Defs.' Mot. 46.

that the effect of the Revision Rule was yet unknown. *Id.* There is simply no merit to Plaintiffs' argument that BLM's nuanced conclusion is inconsistent with the Executive Order.[33]

California and New Mexico's next argument that BLM failed to consider "promotion of 'clean air and water'" as required by the Executive Order suggests that the Order imposes a substantive requirement to promote clean air and water. It does not. Rather, the Order is explicit that it does not create any new substantive or procedural rights. AR 1874. BLM complied with all legal obligations it had to *consider* air quality and water. And nothing in its analysis of air quality and water was inconsistent with the Executive Order. In the Environmental Assessment, BLM incorporated by reference its previous analysis of air quality impacts of the 2016 Rule and then considered the air quality impacts of the Revision Rule. *See* AR 311-312, 314-317. BLM determined that the imposition of requirements to protect air quality that had greater costs than benefits was inconsistent with the MLA. AR 2-3, 7-8. This conclusion was consistent with Executive Order 13783's instruction that that regulations should be "of greater benefit than cost." AR 1871. Finally, BLM was also clear that its "site-specific inspection and approval procedures would apply to any surface disturbing project, and would ensure evaluation and mitigation of site-specific adverse impacts." AR 321. BLM therefore was clear that environmental impacts would be considered even if at a later stage of development.

III. BLM Complied with the APA's Notice Requirements.

A. BLM Provided Notice of Its Concerns Regarding Its Statutory Authority.

California and New Mexico contend that BLM did not provide notice of its position that it lacked authority to regulate uneconomical waste in the proposed Revision Rule. St. Br. 13. They continue to press this argument despite the fact that the proposed Revision Rule noted BLM's concern about its authority to regulate waste "without regard to economic feasibility," AR 418, requested comments on BLM's statutory authority to promulgate the 2016 Rule in light

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[33] As discussed above, there is no merit to the States' argument that there is an irreconcilable tension between BLM's RFA analysis and the Executive Order: BLM's conclusion that the Revision Rule will not have a significant impact on operators' profits does not mean that it will not promote energy development or growth consistent with the Executive Order.

of these economic concerns, *id.*, and included the exact same definition of waste that was included in the final rule and which Plaintiffs now vigorously attack, AR 437; *see also, e.g.*, AR 419. Plaintiffs offer no response to the fact that they themselves commented on BLM's statutory authority to regulate waste when the cost of compliance outweighs the value of the resource, thereby proving that the proposed rule provided adequate notice of the issue. *See* Defs.' Mot. 36; AR 84049-54, 84758-59, 104453-54. Plaintiffs' argument that they did not have notice of BLM's changed position on "waste" is not credible.

Plaintiffs' real argument is that they did not have notice of a handful of specific legal authorities—*Marathon Oil Co. v. Andrus*, 452 F. Supp. 548, 551 (D. Wyo. 1978); *Rife Oil Properties*, 131 IBLA 357 (1994); *Ladd Petroleum Corp.*, 107 IBLA 5 (1989); *Brewster v. Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905)—that support the change in position. None of these authorities provides the raison d'etre of BLM's decision; all are cited in the final rule as examples of the agency's larger points. AR 2-3 (using "see" and "see, e.g.," in citing authorities). And Plaintiffs have made no effort to explain how knowledge of these legal citations would have substantively changed their comments. Even if Plaintiffs "would have had a different proposition against which to argue" if BLM had provided these legal authorities in the proposed rule, Plaintiffs' "proposed solutions would, presumably, have been the same for the same reasons. They might have responded in greater volume or more vociferously, but they have not shown us that the content of their criticisms would have been different to the point that they would have stood a better chance of convincing the Agency . . . ." *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 644 (1st Cir. 1979). BLM's failure to provide notice of every case citation that might support its shift in position is not an APA violation. *See, e.g., Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990) ("Nothing prohibits the Agency from adding supporting documentation for a final rule in response to public comments.").

California and New Mexico provide not a single authority that supports their position. They cite *California v. Department of the Interior* in which the court held that a "few sentences" listing a rule's defects with no further analysis is insufficient to alert the public to the agency's *reasoning*. 381 F. Supp. 3d 1153, 1173-74 & n.17 (N.D. Cal. 2019). The case says nothing

about citations to supporting caselaw or other authorities. In contrast to the rule in *California*, the proposed Revision Rule described BLM's reasons for believing the 2016 Rule exceeded its authority and expressly requested comment on the issue. AR 418-19, 437. Plaintiffs also try to analogize this case to *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995), on the basis that the legal authorities cited in the final Revision Rule are "central" and "primary" to BLM's decision. But in *Idaho Farm Bureau*, the newly cited scientific data was the "only" factual evidence that a snail species met the requirement for habitat loss under the Endangered Species Act. 58 F.3d at 1403. Here, in contrast, BLM did not make a factual finding and omit its only evidence; it instead made a legal determination about its own authority and omitted cases that, while supportive of its decision, were not determinative (as evidenced by the extensive briefing before this court) and did not limit the public's ability to comment (as evidenced by Plaintiffs' comments on BLM's authority). *See* AR 3.

B. BLM Provided Notice as to Its Concerns About Marginal Wells.

Plaintiffs inaccurately allege that BLM "deprived the public of the opportunity to comment" on "new" evidence that supported BLM's conclusion that the Revision Rule imposed significant compliance costs on marginal wells. CG Br. 22. BLM disclosed its concerns about marginal wells in the proposed rule and its RIA. Defs.' Mot. 37. The only thing that BLM did not disclose with the proposed rule were its calculations of compliance costs for marginal wells as a percentage of well revenue, *which were made in response to Plaintiffs' comments*.[34] These calculations did not require a second comment period.

In their comments on the proposed Revision Rule, Citizen Groups cited to a study that allegedly found that the 2016 Rule would not impose a significant burden on marginal wells. AR 84086-87. In response, BLM reviewed that study and developed its own calculations to test

[34] Plaintiffs claim that BLM "only grudgingly" included the "marginal well analysis" in the administrative record. CG Br. 22. Plaintiffs' editorializing is inaccurate. What Plaintiffs are referring to is the Excel spreadsheet that BLM used to calculate the numbers and graphs that are contained in the final RIA, which was always part of the record. *Compare* AR 18079 *with* AR 103-06. BLM agreed to add this internal deliberative document to the record as part of the parties' agreement to resolve record objections without briefing. *See* ECF No. 109-2 at 2-3.

its accuracy. *See* AR 103-06, 113-14, 185. BLM's new calculations confirmed its concern that the 2016 Rule's compliance costs represent a significant portion of marginal well revenue and could therefore cause operators to shut in those wells. *Compare* AR 1-2, 4-5, 13, 22-26, 103-06 *with* AR 417, 423-24, 431, 497-99. Where supplemental data merely confirms the agency's conclusions in the proposed rulemaking, it has no obligation to reopen the comment period. *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006).

Citizen Groups overstate their case when they describe the additional calculations as "central" to BLM's conclusions. CG Br. 23. The data was clearly not central to BLM's analysis of marginal wells because BLM provided that analysis before the data existed, in the proposed rule and its RIA. In particular, BLM explained in the proposed rule that the majority of federal wells are marginal and would be disproportionately impacted by the 2016 Rule's requirements, AR 497, and that the 2016 Rule improperly assumed without analysis that all marginal wells that were unduly burdened by the 2016 Rule's requirements would be granted exemptions, AR 498.

Citizen Groups also provide no credible grounds that they are prejudiced. *Kern Cty.*, 450 F.3d at 1076 (holding agency may use supplemental data "so long as no prejudice is shown"). The additional calculations had no impact on Plaintiffs' ability to comment on impacts to marginal wells, as demonstrated by Citizen Groups' seven pages of comments on that issue alone. AR 84083-89; *see also BASF Wyandotte Corp.*, 598 F.2d at 644 (finding no prejudice where plaintiffs' comments would not have substantively changed even if comment period were reopened). Plaintiffs suggest that, had the data been available, they would have produced their own expert report commenting on the data and BLM, in turn, could have reviewed this critique. CG Br. 23. But this incorrectly assumes that the public has a right to comment on every new piece of data developed by an agency during and after the comment period and that the notice and comment process should not end until *Plaintiffs* are satisfied with the agency's data. The agency need not re-open the comment period every time it identifies additional data. "Otherwise the process might never end." *Nat. Res. Def. Council v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988); *Rybachek*, 904 F.2d at 1286 ("Adherence to [plaintiff's] view" would mean that "either the comment period would continue in a never-ending circle, or, if the [agency] chose not to

respond to the last set of public comments, any final rule could be struck down for lack of support in the record.").[35]

VI. BLM Complied with NEPA.

A. BLM Took a Hard Look at the Health Impacts of the Revision Rule, Including the Impact on Minority and Low-Income Communities.

Plaintiffs contend BLM's analysis of health impacts, particularly on "at-risk communities" such as Native Americans, was insufficient. But the agency identified the types of health risks caused by or traceable to various air pollutants, AR 315-16, 1262-65; quantified the additional emissions that would result from the Revision Rule, AR 315-16, 335-36; and explained why it did not believe impacts on minority and low-income communities[36] would be significant, AR 177, 237, 318, 336.[37] *See also* AR 309. Plaintiffs claim this approach was

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[35] Plaintiffs improperly submitted with their briefs an extra-record, post hoc analysis of BLM's marginal well spreadsheet in an effort to discredit the agency's analysis. *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 992. Even if the Court were to consider this extra-record material, it contains numerous false statements. For example, it claims BLM's "total compliance cost" numbers are "unsourced." ECF No. 109-2 at 24. In fact, those numbers come from the 2016 RIA. *E.g., compare* AR 180476 (cell D4 total costs per well of $25,987 based on addition of 2,954, 5,433, and 17,600) *with* AR 1122 (pneumatic controllers cost $2,954 per year), AR 1127 (pneumatic pump costs $5,433 per year), AR 1156 (referencing EPA data for LDAR which cites $17,600 in annual costs, *see* https://www.epa.gov/sites/production/files/2016-10/documents/2016-ctg-oil-and-gas.pdf, at p. 9-24). It assumes that LDAR costs for two wells should be halved to reflect costs for one well, ECF No. 109-2 at 25, but that ignores that most of the costs are overhead (i.e., cost of an inspector making a trip to the wellsite) that would apply regardless of the number wells at issue. And the report claims that BLM assumed "all marginal wells would be subject to every regulatory requirement," ECF No. 109-2 at 26, when in fact, BLM omitted liquids unloading requirements for marginal oil wells, AR 180476. The report's errors demonstrate why courts should not engage in a battle of the experts, but rather defer to the rational decision of the agency. *See Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013); *Native Ecosystems Council v. Weldon*, 232 F.Supp.3d 1142, 1148 (D. Mont. 2017).

[36] Plaintiffs attack BLM for failing to use the term "Native American" in its EA. CG Br. 35. BLM used the broader term "minority and low-income communities" to better account for all at-risk communities. AR 309, 313, 318, 320, 1268, 1293, 1303. It is unclear why Plaintiffs attack this broader and more inclusive terminology, especially given the national scope of the Rule.

[37] Contrary to Plaintiffs' suggestion, CG Br. 34, the court in *California v. BLM* assessed the irreparable harm likely to be caused by BLM's suspension of the 2016 Rule under a preliminary injunction standard. 286 F. Supp. 3d at 1073-74. It never reached the merits and thus did not

insufficient but NEPA does not require a site-specific analysis for every affected area. *Wyoming v. USDA*, 661 F.3d 1209, 1255-56 (10th Cir. 2011).

In the context of a nationwide rulemaking, the agency cannot feasibly assess localized health effects. Defs.' Mot. 51-52. BLM explained this in its response to comments: "Due to numerous variables, including market prices, local resource concerns, state, county and/or local municipality rules and regulations, and many others, it is impossible to predict precisely where and how fast oil and gas development may progress. The EA attempted to address impacts from a nationwide perspective, which is appropriate for the development of a nationwide rule." AR 177. Consistent with this explanation, BLM identified total nationwide effects and explained broadly why it finds those impacts insignificant. Plaintiffs contend this approach leaves impacts "wholly unstudied" because future site-specific analysis "will be focused on the impacts of the decision at issue," CG Br. 36, but that argument proves BLM's point because BLM employs a tiered decision-making process." AR 298. At the first stage, it develops a resource management plan ("RMP") which guides agency decisionmaking in a broad regional area. *Id.* The agency develops an EIS at that stage to analyze impacts resulting from the RMP, including all past, present, and foreseeable future oil and gas development within the RMP's region. *Id.* At the second stage, BLM leases federal lands for oil and gas development as mandated by the MLA. *Id*. "The BLM will then conduct a second tier of NEPA review – typically through an EA – to address potential impacts that could be caused by oil and gas development within the nominated lease area." AR 299. At the final and third stage, "oil and gas operators must seek approval from the BLM to perform drilling, completion, and production operations for leases on both Federal and Indian lands by submitting an Application for Permit to Drill (APD)." AR 299. BLM conducts additional NEPA analysis at the APD stage. AR 299-300. At all these stages, BLM can far more effectively and accurately assess the impacts of past, present, and future foreseeable oil and gas development in a particular area on particular communities. The cases

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adjudicate the agency's NEPA analysis for the Suspension Rule. The Revision Rule and its associated NEPA was never before it.

Plaintiffs cite are all readily distinguishable both because they do not address oil and gas regulation and because they involve different types of NEPA analysis.[38]

In short, BLM met its obligation in the EA to "concise[ly]" and "[b]riefly" analyze the health impacts of the Revision Rule. 40 C.F.R. § 1508.9. Plaintiffs' disagreement with the agency's ultimate decision does not render it in violation of NEPA. *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005).

B. BLM Took a Hard Look at the Climate Impacts of the Revision Rule.

Plaintiffs argue that BLM's reliance on a domestic SCM metric violated NEPA's "hard look" requirement. But Plaintiffs again stake out the wholly unsupported position that the agency's choice of methodology is not entitled to deference because it does not incorporate global costs. And again what Plaintiffs fail to do is telling: they do not point to any particular finding of BLM that is incorrect but rather seek a holding that a domestic metric is *a priori* lacking in "scientific integrity." Plaintiffs are incorrect for at least three reasons.

First, Citizen Groups argue that BLM's NEPA analysis is insufficient because it did not assess climate impacts. CG Br. 38. This is demonstrably wrong as the EA discussed climate change impacts throughout, and specifically in considering the environmental effects of each alternative. AR 311, 315, 318. To the extent Plaintiffs contend that the qualitative analysis in the EA is insufficient as the agency must quantify costs where it is possible to do so, NEPA does

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[38] *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1018-19 (9th Cir. 2007) (*categorical exclusion* — as opposed to an EA here — for which the Forest Service conducted no NEPA analysis at all for certain timber projects); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011) (agency assumed that impacts from a grazing regulation would be minimal despite lacking data on the majority of the affected lands whereas here BLM quantified the air quality impacts and found that they represent only 0.61% of total annual U.S. methane emissions. AR 315); *Citizens for Better Forestry v. USDA*, 632 F. Supp. 2d 968, 980 (9th Cir. 2009) (finding no effect on the environment because the rule at issue merely set standards for future site-specific actions whereas here, BLM acknowledged the impacts of the Revision Rule but found them insignificant on a national scale and recognized that it would further analyze local impacts in later site-specific NEPA. AR 178, 221-22, 298, 318); *Anderson v. Evans*, 371 F.3d 475, 489-92 (9th Cir. 2004) (finding that the impacts of a whale hunt on the local population of whales, as opposed to the total population, were uncertain and necessitated an EIS whereas here, BLM is constantly conducting additional NEPA at regional and local levels specifically aimed at better assessing regional and local impacts).

not require a cost-benefit analysis or quantification. 40 C.F.R. § 1502.23 ("For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are more important qualitative considerations."); *see also Mont. Envtl. Info. Ctr. ("MEIC") v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1095–96 (D. Mont. 2017). BLM committed no error by qualitatively assessing climate impacts.

Second, Plaintiffs similarly contend that NEPA requires the measurement of "actual environmental effects" through tools such as SCM or carbon budgeting[39], faulting BLM's finding that it cannot reliably assess the actual effects of each proposed alternative on global climate change. CG Br. 38. Describing the uncertainties in estimating climate impacts from methane emissions, the EA noted that "some uncertainties pertain to aspects of the natural world . . . [and] [o]ther sources of uncertainty as associated with current and future human behavior and well-being. . . ." AR 308. Citizen Groups ignore the point of uncertainty that BLM discussed in the EA: the actual effects of the potential emissions from venting and flaring activities. AR 319. Neither the "global" SCM nor carbon budgeting are tools for assessing the *actual environmental impacts* of a particular rulemaking. Moreover, as Plaintiffs concede, NEPA does not specifically mandate the use of a global social cost of carbon or carbon budgeting.[40] *See W. Org. of Res. Councils v. BLM*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018) ("Plaintiffs identify no case, and the Court has discovered none, that supports the assertion that NEPA requires the agency to use a global carbon budget analysis."). Plaintiffs therefore provide no credible grounds for challenging the agency's finding that there was uncertainty in reporting

[39] A carbon budget is the total amount of CO_2 emissions allowed over a specified period to stay below a certain threshold. While Citizen Groups press for carbon budgeting, they do not explain how an emissions budget measures the actual effects of climate change.

[40] Nor is there any merit to Citizen Groups' argument that NEPA requires the agency to consider global effects. CG Br. 39. Plaintiffs cite no authority in support of this theory. And the case they do cite involved a finding that the agency must consider regional effects, not the world writ large. *Id.* (citing *MEIC*, 274 F. Supp. 3d at 1101-02). At bottom, Plaintiffs recycle the same points raised in their challenge to BLM's use of the domestic SCM. *See supra* 27-30.

the actual effects of emissions reductions or increases. *See Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)..

Third, to the extent that Plaintiffs argue that BLM quantified the Revision Rule's benefits without correspondingly quantifying its costs, that too is inaccurate.[41] The EA qualitatively discussed the Revision's Rule's benefits and costs. AR 314-22. And as part of the rulemaking and as required by Executive Order 12836, BLM published the RIA,[42] which undertook a cost-benefit analysis of the Revision Rule. *See supra* 30-33. BLM's observation in its opening brief holds true here: while Plaintiffs may characterize their challenge as a scientific one, it is fundamentally a dispute about a policy choice to use a domestic metric rather than a global one. This is laid bare by the fact that there is no dispute that the science and economics underlying the 2016 and 2018 RIAs are substantially similar. The 2018 RIA explained "that the limitations and uncertainties associated with the global SC-CH4 estimates, which were discussed in detail in the 2016 RIA, likewise apply to the domestic SC-CH4 estimates presented in this analysis." *Id.*; *see EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (deferring to agency's decision to not utilize the social cost of carbon given, among other reasons, the methodology's "significant variation in output"). In short, Plaintiffs provide no credible support for their argument that BLM failed to take a hard look at climate impacts.

C. BLM Took a Hard Look at the Cumulative Impacts of the Revision Rule.

Plaintiffs contend that BLM's cumulative impact analysis should have addressed the cumulative impact of the Revision Rule when combined with two specific actions: "BLM's fossil fuel program" and EPA's proposed revision of its OOOOa regulations. *See* Defs.' Mot. 34

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[41] Because the agency quantified the costs and the benefits of the Revision Rule, *MEIC v. U.S. Office of Surface Mining*, is inapposite. 274 F. Supp. 3d 1074, 1095–96 (D. Mont. 2017), *amended in part, adhered to in part by* No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017). In *MEIC*, the court held that BLM improperly quantified benefits without correspondingly quantifying costs. *Id*. As Plaintiffs' challenge to BLM's costs calculations make plain, BLM did not only quantify the Revision Rule's putative benefits. *See supra* 27-32.

[42] BLM did not use the RIA to "fulfill NEPA's hard look requirement." CG Br. 39 n.25. Rather, the EA properly incorporated the RIA by reference. 40 C.F.R. § 1502.23.

n.12, 55 (explaining EPA's proposed revision). As to BLM's "fossil fuel program," the focus of the cumulative impacts analysis is on the action at issue and "whether that action, when added to the cumulative effects of other relevant actions, will have a significant impact on the environment." *Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv.*, 279 F. Supp. 3d 898, 920 (D. Ariz. 2017). "An agency may . . . characterize the cumulative effects of past actions in the aggregate without enumerating every past project that has affected an area." *Ctr. for Envtl. Law & Policy*, 655 F.3d at 1007. As explained in Defendants' motion, because the Revision Rule applies to all BLM-administered oil and gas development, the EA's analysis of the Revision Rule's total impacts necessarily account for the impacts of BLM's oil and gas "program." Defs. Mot. 56. In addition, the EA for the 2016 Rule addressed the cumulative impact of the status quo at that time—which BLM explained is largely equivalent to the Revision Rule, AR 321—when combined with all development activities on BLM lands. AR 1268-69, 1306-07. BLM also explained that the additional methane emissions that would result from the Revision Rule are negligible in comparison to total U.S. emissions, AR 315; they will be offset in part by reduction in certain emissions that would have been caused by the 2016 Rule, AR 321; and they will reduce over time as EPA regulations are applied apply to new development, *id.* *See Concerned Citizens*, 279 F. Supp. at 920 (noting court "must look not only to the specific section title "Cumulative Effects" . . . , but to the broader analysis contained in the EA" in assessing agency's analysis (citing *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1009 (9th Cir. 2011)). This level of analysis was sufficient under NEPA; BLM had no obligation to individually identify and consider every project on federal lands.

As to EPA's proposed revision of its OOOOa regulations, BLM was not required to consider it under NEPA. Cumulative impacts are the impacts of the proposed action when combined with "other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. "The Ninth Circuit 'defines "reasonably foreseeable" in this context to include only "proposed actions."'" *Chilkat Indian Vill. of Klukwan v. BLM*, No. 3:17-CV-00253-TMB, 2019 WL 3852496, at *19 (D. Alaska Mar. 15, 2019) (quoting *Lands Council*, 395 F.3d at 1023); *see also* 40 C.F.R. § 1508.25(a)(2) ("Cumulative actions, which when viewed with *other proposed*

1 *actions* have cumulatively significant impacts and should therefore be discussed in the same
2 impact statement." (emphasis added)). "For any project that is not yet proposed, and is more
3 remote in time . . . a cumulative effects analysis would be both speculative and premature."
4 *Lands Council*, 395 F.3d at 1023. At the time that the final Revision Rule was published on
5 September 28, 2018, *see* AR 1, EPA had not yet issued its proposed revision of its OOOOa
6 regulations. *See* 83 Fed. Reg. 52,056 (Oct. 15, 2018); *see also* AR 210 ("The BLM notes that at
7 the time of the development of this response to comment document, the EPA has not published a
8 proposed rule revising the NSPS Subpart OOOO or Subpart OOOOa."). Plaintiffs contend that
9 BLM should have relied on an earlier, unofficial version of the proposed rule. But an earlier,
10 unofficial version of a rule is not yet a proposed action and BLM is not required to consider it
11 under NEPA.[43] *See* Defs.' Mot. 55. Indeed, if an agency were required to consider every
12 possible action that another agency might be mulling before the agency formally proposes that
13 action, the list of potential cumulative actions would be endless and highly speculative.[44]

14 **D. BLM Reasonably Determined that the Revision Rule's Impacts Were Not**
15 **Significant and Did Not Require an EIS**.

16 Plaintiffs again fail entirely to address the context prong of NEPA's test for determining
17 whether an EIS is required and rely only the intensity factors. *See* Defs.' Mot. 57. That ignores
18 the nationwide context of the Revision Rule. *Id.*; *Ctr. for Biological Diversity v. Bureau of Land*
19 *Mgmt.*, 937 F. Supp. 2d 1140, 1154 (N.D. Cal. 2013) ("In evaluating the significance of the
20 impact of the proposed action, the agency must consider both the context of the action as well as
21 the intensity."). And Plaintiffs fail to show that BLM was obligated to prepare an EIS.
22 First, Plaintiffs attempt to undermine BLM's conclusion that the Revision Rule will not
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24 [43] *Northern Plains Resource Council v. Surface Transportation Board* is inapposite. There, the
25 agency failed to consider a formally proposed coal bed methane project for which an EIS had
already been prepared. 668 F.3d 1067, 1077-79 (9th Cir. 2011). Here, at the time BLM issued
26 the final Revision Rule, EPA had not yet published an official proposal.

27 [44] Plaintiffs argue that any discussion of the scale of the impacts of EPA's proposed rule "should
not appear for the first time in BLM's brief." CG Br. 41. Because EPA's proposed rule was
28 published after BLM issued the Revision Rule, BLM could not address it in the Revision Rule or
its EA.

have a significant impact on public health because emissions are "geographically dispersed" and occur in "sparsely populated areas." AR 336. But they fail to grapple with the numbers. The total methane emissions from the Revision Rule represent only 0.61% of total U.S. methane emissions. AR 315. When that amount of emissions is dispersed across all BLM-administered lands, it represents an infinitesimal increase in emissions near any given community. *See* AR 1251. Plaintiffs' cited record documents support this conclusion. For example, AR 161898 shows a "threat map" that allegedly depicts populations within a half mile of oil and gas facilities and thus at risk of air pollutant impacts.[45] But by comparing that map to a map of development on federal and Indian lands, one finds that the vast majority of populations allegedly at risk are not near BLM-administered oil and gas development. *Compare* AR 161898 *with* AR 1251. Rather, they are in places like Kansas, Nebraska, Oklahoma, Illinois, Tennessee, Ohio, Pennsylvania, and New York, that have little if any federal oil and gas development. *See also* AR 161947 (map showing asthma attacks primarily in places without BLM-administered development); AR 161963 (listing top 20 states by health impact of oil and gas development, the majority of which do not contain BLM oil and gas development). Plaintiffs also return to their claim that there are "more than 6,000 BLM-managed wells in ozone non-attainment areas," CG Br. 42, but they ignore Defendants' point that, even using Plaintiffs' own numbers, the alleged increase in VOCs per well would be so low as to not have even triggered the 2016 Rule's requirements for upgrading storage equipment. Defs.' Mot. 57 n.27. Moreover, as BLM explained, the Revision Rule "does not authorize operators to violate the Clean Air Act or any other statute or regulation." AR 177. EPA and state Clean Air Act regulations regarding areas that are not in attainment of federal standards, including the areas specifically identified by Plaintiffs like the Uinta Basin, continue to apply regardless of the Revision Rule. *Id.* In short, Plaintiffs' allegation that the Revision Rule will "significantly" harm the health of certain communities in the western United States improperly assumes that *any* increases in air pollution

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[45] The report containing the "threat map" was produced by Earthworks, a plaintiff in this lawsuit, and Clean Air Task Force, whose lawyers are representing another plaintiff, the National Wildlife Federation. *See* AR 161896; CG Br. 47.

are necessarily "significant."[46] That is not the standard under NEPA. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005). BLM's data-driven conclusion that accounts for the nationwide context of the Revision Rule is owed deference. *See Alaska Ctr. For Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999).

Second, BLM had no duty to consider the cumulative significance of the Revision Rule when combined with EPA's proposed revision of its OOOOa regulations since the proposed regulation was issued after the Revision Rule. *Supra* 44. And BLM did consider the cumulative impact of its fossil fuel program and reasonably determined that the combined impact was not significant. *Supra* 43; AR 337.

Third, BLM's use of the domestic SCM is not "highly controversial" within the meaning of 40 C.F.R. § 1508.27(b)(4). A disagreement about methodology is not a disagreement about the "size, nature, or effect" of the Revision Rule. *Pub. Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1027 (9th Cir. 2003) *rev'd*, 541 U.S. 752 (2004). Plaintiffs challenge BLM's methodology to estimate the monetized costs and benefits of the Revision Rule for compliance with Executive Order 12866, which is not part of a NEPA analysis. *See* AR 39-40 (explaining RIA's purpose); AR 314-16 (EA examining air quality and climate impacts based on emissions quantity); AR 173-74 ("The BLM does not agree that it must use the [SCM] - a tool for estimating economic costs and benefits - in its analysis of the environmental effects of this rulemaking."); *MEIC*, 274 F. Supp. 3d at 1095 (finding NEPA does not require a cost-benefit analysis).

Even if Plaintiffs' attacks were on target, they fail to establish controversy. To be controversial, a dispute must go "beyond a disagreement of qualified experts." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001). Where, as here, "there is

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[46] Plaintiffs cite *Center for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140, 1158 (N.D. Cal. 2013), for the proposition that "[t]his Court has held that air pollution from even a small number of oil and gas wells will affect public health and safety and trigger the requirement to prepare an EIS." CG Br. 42. That case, however, considered not the climate change effects of a nationwide regulation but the water quality impacts of four oil and gas leases in California, demonstrating that BLM (and the court if the agency action is challenged) will have the opportunity, and are better equipped, to assess local and regional impacts at later stages of oil and gas development.

conflict in the data, or the evidence supports several conflicting opinions, the agency may rely upon the opinion of its expert" without rendering its decision "highly controversial. *Id.* at 737 n.17; *Native Ecosystems Council*, 428 F.3d at 1241.

Plaintiffs try to distinguish *WildEarth Guardians v. BLM*, on the incorrect basis that, there, "no one objected to the agency's methodology."[47] CG Br. 44 n.27. In fact, plaintiffs in that case made the same claims that Plaintiffs make here: that BLM should have used particular methods and protocols to "to quantify the climate change impact of GHG emissions from the leased parcels," including the social cost of carbon and carbon budgeting. 368 F. Supp. 3d 41, 77 (D.D.C. 2019). The court found that disagreement about appropriate "climate change Methodologies" did not render BLM's decision "highly controversial" because "BLM considered Plaintiffs' suggested methodologies and explained why it did not use them." *Id.* at 82. The same analysis applies here where BLM considered but rejected Plaintiffs' recommended use of the global SCM. AR 4, 7, 74-75, 128-33; *see also Central Montana Wildlands Ass'n v. Kimball*, 308 F. App'x 84, 86 (9th Cir. 2009).

Fourth and finally, Plaintiffs claim BLM cannot square its determination that the effects of the Revision Rule are not "highly uncertain" for purposes of 40 C.F.R. § 1508.27(b), AR 337, with its statement in the EA and FONSI that the "actual effects" of the emissions resulting from the Revision Rule on climate change are "cannot be reliably assessed and thus are sufficiently uncertain as to not be reasonably foreseeable." AR 336. The NEPA "regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are 'highly' uncertain." *Ctr. For Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (quotation omitted). Where, as here, an EA estimates total greenhouse gas emissions of the proposed project and estimates their contribution as a percentage of total U.S.

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[47] Plaintiffs also incorrectly state that, here, "using the interagency, rather than the 'interim' SCM significantly changes the magnitude of the [Revision Rule's] impacts." CG Br. 44 n.27. The impacts—the quantity of emissions released as a result of the Revision Rule—are not in dispute. The dispute is over the monetization of those impacts, which was not part of the agency's NEPA analysis.

emissions, AR 314-15, 1259-62, the project's impacts are not "highly uncertain" simply because "this percentage does not translate into locally-quantifiable environmental impacts given the global nature of climate change." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011); *see also Ctr. For Biological Diversity*, 588 F.3d at 712.

And, as BLM explained, the Revision Rule's impacts are not "highly uncertain" because NTL-4A, the regulatory regime in place for over 30 years prior to the 2016 Rule, was similar to the Revision Rule. AR 337. Plaintiffs try to undermine this point by noting that BLM did not analyze NTL-4A's climate impacts under NEPA. While that may be true, BLM nonetheless had 30 years' worth of practical experience regarding the impacts of NTL-4A. Oil and gas regulation and oil and gas development are not new, and neither are the expected impacts. *See Am. Wild Horse Campaign v. Zinke*, 353 F. Supp. 3d 971, 988 (D. Nev. 2018); *WildEarth Guardians*, 368 F. Supp. 3d at 83 ("Defendants correctly note that 'oil and gas leasing is commonplace in the mountain west,' and that the 'uncertainties Plaintiffs point to concerning quantity of GHG emissions . . . do not establish uncertainty as to the effect of GHG emissions.'").

VII. Plaintiffs Fail to Demonstrate that Vacatur Is Necessary.

Plaintiffs' sweeping request that this Court vacate the Revision Rule and reinstate the 2016 Rule ignores what is equitable and practical. CG Br. 40; St. Br. 36. Vacatur is not presumed. Courts have wide discretion to tailor equitable relief where necessary "to remedy an established wrong." *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994). If this court were to vacate the Revision Rule in its entirety, many operators would not be poised to comply with the 2016 Rule. Defs.' Mot. 60. Nor is such a sweeping remedy necessary. Plaintiffs' challenge is limited to certain provisions of the Revision Rule. By its own terms, the Rule is severable, rendering Plaintiffs' proposed remedy indiscriminately broad. AR 8.

Plaintiffs' principal argument that vacatur is the "default" rule is an incomplete recitation of the law. CG Br. 45; St. Br. 28-29. Vacatur is an equitable remedy that requires a balancing of the parties' injuries. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *Cal. Cmtys. Against*

1 *Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear*
2 *Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). "When equity demands, [a flawed
3 action] can be left in place while the agency follows the necessary procedures to correct its
4 action." *Id.* (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).
5 Moreover, because vacatur of the Revision Rule would be virtually indistinguishable from
6 injunctive relief, it cannot be the "presumptive remedy" given that injunctive relief requires
7 satisfaction of the traditional four-factor test. *Beverly Hills Unified Sch. Dist. v. Fed. Transit*
8 *Admin.*, No. CV 12-9861 -GW(SSX), 2016 WL 4445770, at *6 (C.D. Cal. Aug. 12, 2016)
9 (holding that after *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), court cannot
10 presume vacatur when "a NEPA (or other environmental review) violation is found" where
11 vacatur "would have the effect of injunctive relief"); *see also Sierra Forest Legacy v. Sherman*,
12 951 F. Supp. 2d 1100, 1105 (E.D. Cal. 2013).

13 Where, as here, the Rule is severable, vacatur is also an unnecessarily broad brush.
14 Plaintiffs do not challenge the entire Rule and, other than lodging a general complaint about the
15 rationale for the Rule, they offer no credible opposition to a more targeted remedy.[48] St. Br. 31.
16 A more targeted remedy may not only be possible, but achieve more equitable results. Rather
17 than even acknowledging a more moderate approach, Plaintiffs attempt to cabin the Court's
18 equitable powers by imposing alleged limitations on remand without vacatur that are not even
19 wholly consistent between them. St. Br. 29 (remand without vacatur available where there is
20 "environmental harm"); CG Br. 45 (remand without vacatur available where vacatur would
21 "defeat a statute's purpose."); *Cf. Beverly Hills Unified Sch. Dist.*, 2016 WL 4445770, at *11
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[48] Plaintiffs cite several cases for the proposition that vacatur is the "default rule" but none involved a rule that was severable or a situation where immediate compliance was infeasible and a concurrent pending challenge could effectively negate the relief sought. *See, e.g.*, *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1044, 1053 (9th Cir. 2010) (decision of the National Marine Fisheries Service to kill up to 85 sea lions annually at Bonneville Dam); *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000) (timber sales in the Payette National Forest; noting in *dicta* that agency action will be set aside); *Reed v. Salazar*, 744 F. Supp. 2d 98, 119 (D.D.C. 2010) (annual funding agreement entered into between the Fish & Wildlife Service and tribe for the operation of bison complex).

(declining to vacate, considering, among other things, the "serious economic problems for the $2.466 billion Project" if vacatur were issued).

Nor does vacatur make practical sense. It would result in disrupting effects from an "interim change that may itself be changed." *Cal. Cmtys.*, 688 F.3d at 992. Operators are not in a position to comply with the 2016 Rule in the near term. And the Wyoming district court in the challenge to the 2016 Rule has signaled its willingness to entertain an immediate challenge to the 2016 Rule if it were reinstated. Or. Granting Motions to Stay Proceedings, *Wyoming v. Dep't of the Interior*, No. 16-cv-285 (D. Wyo. Aug. 23, 2019), ECF No. 256. Plaintiffs' repeated refrain that this Court need not consider this practical reality because BLM suspended the 2016 Rule before revising it invites a remedy that will lead to unintended consequences. CG Br. 45; St. Br. 3. If the Court is considering vacatur, it should stay any such order to allow BLM to reconsider its decision without further straining judicial resources. *See Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002).

Finally, in determining whether to vacate, courts also consider "how serious the agency's errors are." *Cal. Cmtys.*, 688 F.3d at 992. The Court need not vacate where "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 15; *see Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). The circumstances described in *Allied-Signal* that justify remand without vacatur are present here. BLM believes that it engaged in no error; but, even if it did, the agency can remedy on remand any procedural or substantive errors involving the calculation of impacts or its assessment of its statutory authority. *See Cal. Cmtys.*, 688 F.3d at 992 (describing a "significant" error that did not require vacatur); *Idaho Farm Bureau*, 58 F.3d at 1403 (holding equitable factors weigh towards remand despite failure to disclose report that "was central to the Secretary's decision").

CONCLUSION

Because BLM fully complied with the APA and NEPA in promulgating the Revision Rule, this Court should deny Plaintiffs' summary judgment motions and dismiss this case.

Respectfully submitted this 15th day of November, 2019.

JEAN E. WILLIAMS
Deputy Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

/s/ Marissa Piropato
MARISSA PIROPATO (MA 651630)
P.O. Box 7611
Washington, DC 20044-7611
Tel.: (202) 305-0470/Fax: (202) 305-0506
marissa.piropato@usdoj.gov
CLARE BORONOW, admitted to MD Bar
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
Tel.: (303) 844-1362 / Fax: (303) 844-1350
clare.boronow@usdoj.gov

Counsel for Defendants