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April 23, 2018

Joseph R. Balash
Assistant Secretary for Land and Minerals Management
U.S. Department of the Interior
Director (630), Bureau of Land Management
Mail Stop 2134LM
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Attention: 1004-AE53

Comments submitted electronically via <https://www.regulations.gov>

RE: Comments on the Proposed Rescission or Revision of Certain Requirements of the Final Rule, “Waste Prevention, Production Subject to Royalties, and Resource Conservation,” 83 Fed. Reg. 7,924, Regulation Identifier Number: 1004–AE53

Dear Mr. Balash:

The Attorney General of California, Xavier Becerra,¹ and the Attorney General of New Mexico, Hector Balderas, submit these comments in opposition to the proposal by the U.S. Bureau of Land Management (“BLM”) to rescind or revise certain requirements of its 2016 final rule governing the prevention of waste from oil and gas operations on federal and Indian lands. 83 Fed. Reg. 7,924 (Feb. 22, 2018) (“Proposed Repeal”). Promulgated just over one year ago, the Waste Prevention Rule² provides a commonsense and much-needed update to BLM’s rules governing the waste of natural gas and royalty payments from mineral leases administered by BLM, including millions of acres in California and New Mexico.

¹ The California Attorney General submits these comments pursuant to his independent power and duty to protect the environment and natural resources of the State. *See* Cal. Const., art. V, § 13; Cal. Gov. Code, §§ 12511, 12600-12612; *D’Amico. v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 1415.

² “Waste Prevention, Production Subject to Royalties, and Resource Conservation” (the “Waste Prevention Rule” or “Rule”), 81 Fed. Reg. 83,008 (Nov. 18, 2016).

BLM's current proposal to rescind or revise key requirements of the Waste Prevention Rule is devoid of legal justification and violates the fundamental requirements of the Administrative Procedure Act ("APA"). Indeed, BLM has failed to articulate a reasoned basis for repealing a rule that it recently found was needed to fulfill its statutory mandates and ensure the environmentally responsible development of oil and gas resources on federal and Indian lands. BLM's primary justification that the Waste Prevention Rule unnecessarily encumbers energy production and economic growth is contradicted by its own findings that the Rule's compliance costs are insignificant to operators and will have no impact on energy development. While BLM now claims that the Rule overlaps with other federal and state requirements, those standards have not changed materially since November 2016, and the Rule is still more comprehensive than the requirements in many states and tribal areas.

Moreover, BLM's contention that the costs of the Rule now outweigh the benefits relies upon an "interim" social cost of methane methodology that measures only the domestic impacts of climate change, arbitrarily excluding 90% of the costs. Finally, there is no authority to support BLM's new "policy determination" that "it is not appropriate for waste prevention regulations to impose compliance costs greater than the value of the resources" conserved, and its proposed definition of "waste of oil or gas" to incorporate this limitation is arbitrary and unworkable. For all of these reasons, Attorney General Becerra and Attorney General Balderas strongly recommend that BLM terminate its arbitrary rush towards repeal and preserve the Waste Prevention Rule's important requirements to protect public resources, boost royalty receipts for American taxpayers, and ensure the safe and responsible development of oil and gas resources.

FACTUAL BACKGROUND

I. The Waste Prevention Rule Provides a Necessary Regulatory Update to Prevent Waste and Control Emissions.

BLM oversees more than 245 million acres of land and 700 million subsurface acres of federal mineral estate, on which reside nearly 100,000 producing onshore oil and gas wells. 81 Fed. Reg. at 83,014. Over the past decade, oil and gas production in the United States has increased dramatically due to technological advances such as hydraulic fracturing and directional drilling. 81 Fed. Reg. at 83,009. However, as BLM recognized in the Waste Prevention Rule, the American public has not fully benefitted from this increase in domestic energy production because it "has been accompanied by significant and growing quantities of wasted natural gas." *Id.* at 83,014. For example, between 2009 and 2015, nearly 100,000 oil and gas wells on federal land released approximately 462 billion cubic feet ("Bcf") of natural gas through venting and flaring, enough gas to serve about 6.2 million households for a year. *Id.* at 83,009. In 2014, operators vented and flared approximately 4.1 percent of the total production from BLM-administered leases, or enough natural gas to supply 1.5 million households for a year. *Id.* at 83,010.

When oil and gas operators waste natural gas through venting, flaring, and leaks, this not only squanders a valuable public resource that could be used to supply our nation's power grid

and generate royalties, but it also harms air quality. For example, venting, flaring, and leaks of natural gas can release volatile organic compounds (“VOCs”), including benzene and other hazardous air pollutants, as well as nitrogen oxides and particulate matter, which can cause and worsen respiratory and heart problems. *Id.* at 83,014. In addition, the primary constituent of natural gas—methane—is an especially potent greenhouse gas, which contributes to climate change at a rate much higher than carbon dioxide. *Id.* at 83,009.

Prior to 2016, BLM’s regulatory scheme governing the minimization of resource waste had not been updated in over three decades. *Id.* at 83,008. Several oversight reviews, including those by the Government Accountability Office (“GAO”) and the Department of the Interior’s Office of the Inspector General, called on BLM to update its “insufficient and outdated” regulations regarding waste and royalties. *Id.* at 83,009-10. The GAO specifically noted that “around 40 percent of natural gas estimated to be vented and flared on onshore Federal leases could be economically captured with currently available control technologies.” *Id.* at 83,010. The reviews recommended that BLM require operators to augment their waste prevention efforts, afford the agency greater flexibility in rate setting, and clarify policies regarding royalty-free, on-site use of oil and gas. *Id.*

In 2014, BLM responded to these reports by initiating the development of a rule to update its existing regulations on these issues. *Id.* After soliciting and reviewing input from stakeholders and the public, BLM released its proposal in February 2016. 81 Fed. Reg. 6,616 (Feb. 8, 2016) (“Proposed Rule”). BLM received approximately 330,000 public comments, including approximately 1,000 unique comments, on the Proposed Rule. 81 Fed. Reg. at 83,021. The agency also hosted stakeholder meetings and met with regulators from states with significant federal oil and gas production. *Id.*

BLM issued the final Waste Prevention Rule in November 2016. The Rule sets forth new regulations to reduce waste of natural gas from venting, flaring, and equipment leaks during oil and gas production activities. *Id.* at 83,010-13. As BLM stated:

Venting, flaring, and leaks waste a valuable resource that could be put to productive use, and deprive American taxpayers, tribes, and States of royalty revenues. In addition, the wasted gas may harm local communities and surrounding areas through visual and noise impacts from flaring, and contribute to regional and global air pollution problems of smog, particulate matter, and toxics (such as benzene, a carcinogen). Finally, vented or leaked gas contributes to climate change, because the primary constituent of natural gas is methane, an especially powerful greenhouse gas (GHG), with climate impacts roughly 25 times those of carbon dioxide (CO₂), if measured over a 100-year period, or 86 times those of CO₂, if measured over a 20-year period. Thus, measures to conserve gas and avoid waste may significantly benefit local communities, public health, and the environment.

Id. at 83,009. The Rule is designed to force considerable reductions in waste from flaring (49 percent) and venting (35 percent), saving and putting to use up to 41 Bcf of gas per year. *Id.* at 83,014. In addition, the Rule would avoid an estimated 175,000-180,000 tons of methane emissions per year and reduce emissions of VOCs, including benzene and other hazardous air pollutants, by 250,000–267,000 tons per year. *Id.*

II. Efforts to Undermine the Waste Prevention Rule.

Soon after its promulgation, the Waste Prevention Rule was challenged by two industry groups and the States of Wyoming, Montana, and North Dakota (later joined by Texas) (collectively, the “Wyoming Petitioners”) in federal district court in Wyoming. *Western Energy Alliance v. Jewell*, No. 2:16-cv-00280-SWS (D. Wyo.) (Nov. 16, 2016); *State of Wyoming v. Jewell*, No. 2:16-cv-00285-SWS (D. Wyo.) (Nov. 18, 2016) (collectively, the “Wyoming litigation”). The California Attorney General’s Office, on behalf of the California Air Resources Board (“ARB”), and the State of New Mexico intervened on the side of BLM and successfully opposed the Wyoming Petitioners’ requests to preliminarily enjoin the Rule, allowing it to go into effect on January 17, 2017. The case was stayed in December 2017 at the request of BLM and several of the Wyoming Petitioners in light on BLM’s ongoing efforts to repeal the Rule.

On March 28, 2017, President Donald Trump issued Executive Order 13783, entitled “Promoting Energy Independence and Economic Growth.” 82 Fed. Reg. 16,093 (Mar. 31, 2017). Section 7 of that Executive Order specifically called on the Secretary of the Interior to review and “as soon as practicable, suspend, revise, or rescind” the Waste Prevention Rule. On March 29, 2017, Secretary of the Interior Ryan Zinke issued Secretarial Order 3349, which provided that within 21 days, BLM would review the Rule and issue an internal report as to “whether the rule is fully consistent with the policy set forth in Section 1 of the March 28, 2017 E.O.” On October 25, 2017, the Secretary released the “Final Report: Review of the Department of the Interior Actions that Potentially Burden Domestic Energy.” 82 Fed. Reg. 50,532 (Nov. 1, 2017). The Report claims that “BLM conducted an initial review of the rule and found that it was inconsistent with the policy stated in EO 13783 that ‘it is in the national interest to promote clean and safe development of our nation’s vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.’” *Id.* at 50,535. No details regarding this “initial review” or the alleged inconsistencies are provided.

The Waste Prevention Rule was also targeted by Congress for repeal pursuant to the Congressional Review Act, 5 U.S.C. § 801 *et seq.* On February 3, 2017, the House passed Joint Resolution 36 to disapprove of the Rule. However, on May 10, 2017, a similar resolution failed in the Senate by a 49-51 vote.

On June 15, 2017, BLM issued a notice “postponing” indefinitely certain compliance dates of the Waste Prevention Rule without following notice and comment procedures, citing Section 705 of the APA, 5 U.S.C. § 705. 82 Fed. Reg. 27,430. The States of California and New Mexico challenged this unlawful action on July 5, 2017 in the U.S. District Court for the

Northern District of California. On October 4, 2017, the court ruled that Section 705 did not apply to an already effective rule, and that the postponement amounted to a rulemaking that required compliance with the APA's notice and comment procedures. The court also found that BLM's action was arbitrary and capricious because the basis for the postponement was to allow for agency reconsideration rather than judicial review, and because BLM ignored the benefits of compliance with the Rule. Thus, the court ordered the postponement action vacated, putting the Rule back into effect. *See State of California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) ("*California v. BLM I*").

On December 8, 2017, following an expedited comment process, BLM published a notice in the Federal Register suspending until January 17, 2019 important requirements of the Rule that were already in effect or set to take effect in January 2018. 82 Fed. Reg. 58,050 (Dec. 8, 2017) ("Suspension Rule"). On December 19, 2017, the States of California and New Mexico challenged the Suspension Rule and filed a motion for preliminary injunction. On February 22, 2018, the court granted the motion, finding that: (1) Plaintiffs had shown a likelihood of success on the merits of their claim that the Suspension Rule was not grounded in a reasoned analysis and was therefore arbitrary and capricious; (2) Plaintiffs established irreparable harm in the form of environmental injuries including the emission of methane and other hazardous air pollutants; and (3) the balance of equities and public interest weighed in favor of an injunction because compliance costs to even the smallest regulated entities would be minimal, and "the financial costs of compliance are not as significant as the increased gas emissions, public health harms, and pollution." *See State of California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018) ("*California v. BLM IP*"). BLM issued its Proposed Repeal on the same day.

Following the issuance of this injunction, the Wyoming Petitioners filed motions to lift the stay in the Wyoming litigation and requested various form of preliminary injunctive relief. On April 4, 2018, the Wyoming district court issued an Order staying several provisions of the Waste Prevention Rule, and staying the litigation pending BLM's finalization or withdrawal of the Proposed Repeal. California and New Mexico appealed this Order to the Tenth Circuit Court of Appeals on April 6, 2018, and have moved for a stay pending appeal.

STATUTORY BACKGROUND

As described in the Waste Prevention Rule, BLM is charged by statute to ensure that the public benefits from mineral production on public lands by preventing waste of oil and gas resources and ensuring the adequate payment of royalties to federal, state, and tribal governments from such production. 81 Fed. Reg. at 83,019-20. In addition, BLM is tasked with regulating the physical impacts of oil and gas development on public lands to prevent environmental harm and protect public welfare. *Id.* at 83,020; *see id.* at 83,009, 83,014 (discussing BLM's mandate to prevent undue waste and discussing benefits of increased natural gas supplies, increased royalty revenues, decreased air pollution and climate change impacts, and reduced visual and noise impacts from flaring).

In particular, the Mineral Leasing Act of 1920 (“MLA”), 30 U.S.C. § 181 *et seq.*, provides BLM with broad regulatory power to require oil and gas lessees to observe “such rules ... for the prevention of undue waste as may be prescribed by [the] Secretary,” to protect “the interests of the United States,” and to safeguard “the public welfare.” *Id.* § 187. The MLA specifically requires that “[a]ll leases of lands containing oil or gas ... shall be subject to the condition that the lessee will ... use all reasonable precautions to prevent waste of oil or gas developed in the land” *Id.* § 225. Pursuant to the Federal Oil and Gas Royalty Management Act of 1982 (“FOGRMA”), 30 U.S.C. § 1701 *et seq.*, Congress provided that lessees would be “liable for royalty payments on oil or gas lost or wasted from a lease site when such loss or waste is due to negligence on the part of the operator of the lease, or due to the failure to comply with any rule or regulation, order or citation issued under this chapter or any mineral leasing law.” *Id.* § 1756.

The Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1701 *et seq.*, provides BLM with broad authority to regulate “the use, occupancy, and development of the public lands.” *Id.* § 1732(b). Among other requirements, FLPMA mandates that BLM manage public lands “in a manner that will protect the quality of ... ecological, environmental, [and] air and atmospheric ... values,” *id.* § 1701(a)(8), and provides BLM with authority to take any action, by regulation or otherwise, “necessary to prevent unnecessary or undue degradation of the lands.” *Id.* § 1732(b). BLM has similar authority over tribal lands pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g, and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101–08.

Under the Administrative Procedure Act, courts will set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious where the agency (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) is so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”).

An “agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change.” *Id.* at 42. The Supreme Court has clarified that while an agency need not show that a new rule is better than the rule it replaced, it must demonstrate that “there are good reasons” for the replacement. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Further, an agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” when “its new policy rests upon factual findings that contradict those which underlay its prior policy.” *Id.* Any “unexplained inconsistency” between a rule and its repeal is “a reason for holding an interpretation to be an arbitrary and capricious change.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

BLM'S PROPOSED REPEAL OF THE WASTE PREVENTION RULE IS ARBITRARY AND CAPRICIOUS

I. BLM Has Failed to Explain How Its Proposed Repeal of the Waste Prevention Rule Will Fulfill the Agency's Statutory Mandates to Prevent Waste and Ensure the Safe and Responsible Development of Federal Oil and Gas Resources.

When an agency rescinds a prior regulation, it is required to demonstrate “that the new policy is permissible under the statute” and that “that there are good reasons for it.” *Fox*, 556 U.S. at 515. In addition, an agency action is arbitrary and capricious where the agency has entirely failed to consider an important aspect of the problem. *State Farm*, 463 U.S. at 43. Here, BLM failed to consider how the Proposed Repeal will fulfill its important statutory mandates to prevent waste and ensure the safe and responsible development of oil and gas on public lands, or its statutory trust responsibilities for Indian lands. To the contrary, the Proposed Repeal simply ignores the important reasons articulated for promulgation of the Waste Prevention Rule just over one year ago.

For example, in November 2016, citing seven different statutes—including the MLA and FLPMA—BLM stated that it was updating its “decades-old” requirements related to waste of natural resources in order to “advanc[e] those mandates.” 81 Fed. Reg. at 83,009. As BLM affirmed:

While oil and gas production technology has advanced dramatically in recent years, the BLM's rules to minimize waste of gas have not been updated in over 30 years. The Mineral Leasing Act of 1920 (MLA) requires the BLM to ensure that lessees “use all reasonable precautions to prevent waste of oil or gas developed in the land,” 30 U.S.C. 225, and that leases include “a provision that such rules . . . for the prevention of undue waste as may be prescribed by [the] Secretary shall be observed,” *id.* at § 187. The BLM believes there are economical, cost-effective, and reasonable measures that operators can take to minimize gas waste. These measures will enhance our nation's natural gas supplies, boost royalty receipts for American taxpayers, tribes, and States, reduce environmental damage from venting, flaring, and leaks of gas, and ensure the safe and responsible development of oil and gas resources.

Id.

Yet BLM has now moved to repeal the Waste Prevention Rule without any consideration of whether or how these statutory mandates will be achieved. In particular, BLM provides absolutely no justification regarding how the Proposed Repeal will prevent waste, ensure the adequate payment of royalties, or protect the public interest. To the contrary, BLM admits that the benefits of the Rule in reducing waste, increasing royalty payments, and cutting air pollution and greenhouse gas emissions will be completely eliminated by the Proposed Repeal. 83 Fed. Reg. at 7,938.

BLM acknowledges its prior finding that the 39-year-old regulations governing waste, known as the “Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost” (“NTL-4A”), are “outdated” and “needed to be overhauled to account for technological advancements and to incorporate ‘economical, cost-effective, and reasonable measures that operators can take to minimize gas waste.’” 83 Fed. Reg. at 7,927. Yet BLM now asserts that “a return to the NTL-4A framework ... is appropriate” because of its new determination that the requirements imposed by the Rule are “not, in fact, cost-effective and actually imposed compliance costs well in excess of the value of the resource to be conserved.” *Id.* at 7,927-28. As discussed below, however, BLM’s latest calculations regarding the compliance costs of the Rule are not materially different than they were in 2016, and it continues to find that such costs are insignificant for even the smallest operations. *See infra* at Part II. Moreover, BLM has no authority to qualify its waste regulations based on “the value of the resources to be conserved.” *See infra* at Part IV. In any event, other than issues regarding cost, BLM fails to explain why NTL-4A is no longer “outdated,” especially given technological advances during the past four decades that provide operators with the ability to take “reasonable precautions” to prevent “undue waste.” *See* 81 Fed. Reg. at 83,009.

Similarly, BLM now cites the “overlap with Federal and State requirements and regulations” as a basis for the Proposed Repeal. 83 Fed. Reg. at 7,924-26, 7,928. Yet BLM was well aware of these requirements when it promulgated the Waste Prevention Rule in 2016 and fails to explain why such requirements provide any basis for a repeal. For example, with regard to the U.S. Environmental Protection Agency’s (“EPA”) New Source Performance Standards at 40 CFR part 60, subparts OOOO and OOOOa (“NSPS”), BLM “carefully coordinated” with EPA “to minimize compliance burdens for operators and to avoid unnecessary duplication.” 81 Fed. Reg. at 6,618, 6,635; 81 Fed. Reg. at 83,013, 83,018-19.³ The Waste Prevention Rule addressed the potential for overlapping regulations by (1) allowing compliance with EPA’s requirements for new or modified sources to satisfy the requirements of the Rule when both EPA regulations and the Rule apply; (2) exempting from the Rule equipment covered by existing EPA regulations; and (3) allowing a state or tribe to request a variance from provisions of the Rule if their regulations are at least as effective as the Rule in reducing waste. 81 Fed. Reg. at 83,013, 83,027, 83,055, 83,058-59, 83,061, 83,067-68. As BLM also found, “[t]he EPA regulations are directed at air pollution reduction, not waste prevention; they cover only new, modified and reconstructed sources; and they do not address wasteful routine flaring of associated gas from oil wells, among other things.” *Id.* at 83,010.

³ Similarly, EPA stated in its own rulemaking that it “worked closely with [BLM] during development of this rulemaking in order to avoid conflicts in requirements between the NSPS and BLM’s proposed rulemaking.” 81 Fed. Reg. 35,824, 35,825 (June 3, 2016); *see id.* at 35,831 (“While we intend for our rule to complement the BLM’s action, it is important to recognize that the EPA and the BLM are each operating under different statutory authorities and mandates in developing and implementing their respective rules.”).

The Waste Prevention Rule does not conflict with or undermine any EPA regulations promulgated pursuant to the Clean Air Act (“CAA”), 42 U.S.C. § 7401 *et seq.* Unlike EPA’s NSPS for new, reconstructed, and modified sources in the oil and natural gas sector, which impose numeric percentage-reduction requirements on emissions of GHGs and VOCs from specified equipment and processes within the oil and natural gas source category, 81 Fed. Reg. at 35,824, the Waste Prevention Rule sets no emissions standards for particular pollutants and contains no air quality monitoring requirements. *See* 42 U.S.C. § 7411. Unlike a CAA rulemaking that establishes performance standards for private, stationary sources of pollution, the Waste Prevention Rule seeks to prevent waste from the development of public resources on federal and Indian lands.

The fact that the Waste Prevention Rule also benefits air quality does not undermine its waste prevention purpose, and it is fully within BLM’s authority to promulgate. *See* 83 Fed. Reg. at 7,927 (“BLM requests comment on whether the 2016 final rule was consistent with its statutory authority.”) As the Wyoming court previously found, “BLM has authority to promulgate and impose regulations which may have air quality benefits and even overlap with CAA regulations if such rules are independently justified as waste prevention measures pursuant to its MLA authority.” *See State of Wyoming v. U.S. Dept. of the Interior*, 2017 WL 161428, *9 (D. Wyo. Jan. 16, 2017). The court also recognized that “a regulation that prevents wasteful losses of natural gas necessarily reduces emissions of that gas,” *id.* at *6, but that does not transform it into an impermissible “air quality” rule.

As BLM stated in November 2016: “The purpose of this rule is to reduce waste of natural gas owned by the American public and tribes, which occurs during the oil and gas production process.” 81 Fed. Reg. at 83,015. The Rule is clearly a waste prevention rule which directs “operators to take reasonable and common-sense measures to prohibit routine venting, minimize the quantities of natural gas routinely flared, reduce natural gas losses through leaks, and deploy up-to-date technology to reduce routine losses from production equipment.” *Id.* The Rule has obvious and significant waste minimization benefits: reducing the total volume of gas wasted on BLM-administered leases will result in additional natural gas production of 9-41 billion cubic feet annually, and generate \$3-14 million in additional royalties per year. 81 Fed. Reg. at 83,014. The Waste Prevention Rule is also fully consistent with BLM’s mandate to safeguard “the public welfare” and to manage public resources in a way that takes environmental considerations into account, including “air and atmospheric” values. *See* 30 U.S.C. § 187; 43 U.S.C. § 1701(a)(8); *see also id.* §§ 1701(a)(9) (BLM must receive “fair market value of the use of the public lands and their resources”), 1702(c) (defining “multiple use” mandate to include environmental considerations).

The Waste Prevention Rule in no way infringes on EPA’s authority under the CAA. The U.S. Supreme Court has rejected the contention that two agencies with overlapping mandates are somehow prohibited from administering their separate statutory obligations. In *Massachusetts v. EPA*, the Court considered EPA’s authority to regulate carbon dioxide emissions under the CAA. 549 U.S. 497 (2007). EPA argued that doing so would improperly require it to tighten vehicle mileage requirements, a task that Congress had assigned to the U.S. Department of

Transportation (“DOT”). *Id.* at 531-32. The Court rejected this argument, noting that DOT’s statutory charge to set mileage standards “in no way licenses EPA to shirk its environmental responsibilities.” *Id.* at 532. The Court noted that the two agency’s “obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.” *Id.* Similarly, here, the fact that EPA is charged with protecting air quality does not strip BLM of its mandate to regulate resource waste simply because that waste is emitted in the form of air pollution.⁴

BLM was also fully aware of existing and proposed state regulations when it promulgated the Waste Prevention Rule. *See* 83 Fed. Reg. at 7,928 (citing 81 Fed. Reg. 6,616, 6,633–34); *see* 81 Fed. Reg. 83,019 (“In developing this rule, the BLM consulted with State regulators and reviewed analogous State requirements related to waste of oil and gas resources. Specifically, the BLM reviewed requirements from Alaska, California, Colorado, Montana, North Dakota, Ohio, Pennsylvania, Utah, and Wyoming.”). While BLM claims that the State of California has issued new regulations “[s]ince the promulgation of the 2016 final rule,” these regulations had been proposed several months before that time and BLM was well aware of this development. *See* 81 Fed. Reg. at 83,019 (“On February 1, 2016, California’s Air Resources Board proposed new rules to reduce emissions of methane through venting and leaks during oil and gas production, processing, and storage.”). Regardless, as BLM explained in 2016:

State regulations do not apply to BLM-administered leases on Indian lands, and States do not have a statutory mandate or trust responsibility to reduce the waste of Federal and Indian oil and gas. Finally, because State laws and regulations are subject to change, BLM reliance on State standards risks additional waste of public resources and adverse environmental impacts to Federal and Indian lands should the State standards change to allow for additional waste and environmental impacts. There is therefore a need for uniform, modern waste reduction standards for oil and gas operations on public and Indian lands across the country.

Id. at 83,019. BLM fails to explain in the Proposed Repeal why the existence of these state regulations now provides a basis for rescinding or revising the Waste Prevention Rule.

Finally, BLM claims that “the oil and gas exploration and production industry continues to pursue reductions in methane emissions on a voluntary basis,” including taking action “to implement LDAR programs and replace, remove, or retrofit high-bleed pneumatic controllers with low- or zero-emitting devices.” 83 Fed. Reg. at 7,928; *id.* at 7,931-32. However, BLM provides no data or analysis to support this justification. *See* BLM, Regulatory Impact Analysis for the Proposed Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule (Feb. 5, 2018) (“2018 RIA”) at 36 (noting “uncertainty over the amount of voluntary compliance currently occurring.”). BLM also fails to explain how this “voluntary” behavior

⁴ EPA has proposed to stay certain requirements in its own rules for two years while it reconsiders the NSPS. *See* 82 Fed. Reg. 27,645 (June 16, 2017).

fulfills its statutory mandates and trust responsibilities to reduce the waste of oil and gas on federal and tribal lands. Moreover, the fact that operators may be “voluntarily” taking actions required by the Waste Prevention Rule suggests that such requirements are not as costly or burdensome as BLM contends.

In sum, BLM entirely failed to consider how the Proposed Repeal will fulfill its important statutory mandates to prevent waste and ensure the safe and responsible development of oil and gas on public lands or provide any “good reasons” for its drastic change in position. *See State Farm*, 463 U.S. at 43; *Fox*, 556 U.S. at 515. The unexplained inconsistencies between the Waste Prevention Rule and the Proposed Repeal constitute “a reason for holding an interpretation to be an arbitrary and capricious change.” *Nat’l Cable & Telecomms. Ass’n*, 545 U.S. at 981.

II. BLM’s Reliance on Executive Order 13783 and Secretarial Order 3349 to Justify the Proposed Repeal Fails to Provide the “Reasoned Explanation” Required by the APA.

The primary rationale cited by BLM for the Proposed Repeal is direction from Executive Order 13783 and Secretarial Order 3349 to rescind any rules that unnecessarily burden domestic energy production, constrain economic growth, and prevent job creation. 83 Fed. Reg. at 7,924, 7,925. However, BLM’s decision to rely on these orders to justify the Proposed Repeal fails to provide the “reasoned explanation” required by the APA. In fact, the record demonstrates that the Waste Prevention Rule will impose minimal, insignificant costs on operators and will, in fact, increase energy production from BLM leases on federal and Indian lands.

Executive Order 13783 directs agencies to review regulations that “unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.” Executive Order 13783, Sec. 1, 82 Fed. Reg. 16,093 (Mar. 31, 2017). The Executive Order further defines to “burden” as “to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.” *Id.*, Sec. 2(b). Secretarial Order No. 3349, which was promulgated just one day after Executive Order 13783, directs BLM to review the Waste Prevention Rule to determine whether it is consistent with Section 1 of Executive Order 13783.

As discussed above, BLM’s initial review pursuant to Executive Order 13783 allegedly found that the Rule “was inconsistent with the policy stated in EO 13783 that ‘it is in the national interest to promote clean and safe development of our nation’s vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.’” 82 Fed. Reg. at 50,535; *see* 83 Fed. Reg. at 7,925. However, this “initial review” has not been made public and is otherwise not part of the rulemaking record. Moreover, elsewhere BLM states that the Proposed Repeal will not “significantly impact the price, supply, or distribution of energy,” or “substantially alter the investment or employment decisions” of operators. 83 Fed. Reg. at 7,939, 7,940. BLM’s

regulatory impact analysis for the Proposed Repeal, which draws heavily from the same analysis conducted for the 2016 Rule, provides similar conclusions. *See* 2018 RIA at 48; 52. Furthermore, the Waste Prevention Rule will actually increase the production of natural gas from federal and Indian lands while having a minimal impact on oil production. *See* 81 Fed. Reg. at 83,014; 83 Fed. Reg. at 7,939 (BLM estimating 299 Bcf of forgone natural gas production that would have been produced and sold under the 2016 Rule as a result of the Proposed Repeal).

Consequently, the record demonstrates that the Waste Prevention Rule does not “burden the development of domestic energy resources,” “or encumber energy production, constrain economic growth, and prevent job creation.” Moreover, considering the increased pollution that will result from the Proposed Repeal, BLM has failed to address the other provisions of Executive Order 13783, including that “all agencies should take appropriate actions to promote clean air and clean water for the American people.” *See* Executive Order 13783, Section 1(d), 82 Fed. Reg. at 16,093. The Northern District of California recently rejected the same rationale provided by BLM to justify the Suspension Rule. *California v. BLM II*, 286 F. Supp. 3d at 1067.

There is also no basis for BLM’s statements that the Rule imposes “substantial” compliance costs that were “underestimated” by the prior rulemaking. 83 Fed. Reg. at 7,926, 7,928. When it promulgated the Waste Prevention Rule, BLM conducted a regulatory impact analysis (“2016 RIA”) and found that implementation costs for “individual operators would be small, even for businesses with less than 500 employees.” *See* 81 Fed. Reg. at 83,013. Specifically, BLM estimated that average costs for a “representative small operator” would “result in an average reduction in profit margin of 0.15 percentage points.” *Id.* at 83,013-14 (citing 2016 RIA at 129).

While BLM now suggests that such costs may have been underestimated, 83 Fed. Reg. at 7,925, 7,928, its 2018 RIA for the Proposed Repeal admits that the agency did not change its assumptions and calculations with regard to the compliance costs of the Rule, with the exception of a minor increase in the “administrative burdens” to industry and BLM. *See* 2018 RIA at 30 (“we have not revisited the estimated compliance costs or cost savings at this time”); *id.* at 29 (“this RIA generally uses the same underlying assumptions as in the RIA prepared for the 2016 final rule, published in November 2016”). Not surprisingly, just like its 2016 findings, BLM concludes that the Proposed Repeal will increase the profit margin for small operators by just 0.19 percentage points, and admits that such an amount is insignificant. 2018 RIA at 2, 53 (increase in profit margin is “unlikely to achieve the level of being significant”); 60 (“BLM believes that the proposed rule would not have a ‘significant economic impact on a substantial number of small entities’”); 83 Fed. Reg. at 7,941 (same).

Just two months ago, the Northern District of California rejected an identical rationale provided by BLM to justify its Suspension Rule. In particular, the court found that given the costs of the Waste Prevention Rule and the savings from the Suspension Rule “both represent a fraction of a percentage point” for even the smallest operators, “BLM’s concern that small operators’ ability to maintain or economically operat[e] their wells would be jeopardized is unfounded.” *California v. BLM II*, 286 F. Supp. 3d at 1066. The court held that “BLM is simply

‘casually ignoring’ all of its previous findings and arbitrarily changing course,” and that “Plaintiffs have shown a reasonable likelihood of success on the merits of their claim that the Suspension Rule is not grounded in a reasoned analysis and is therefore arbitrary and capricious.” *Id.* at 1068.

BLM also expresses “concern” that the Rule will impact “marginal or low-producing” wells, which it claims are “less likely to remain economical to operate” if subject to additional compliance costs. 83 Fed. Reg. at 7,924, 7,926. Yet BLM fails to provide any analysis or data to show that such wells would be forced to close or would not receive the many economic exemptions in the Rule where compliance with certain requirements “would impose such costs as to cause the operator to cease production and abandon significant recoverable oil reserves under the lease.” *See, e.g.*, 43 C.F.R. § 3179.102(c) (exemption from requirements related to well completion); § 3179.201(b)(4) (exemption from pneumatic controllers requirements); § 3179.202(f) (exemption from pneumatic diaphragm pump requirements); § 3179.203(c)(3) (exemption from storage vessels requirement); § 3179.303(c) (operator may request approval of a leak detection program that does not meet criterion specific in § 3179.303(b)); § 3179.8(a) (operator may request lower capture percentage). The 2018 RIA simply expresses “[u]ncertainty associated with the impacts on marginal and low-production wells” and provides only a qualitative discussion of the potential impacts of the Rule. 2018 RIA at 36, 55-57. BLM cited similar “concern” regarding marginal wells in promulgating the Suspension Rule, which the Northern District of California rejected as a justification because “BLM fails to point to any factual support underlying its concern.” *California v. BLM II*, 286 F. Supp. 3d at 1065-66.

By BLM’s own admission, the Waste Prevention Rule does not impose significant compliance costs on industry and likely has no impact on the development of federal oil and gas resources. Given that BLM also recently found that the Rule would “enhance our nation’s natural gas supplies, boost royalty receipts for American taxpayers, tribes, and States, reduce environmental damage from venting, flaring, and leaks of gas, and ensure the safe and responsible development of oil and gas resources,” 81 Fed. Reg. at 83,009, its rationale for the Proposed Repeal runs counter to the evidence before the agency and fails to provide a reasoned basis for repealing the Rule’s requirements. *See State Farm*, 463 U.S. at 42-43. Moreover, BLM’s “[d]ivergent factual findings...raise questions as to whether the agency is fulfilling its statutory mandates impartially and competently.” *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010).

In sum, BLM’s alleged compliance with Executive Order 13783 or Secretarial Order 3349 is contracted by the record and cannot provide the reasoned basis for the Proposed Repeal required by the APA. *State Farm*, 463 U.S. at 42. As the Northern District of California recently stated in rejecting BLM’s attempt to postpone certain requirements of the Waste Prevention Rule, “[n]ew presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and ‘address [the] prior factual findings’ underpinning a prior regulatory regime.” *California v. BLM I*, 277 F. Supp. 3d at 1123 (quoting *Organized Village of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015)). No such explanation has been provided here.

III. BLM's Regulatory Impact Analysis for the Proposed Repeal Is Arbitrary and Capricious.

The Proposed Repeal is also arbitrary and capricious because it improperly calculates the costs and benefits of the Waste Prevention Rule based on an inherently flawed regulatory impact analysis. *See Center for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1149 (N.D. Cal. 2006) (finding it arbitrary and capricious for agency's economic analysis "to rely on a critical assumption that lacks support in the record to justify" decision); *California v. BLM I*, 277 F. Supp. 3d at 1123 ("Defendants' failure to consider the benefits of compliance with the provisions that were postponed, as evidenced by the face of the Postponement Notice, rendered their action arbitrary and capricious and in violation of the APA."). Under the APA, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted).

As a justification for the Proposed Repeal, BLM claims that "the 2016 final rule is more expensive to implement and generates fewer benefits than initially estimated," and it now claims that the Rule's costs would exceed its benefits. 83 Fed. Reg. at 7,925-26. This conclusion differs from the 2016 Rule primarily because BLM now arbitrarily relies on an "interim domestic Social Cost of Methane" metric that greatly undervalues the impacts of increased methane emissions by failing to consider the full, global impacts of these emissions. 2018 RIA at 2, 71-73. This new interim measure instead considers only "domestic" impacts and assumes that "U.S. damages are approximated as 10% of the global values"—effectively dismissing 90% of the costs of increased methane emissions. *Id.* The effect of this swap is to significantly reduce the estimated benefits of the Waste Prevention Rule, rendering them lower than largely-unchanged compliance costs, without reasoned justification or basis in the record.

BLM claims that it relied on this "interim" measure because Executive Order 13783 "disbanded the earlier Interagency Working Group on Social Cost of Greenhouse Gases (IWG) and withdrew the Technical Support Documents upon which the RIA for the 2016 final rule relied for the valuation of changes in methane emissions." 83 Fed. Reg. at 7,928. However, Executive Order 13783 still requires agencies to "monetiz[e] the value of changes in greenhouse gas emissions" and ensure that such estimates are "consistent with the guidance contained in OMB Circular A-4." 82 Fed. Reg. at 16,096. OMB Circular A-4, in turn, requires that agencies use "the best reasonably obtainable scientific, technical, and economic information available. To achieve this, you should rely on peer-reviewed literature, where available." OMB Circular A-4 at 17.

Consequently, even though Executive Order 13783 disbanded the IWG and withdrew the technical support documents upon which the prior calculation was based, the IWG's approach continues to represent the best available science in monetizing the impacts of changes in greenhouse gas emissions. The Social Cost of Greenhouse Gases was first developed by federal agencies under President George W. Bush, and the IWG was specifically organized to develop a

single, harmonized value for federal agencies to use in their regulatory impact analyses under Executive Order 12866. This approach was developed over several years, through robust scientific and peer-reviewed analyses and public processes.

By contrast, BLM's "interim" measure lacks substantial analysis, much less peer review, and arbitrarily ignores nearly 90% of the costs imposed by methane emissions. As BLM itself admits, "[t]he SC-CH₄ estimates presented by the BLM for this rule are interim values for use in regulatory analyses until an improved estimate of the impacts of climate change to the U.S. can be developed." 83 Fed. Reg. at 7,928. BLM's substitution of the IWG's social cost of methane with an unvetted and outcome-driven "interim" measure is arbitrary and capricious.

Moreover, the best available science does not support the use of a "domestic-only" value of the social cost of greenhouse gas emissions. BLM's interim estimate approximates "U.S. damages" as 10% of the global values, as reported in a 2017 paper by William D. Nordhaus. 2018 RIA at 71.⁵ However, even the Nordhaus paper demonstrates that such estimates vary based on the model used, and the author himself states that "regional damage estimates are both incomplete and poorly understood," and "[a] key message here is that there is little agreement on the distribution of the SCC by region."

Furthermore, neither Executive Order 13783, OMB Circular A-4, or Executive Order 12866 allow BLM to completely ignore international impacts in its 2018 RIA. To the contrary, OMB Circular A-4 specifically recognizes that a regulation may "have effects beyond the borders of the United States," and states that an agency's economic analysis should encompass "all the important benefits and costs likely to result from the rule," including "any important ancillary benefits."⁶ Further, OMB Circular A-4 provides guidance for the implementation of Executive Order 12866, which directs agencies to assess "*all* costs and benefits" of regulatory actions. Executive Order 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (emphasis added). Consequently, it was arbitrary and capricious for BLM to completely ignore the global costs of increased methane emissions that will result from the Proposed Repeal.

Furthermore, the seven percent discount rate used in 2018 RIA is also contrary to the best available science. Established economic analyses have discounted future damages from greenhouse gases at rates from two and a half percent to five percent, a range that captures uncertainty in future impacts and intergenerational equity. Because of the long life of greenhouse gases and the long-term, irreversible consequences of climate change, the effects of emissions today will be felt for many years into the future. In fact, as OMB explained in 2015,

⁵ Nordhaus, William D., "Revisiting the social cost of carbon," Proceedings of the National Academy of Sciences of the United States, 114(7) (2017), at 1518-1523, *available at*: <http://www.pnas.org/content/114/7/1518.full.pdf>.

⁶ Office of Management and Budget, Circular A-4 (Sept. 17, 2003), *available at*: https://www.whitehouse.gov/omb/circulars_a004_a-4.

“the use of 7 percent is not considered appropriate for intergenerational discounting. There is wide support for this view in the academic literature, and its is recognized in Circular A-4 itself.”⁷ The Proposed Repeal fails to provide a reasonable justification for adding consideration of a seven percent discount rate.

Finally, the 2018 RIA fails to provide any weight to the unquantified, foregone benefits of repealing the Waste Prevention Rule, such as the public health consequences of many additional tons of VOC emissions, and visual and noise impacts on local communities from flaring. As OMB Circuit A-4 provides, “When there are important non-monetary values at stake, you should also identify them in your analysis so policymakers can compare them with the monetary benefits and costs. When your analysis is complete, you should present a summary of the benefit and cost estimates for each alternative, including the qualitative and non-monetized factors affected by the rule, so that readers can evaluate them.” OMB Circular A-4 at 3. BLM has failed to consider such impacts in its Proposed Repeal.

IV. BLM’s New Policy Determination and Definition of “Waste of Oil or Gas” Lacks Any Statutory Basis and Is Arbitrary and Capricious.

In addition to repealing the key requirements of the Waste Prevention Rule, BLM announces a new “policy determination” that “it is not appropriate for ‘waste prevention’ regulations to impose compliance costs greater than the value of the resource they are expected to conserve,” and proposes to add a new definition of “waste of oil or gas” to include this language. 83 Fed. Reg. at 7,928, 7,933. However, there is no basis in the MLA or BLM’s other statutory authorities to condition waste prevention on these terms. Moreover, this proposed definition is contrary to BLM’s existing definition of “waste” found elsewhere in its regulations, and its implementation is unworkable given the variability of company sizes and oil and gas price fluctuations.

BLM’s proposed redefinition of “waste,” expanded to include a market-based approach to regulation, conflicts with its governing statutes. Section 187 of the MLA, 30 U.S.C. § 187, provides that oil and gas leases issued by BLM *must* contain a provision for “the prevention of undue waste.” In addition, Section 225 of the MLA, 30 U.S.C. § 225, requires BLM to ensure that lessees “use all reasonable precautions to prevent waste” of oil or gas being developed on public lands. These requirements to prevent waste of public resources, enacted by Congress almost 100 years ago, contain no such cost considerations or limitations based on the self-interest of operators.⁸ Similarly, FLPMA requires BLM, “by regulation or otherwise, [to] take action necessary to prevent unnecessary or undue degradation of [public] lands,” with no mention of a market-based approach to prevent such degradation. *See* 43 U.S.C. § 1732(b).

⁷ Interagency Working Group on the Social Cost of Carbon, Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12,866 at 36 (July 2015).

⁸ As discussed above, BLM has already determined that the requirements of the Waste Prevention Rule are “economical, cost-effective, and reasonable.” 81 Fed. Reg. at 83,009.

BLM's proposed redefinition conflicts with its established definition of "waste of oil or gas" that has been in effect since at least 1982. *See* 47 Fed. Reg. 47,758 (Oct. 27, 1982) ("Oil and Gas Operating Regulations," Final rulemaking). Specifically, 43 C.F.R. § 3160.0-5 defines "waste of oil or gas" to mean:

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

Furthermore, in managing public oil and gas resources, BLM is required to ensure that all "operations be conducted in a manner which protects other natural resources and the environmental quality, protects life and property and results in the *maximum ultimate recovery of oil and gas with minimum waste* and with minimum adverse effect on the ultimate recovery of other mineral resources. 43 C.F.R. § 3161.2 (emphasis added). BLM's new policy determination and proposed definition directly conflict with these existing regulations.

Finally, BLM's proposed definition is arbitrary and unworkable. The differing sizes of oil and gas companies, the varying percentages of waste compared to overall costs, and the fluctuation of oil and gas market prices will make compliance with this proposed definition virtually impossible to determine. For example, BLM has identified "up to 1,828 entities that operate Federal and Indian leases," and found that "for 26 small companies, the estimated per-entirety reduction in compliance costs would result in an average increase in profit margin of 0.19 percentage points." 2018 RIA at 53. For larger companies, the compliance costs will likely be an even smaller fraction of the profit margin, and BLM admits that some companies are already pursuing waste reduction measures "on a voluntary basis." 83 Fed. Reg. at 7,928. BLM's proposal also makes compliance arbitrarily dependent on fluctuating natural gas prices, which can vary greatly over time.⁹

⁹ *See, e.g.*, U.S. Energy Information Administration, Monthly Energy Review (Mar. 27, 2018), Table 9.10 (Natural Gas Prices), *available at*: https://www.eia.gov/totalenergy/data/monthly/pdf/sec9_15.pdf; U.S. Energy Information Administration, "Factors Affecting Natural Gas Prices (Aug. 23, 2017), *available at*: "https://www.eia.gov/energyexplained/index.cfm?page=natural_gas_factors_affecting_prices.

CONCLUSION

In sum, BLM has failed to articulate a valid basis for repealing the requirements of a rule that it recently found was necessary to fulfill its statutory mandates to prevent waste, increase royalty receipts for American taxpayers, and ensure the safe and responsible development of oil and gas resources on federal and Indian lands. BLM should not move forward with its Proposed Repeal and instead should retain the Waste Prevention Rule in its entirety.

Sincerely,



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