THE ATTORNEYS GENERAL OF CALIFORNIA, NEW MEXICO, COLORADO, CONNECTICUT, MARYLAND, NEW JERSEY, NEW YORK, AND OREGON

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Director (630), Bureau of Land Management
1849 C St. NW
Room 5646
Washington, DC 20240

Comments submitted electronically via https://www.regulations.gov, docket ID BLM-2022-0003[1]

RE: Comments on the Proposed "Waste Prevention, Production Subject to Royalties, and Resource Conservation" Rule, 87 Fed. Reg. 73,588, Regulation Identifier Number: 1004–AE79

Dear Ms. Daniel-Davis:

The Attorneys General of California,[2] New Mexico, Colorado, Connecticut, Maryland, New Jersey, New York, and Oregon ("Joint State Commenters"), submit these comments in support of the proposed revisions to the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule, 87 Fed. Reg. 73,588 (Nov. 30, 2022) ("Proposed Rule"). The Proposed Rule provides a commonsense and much-needed update to the Bureau of Land Management's ("BLM") rules governing the waste of natural gas and royalty payments from mineral leases administered by BLM.

The Joint State Commenters commend BLM's efforts to modernize its waste prevention rule and fulfill its statutory mandates to prevent waste and protect the public welfare by ensuring the environmentally responsible development of oil and gas resources on federal and tribal lands. The Proposed Rule is an essential update to a decades-old regulatory framework that is legally sound, includes important requirements and financial incentives to reduce waste, and will result in additional captured gas that provides environmental, public health, and monetary benefits to the public. For all of these reasons, the above listed Attorneys General support and urge finalization of the Proposed Rule as a rational approach to ensure the safe and responsible development of oil and gas resources.

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[1] These comments are also submitted in regard to the Environmental Assessment for the Proposed Rule, docket number BLM-2022-0003-0003.

[2] 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*, 11 Cal.3d 1, 14-15 (1974).

FACTUAL AND LEGAL BACKGROUND

I. The Original 1980 Waste Prevention Rule

The regulations governing flaring, venting, and royalties associated with the production of oil and gas on federally leased lands are contained in "Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases: Royalty or Compensation for Oil and Gas Lost" ("NTL-4A"). Promulgated in January 1980, NTL-4A requires operators to pay royalties on "avoidably lost" gas, meaning gas lost due to operator negligence, failure to take reasonable precautions to prevent or control the loss, or failure to comply with lease terms or other obligations. 87 Fed. Reg. at 73,594. Among its other provisions, NTL-4A expressly authorizes royalty-free venting and flaring "on a short-term basis" during emergencies and certain tests, and allows BLM to approve flaring where conservation of the gas is not "economically justified." *Id.* To evaluate the feasibility of conservation measures for gas, NTL-4A requires BLM to consider the "economics of a field-wide plan." *Id.* Further, NTL-4A specifies that the loss of vapors from gas tanks is considered an unavoidable loss, unless BLM determines that the "recovery of such vapors would be warranted." *Id.*

Subsequent implementing guidelines provided guidance on the economic standard for obtaining approval to flare, clarifying that the fact that the capture and sale of gas would not pay for itself was not sufficient to meet this standard. *Id.* This indicated that BLM intended its standard for approving royalty-free flaring to be demanding, and BLM originally applied it as such. *Id.* However, this policy changed with Instruction Memorandum No. 87-652 (Aug. 17, 1987), which required BLM to give the operator an opportunity to demonstrate, after the fact, that capturing the gas was not economically justified. The number of applications for royalty-free flaring increased dramatically, from only 50 in 2005 to 4,181 in 2015. *Id.*

Due to the substantial increase in flaring, the growing number of applications to flare royalty-free, and new information regarding the quantities of gas lost through venting and flaring, BLM recognized the need to update these regulations, and attempted to do so in 2016. However, due to many legal challenges and changes in federal government administrations, the 2016 Rule has since been vacated and NTL-4A remains the governing rule.

II. 2016 Waste Prevention Rule and Subsequent Challenges

BLM finalized the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Waste Prevention Rule" or "Rule") in November 2016, after conducting a multi-year process of stakeholder engagement, analysis, and review of thousands of public comments. 81 Fed. Reg. 83,008, 83,010 (Nov. 18, 2016). In promulgating the Rule, BLM recognized that the NTL-4A regulations required updating because they preceded the development of new technologies, such as directional drilling and hydraulic fracturing techniques, that had significantly affected both the manner and volume of gas produced and wasted. BLM determined that the prior regulations were inadequate to prevent the waste of publicly-owned resources and that the volume of natural gas lost during production on public and tribal lands was "unacceptably high." *Id.* at 83,009-10, 83,015.

On the same day the Rule was issued, it was challenged in federal district court by the States of Wyoming and Montana, which alleged that the Rule was an unlawful attempt to impose air quality regulations under the "guise" of waste prevention and that BLM lacked the authority to promulgate the Rule. *Wyoming, et al. v. U.S. Dep't of Interior, et al*, No. 16-cv-0285 (D. Wyo. 2016). Industry groups brought a similar challenge in *Western Energy Alliance, et al. v. Jewell*, No. 16-cv-280 (D. Wyo. 2016), and the cases were consolidated. In December 2016, the states of California and New Mexico intervened as respondents in defense of the Waste Prevention Rule. In January 2017, the District of Wyoming denied petitioners' motion to preliminarily enjoin the Rule prior to its effective date of January 17, 2017, finding that the petitioners had not shown a "clear and unequivocal right to relief." This case was subsequently stayed pending the developments described below.

III. 2017 Postponement and Suspension Rules

After the change in administrations in January 2017, then-President Trump issued Executive Order 13783, "Promoting Energy Independence and Economic Growth," in March 2017. Among other things, the Order directed BLM to review the Waste Prevention Rule and, if appropriate, publish proposed and final rules suspending, revising, or rescinding it in whole or in part. This resulted in two attempts to delay implementation of the Rule, both of which were overturned by federal courts.

First, in June 2017, BLM issued a final rule delaying the January 2018 compliance date of certain sections of the Waste Prevention Rule, citing a provision of the Administrative Procedures Act ("APA") allowing agencies to postpone the effective date of rules under certain circumstances, 82 Fed. Reg. 27,430 (June 15, 2017) (the "Postponement Notice"). California and New Mexico challenged this action, and in October 2017 the court vacated the Postponement Notice, holding that compliance dates are distinct from effective dates and that the plain language of the APA does not permit an agency to "postpone" a rule that has already gone into effect. *California, et al v. BLM*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

Second, in December 2017, BLM published a final rule suspending or postponing certain provisions of the Waste Prevention Rule until January 17, 2019, 82 Fed. Reg. 58,050 (Dec. 8, 2017) (the "Suspension Rule"). California and New Mexico challenged this rule as well, and on February 22, 2018, the court preliminarily enjoined the Suspension Rule. *California, et al. v. BLM*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018). In finding that the plaintiffs were likely to succeed on the merits of their claims that the Suspension Rule was arbitrary and capricious, the court determined, among other things, that: BLM had provided no analysis or factual data in support of its newfound concern that the Waste Prevention Rule would jeopardize the operation of marginal wells; BLM's purported concerns with the Rule's economic impacts on small operators was contradicted by the agency's own analysis under the Regulatory Flexibility Act; BLM had provided no factual support for the purported concern that the Rule would decrease royalties, in contradiction of the 2016 Regulatory Impact Analysis showing a significant *increase* in royalties; and BLM had not pointed to any facts justifying the assertion that the Rule would encumber energy production. *Id.* at 1065-1068. BLM appealed the decision, but the case was rendered effectively moot by the Rescission Rule discussed below, and was ultimately dismissed

by stipulation of the parties. *Sierra Club, et al. v. BLM*, 17-cv-7186, Dkt. 129 (N.D. Cal, Mar. 29, 2019).

IV. 2018 Rescission Rule

In September 2018, BLM issued a final rule eliminating most of the substantive provisions of the Waste Prevention Rule, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (the "Rescission Rule"). Specifically, the provisions rescinded included requirements for (1) waste minimization plans, (2) gas capture percentages, (3) well drilling, (4) well completion and related operations, (5) pneumatic controllers, (6) pneumatic diaphragm pumps, (7) storage vessels, and (8) leak detection and repairs. California and New Mexico challenged the Rescission Rule in federal district court, and on July 15, 2020, after thorough briefing and a hearing, the court vacated the Rescission Rule as unlawful under the National Environmental Policy Act ("NEPA") and other statutes, and in violation of the APA's requirements for reasoned decision-making. *California v. Bernhardt*, 472 F. Supp. 3d 573 (N.D. Cal. 2020).

Among the key findings of the court was that the definition of "waste" underlying the Rescission Rule – which deemed waste to not occur if the cost of conserving oil or gas exceeded the value of the oil or gas – contradicted the plain language and legislative history of the relevant statutes. Examining the language of the Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 181 *et seq*., the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*., and the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"), 30 U.S.C. § 1701 *et seq*., the court held that "[t]he statutory language demonstrates on its face that any consideration of waste management limited to the economics of individual well-operators would ignore express statutory mandates concerning BLM's public welfare obligations." *Id.* at 596. The court also pointed out that certain provisions of the Rescission Rule were inconsistent with this newly adopted definition, such as the elimination of requirements for low-bleed pneumatic controllers even though the compliance costs of such devices are less than the value of the gas they save. *Id.* at 599. The court thus held the Rescission Rule's definition of waste to be both an impermissible interpretation of the MLA and unsupported by a reasoned explanation, as required by the APA. *Id.* at 593-601.

The court also found that the following aspects of the Rescission Rule failed to meet APA's requirements for reasoned decision-making and public input:

- The provisions granting deference to *any* state or tribal waste regulations for the flaring of gas and only applying BLM requirements where a state or tribe had no applicable regulations, without any analysis of the sufficiency of such state or tribal regulations;
- The purported justification of the Rescission Rule as needed to reduce undue regulatory burden, contrary to factual findings that did not differ in any material way from those underlying the Waste Prevention Rule;
- The use of an "interim domestic" social cost of methane standard that ignored global climate impacts on American financial and geopolitical interests, which was unsupported by expert opinion and outside the expertise of the agency;

- The failure to quantify and monetize the environmental benefits foregone by the Rescission Rule, resulting in a skewed cost-benefit analysis; and
- The overstatement of the Waste Prevention Rule's compliance costs, and the arbitrary discounting of evidence that operators were able to comply with the Rule during the period it was effective.

Id. at 601-618.

In addition, the court found that BLM had failed to satisfy its obligations under NEPA to take a "hard look" at environmental impacts of its action with respect to public health and tribal communities, climate impacts, and cumulative impacts of the fossil fuel program for federal and tribal lands. *Id*. It also found that BLM erred by preparing an Environmental Assessment rather than an Environmental Impact Statement. *Id*.

BLM, the State of Wyoming, and industry groups appealed the district court's decision to the Ninth Circuit Court of Appeals. The parties have agreed to keep those appeals in administrative closure and delay briefing pending BLM's development of its revised Waste Prevention Rule for oil and gas operations on BLM-administered lands.

V. Vacatur of the 2016 Rule

Following the decision in *California v. Bernhardt*, the Wyoming court lifted the stay in the challenge to the 2016 Waste Prevention Rule, and soon thereafter issued a decision vacating that Rule. *Wyoming v. United States Dep't of the Interior*, 493 F. Supp. 3d 1046 (D. Wyo. 2020). Fundamental to the court's decision was its finding that BLM had usurped the authority of the United States Environmental Protection Agency ("EPA") to regulate air quality by promulgating a rule primarily aimed at reducing methane emissions "under the guise of waste management." *Id.* at 1066. In support of that conclusion, the court pointed to: statements BLM made in the Rule's preamble regarding the effects of lost natural gas on climate and health; the Rule's preference for flaring over venting; its incorporation of EPA air quality regulations (New Source Performance Standards subparts OOOO and OOOOa) and its unilateral extension of those requirements to *existing* facilities; its requirement that states apply for a variance from BLM requirements in order to substitute state regulations; and the fact that BLM's cost-benefit analysis showed a net economic benefit only if climate impact benefits were included. *Id*. at 1063-70. Thus, while the court acknowledged that "BLM has authority to promulgate and impose regulations which may have ancillary air quality benefits and even overlap with CAA regulations if such rules are independently justified as waste prevention measures pursuant to its MLA authority," it found that the 2016 Rule did not pass that test. *Id.* at 1067.

The vacatur was also based in part on the court's finding that BLM had not provided a reasoned explanation for its change in interpretation of the meaning of "avoidably lost" waste. *Id.* at 1074. Specifically, the court faulted BLM for defining avoidable losses by reference to a specified list of *unavoidable* losses without considering case-by-case operator economics, allegedly in contradiction of BLM's longstanding definition of waste. This finding was also

related to the court's view of the Rule as an air quality rule in disguise—the court essentially held that an intent to "benefit the environment and improve air quality" could not constitute a reasoned explanation for a change in the interpretation of waste because such purposes were outside the scope of the agency's statutory authority. *Id.* The court also found that the Rule was arbitrary and capricious under the APA with respect to its assessment of impacts on marginal wells, the justification for gas capture requirements, and the reliance on global climate impacts to justify the Rule.

California and New Mexico have appealed this decision to the Tenth Circuit Court of Appeals. As with the appeal of the Rescission Rule vacatur, briefing in this case is suspended pending BLM's anticipated finalization of the revised Waste Prevention Rule.

VI. The Proposed Rule

Following the change in administrations in January 2021, BLM indicated that it planned to revise the Waste Prevention Rule again. The 2022 Proposed Rule is the latest version of BLM's Waste Prevention Rule that will replace the outdated NTL-4A. The Proposed Rule includes several important improvements, including specific affirmative obligations that oil and gas operators must take to avoid wasting oil and gas resources on BLM-administered lands. 87 Fed. Reg. at 73,589. The Proposed Rule also allows BLM to specify further waste reduction measures as conditions of approval for drilling permits or requirements for ongoing exploration and production operations. *Id.* Further, the Proposed Rule requires operators to submit waste minimization plans with all drilling permit applications, clarifies when oil and gas can be "unavoidably lost" and therefore not subject to royalty payments, and establishes monthly volume limits on royalty-free flaring. *Id.*

STATES' INTERESTS IN THE PROPOSED RULE

The Joint State Commenters have strong interests in the Proposed Rule and its implementation. California and New Mexico have been involved in BLM's process to update its Waste Prevention Rule since at least 2016, when both states intervened in challenges to the 2016 Rule brought in the District of Wyoming. *See 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). Both states have been actively involved in subsequent litigation, as described above. As such, both states have a significant interest in the Proposed Rule since it will almost certainly impact the pending appeals. California and New Mexico have additional significant interests in the Proposed Rule beyond the pending litigation, as do the other Joint State Commenters.

I. California

California has a strong interest in the Proposed Rule and its implementation because of the vast amount of BLM-administered land in California and the benefits that will result from the Proposed Rule. BLM administers 15.2 million acres of public lands in California, equal to nearly 15 percent of the state. California is a prolific producer of oil on public lands, producing

about 8.5 million barrels annually, and also produces approximately 6 billion cubic feet of natural gas each year.[3] Although California's own state regulations adequately maintain the state's significant interest in preventing the waste of these valuable public resources, California maintains an interest in regulations that will implement a federal regulatory floor for the development of oil and gas resources on BLM-administered lands nationwide. In addition, Californians, like other US citizens, have an interest in obtaining a fair return from the production of oil and natural gas on public lands in their state in the form of royalties.

The Proposed Rule will also have positive environmental impacts that will greatly benefit Californians. As methane is a potent greenhouse gas with local and global impacts, Californians have an interest in reducing waste from oil and gas development on a national scale. California already experiences serious challenges due to climate change, including increased heat-related deaths, damaged coastal areas, disrupted ecosystems, more severe weather events, increased wildfires, and longer and more frequent droughts.[4] BLM estimates that the Proposed Rule will prevent methane emissions resulting in a monetized benefit to society of $427 million per year in avoided climate impacts.[5] 87 Fed. Reg. at 73,600. This is a significant amount of avoided climate impacts, and will contribute to the overall prevention and mitigation of climate-related harm in California.

II. New Mexico

In New Mexico, BLM administers 35.9 million acres of federal mineral land, including

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[3] "Natural Resources and Revenue Data," U.S. Dep't of the Interior, https://revenuedata.doi.gov/explore/?commodity=Gas%20%28mcf%29&dataType=Production&location=NF%2CNA%2CCA&mapLevel=State&offshoreRegions=false&period=Calendar%20Year&year=2021.

[4] "Climate Change Impacts in California," State of Cal. Dep't of Justice, https://oag.ca.gov/environment/impact.

[5] Joint State Commenters note that this figure is based on the "social cost of methane" currently used by the federal government, but that this number is likely too low for at least two reasons. First, the current metric uses a 3 percent "discount rate" to reduce the significance of social costs in the future. The higher the discount rate used, the lower the "social cost" figure. In 2021, the Interagency Working Group on the Social Cost of Greenhouse Gases ("IWG") acknowledged that "consideration of discount rates below 3 percent, including 2 percent and lower, are warranted when discounting intergenerational impacts." Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide, Interim Estimates Under Executive Order 13990, at 21. Therefore, the 3 percent rate used here is too high. Second, the current number does not account for "impact categories omitted from the models [that are used to generate the social cost figure]… To name just one example of many known GHG-induced damages omitted … none of the models include damages associated with ocean acidification." *Id.* at 27. Therefore, the Intergovernmental Panel on Climate Change has concluded that social cost of greenhouse gases estimates "very likely…underestimate the damage costs" due to omitted impacts. *Id.* at 31.

25.4 million acres of federal surface lands and 9.5 million acres with federal mineral rights under private lands.[6] Over half (57 percent) of all federal onshore oil production occurs in New Mexico, which is the second largest crude oil producing state after Texas.[7] The state contains approximately 9 percent of the United States' total proved crude oil reserves, and has "the second-largest number of federal leases and the largest number of producing oil and gas wells on federal lands."[8] New Mexico is also among the top 10 states in natural gas production, contains almost 6 percent of proved gas reserves in the country,[9] and accounts for 31 percent of federal onshore natural gas production.

New Mexico uses its 50 percent share of federal mineral leasing royalty payments for educational purposes. *See* NMSA 1978, § 22-8-34(A). Ensuring fair and adequate royalty recovery therefore serves vital state needs, giving New Mexico a strong interest in regulations governing how much oil and gas may be wasted royalty-free. According to a recent report by Taxpayers for Common Sense, from 2008-2017, oil and gas operators in New Mexico reported wasting 86.6 billion cubic feet ("bcf") of gas – more than 40 percent of all such waste reported on all federal lands nationwide – while paying royalties on only 47.5 bcf (55 percent) of the lost gas.[10]

Recognizing the need to minimize waste of a valuable resource in the face of technological and market developments, New Mexico has promulgated waste prevention regulations for the oil and gas industry that are among the most stringent in the nation. *See* 19.15.27.1 et seq. NMAC (2021). Those regulations:

- Prohibit routine venting and flaring;
- Require attainment of gas capture targets under which upstream and midstream operators, including pipelines, must attain a higher level of natural gas capture each year, culminating in 98 percent natural gas capture by the end of 2026;
- Give the state the authority to deny drilling permits if gas capture targets are not achieved; and
- Require operators to have plans in place for takeaway capacity at all wells.

New Mexico therefore has a strong interest both in ensuring that oil and gas in New Mexico is not wasted, and that federal regulations do not interfere with application of more stringent state regulations on federal mineral operations.

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[6] *Public Land Statistics 2021*, United States Department of the Interior, BLM, Table 1-3.
[7] U.S. Energy Information Administration, New Mexico overview page, https://www.eia.gov/beta/states/states/nm/analysis.
[8] *Id.*
[9] *Id.*
[10] New Mexico's Boom That Cost Billions: How Federal Oil & Gas Policies Fail Taxpayers at 2, available at https://www.taxpayer.net/wp-content/uploads/2019/06/TCS-New-Mexico-Federal-Lands-report-June-2019.pdf.

Finally, like all states and especially those in the arid southwest, New Mexico is experiencing the accelerating adverse impacts of climate change. To cite just a few examples, it is in the midst of a 20-plus year mega-drought believed by scientists to be the worst in 1200 years; its largest reservoir, Elephant Butte Lake, is presently at only 12.8 percent capacity, and its two largest wildfires in history – each over 300,000 acres – both occurred in 2022. New Mexico is taking aggressive action to reduce the causes of climate change, for example setting a statewide renewable energy standard of 50 percent by 2030 for New Mexico investor-owned utilities and rural electric cooperatives and a goal of 80 percent by 2040, in addition to setting zero-carbon resources standards for investor-owned utilities by 2045 and rural electric cooperatives by 2050. *See* New Mexico Energy Transition Act, 62-18-1 NMSA 1978, *et seq*. Thus while the purpose of the Proposed Rule is not to address climate change, it is entirely appropriate to consider the co-benefits of methane reduction when assessing the cost and benefits of the Rule as required by long-standing executive order.

III. Colorado

As a state with large amounts of BLM-managed land within its borders, Colorado and its citizens have a significant interest in ensuring that natural resources within its borders are used effectively. The proposed regulatory framework adopts a national floor, based on sound policy concerns, and provides states like Colorado with flexibility to impose a more protective standard. Colorado's regulatory framework for oil and gas production ensures that operators are required to follow standards that protect public health and will operate in tandem with this rule.

IV. Other States

Although the other states among the Joint State Commenters (Connecticut, Maryland, New Jersey, New York, and Oregon) do not have producing oil and gas leases on federal land, these states also maintain a compelling interest in the Proposed Rule. The residents of these states, as all United States residents, share an interest with the oil-and-gas-producing states in minimizing the waste of resources on public lands and in obtaining a fair return from extraction of oil and gas resources. These interests are not minimized by a lack of wells in an individual state. In addition, given the effect of methane on climate change,[11] these states have a significant interest in the Proposed Rule since it will prevent natural gas waste and therefore greatly reduce methane emissions.

COMMENTS IN SUPPORT OF THE PROPOSED RULE

I. The Proposed Rule Provides a Much-Needed Regulatory Update to Replace the Outdated NTL-4A.

The Proposed Rule recognizes that the decades-old NTL-4A is "ill-suited to address the

[11] *See, e.g.*, "Methane Emissions," https://www.epa.gov/ghgemissions/overview-greenhouse-gases.

large volume of flaring associated with the rapid development of unconventional tight oil and gas resources that has occurred in recent years." 87 Fed. Reg. at 73,588. This is in line with previous findings by BLM, even in different administrations, that noted the need to update "decades-old" requirements that are "outdated" and "needed to be overhauled." *See, e.g.*, 2016 Rule, 81 Fed. Reg. at 83,009; 2018 Revision/Rescission, 83 Fed. Reg. at 7,927. Moreover, the amount of venting and flaring from federal leases has increased dramatically from the 1990s to the 2010s, with an upward trend in flaring suggesting that it will continue to be an issue in coming years. 87 Fed. Reg. at 73,590. An increase of more than 30 bcf per year in venting and flaring between 2010 and 2020 illustrates the need for updated regulations. *Id.* A new rule is therefore both appropriate to respond to modern circumstances and necessary to prevent waste amid increasing amounts of venting and flaring.

Furthermore, a national floor for the regulation of venting and flaring on federally-leased land, like the Proposed Rule, is needed to ensure adequate protection of federal minerals wherever they are extracted. As recognized by BLM, the agency cannot rely on a "patchwork" of state and federal regulations to achieve its statutory duties to prevent waste, ensure a fair return to the public, and fulfill its trust responsibilities to Native American mineral owners. 87 Fed. Reg. at 73,599. At the same time, any federal regulation in this area must harmonize with BLM's longstanding recognition of the applicability of state regulations to oil and gas operations on federal lands. The Joint State Commenters note that one federal court found that BLM acted arbitrarily and capriciously in granting a "blanket variance" under which the federal rule gives way to any state or tribal waste regulation, regardless of the stringency of the state or tribal provisions and without analysis of whether they adequately prevent waste of federal minerals. *California v. Bernhardt*, 472 F. Supp. 3d at 603. The Proposed Rule avoids this pitfall by incorporating, like the 2016 Waste Prevention Rule, variance provisions that "set a federal floor, requiring states to show their regulations would 'perform at least equally well in terms of reducing waste of oil and gas,' and 'reducing environmental impacts from venting and or flaring of gas.'" *Id.*; *see also* 87 Fed. Reg. at 73620 (proposed 43 C.F.R. part 3170, § 3179.401(a)(2)(4)).

The Joint State Commenters also agree with BLM's determination that the Wyoming court's finding that the 2016 Rule's variance provisions violated the cooperative federalism framework of the Clean Air Act is not applicable to the Proposed Rule, because the Proposed Rule is exclusively targeted at and justified by waste prevention purposes, not air quality management. 87 Fed. Reg. at 73599, n. 89. In addition to providing for variances, however, the final Rule should recognize that state regulations that differ in kind from the federal Waste Prevention Rule – for example, state percentage-based gas capture requirements – are applicable on federal leases under principles of concurrent jurisdiction, without the need for a variance.[12]

[12] The New Mexico Energy, Minerals, and Natural Resources Department and New Mexico Environment Department are submitting joint comments on the Proposed Rule which provide further explication of these issues.

II. The Proposed Rule Includes Reasonable Requirements Calculated to Prevent Waste of Natural Gas and Obtain a Fair Return to Taxpayers Through Royalties.

One of the main objectives of the Proposed Rule is to impose requirements that are consistent with the "prudent operator" standard as that term has been applied in oil and gas jurisprudence. 87 Fed. Reg. at 73,597. Among the major requirements imposed are including waste minimization plans in drill permit applications, clarifying the circumstances when oil or gas can be "unavoidably lost," establishing monthly limits on royalty-free flaring, and imposing certain obligations on operators to prevent waste. The Proposed Rule provides sound explanations for how these requirements will result in significant waste reductions. *See, e.g.*, *id.* at 73,600-01 (discussion of waste minimization plans in Drilling Applications and Plans). Ultimately, the Proposed Rule provides commonsense, reasonable, and achievable precautions that operators can implement to prevent waste.

Additionally, the Proposed Rule's requirements do not impose undue compliance costs on operators. Although operators will face some compliance costs associated with the Rule, BLM determined that "per-entity, annualized compliance costs associated with this proposed rule are estimated to represent only a small fraction of the annual net incomes of the companies likely to be impacted." *Id.* at 73,611. The compliance costs to operators will exceed of the market value of the gas conserved, but this does not conflict with the Proposed Rule's purpose of preventing waste. Rather, as BLM correctly notes, it is simply a reflection that in some circumstances, where "an operator's interest in maximizing profits diverges from the public interests in maximizing resource recovery," regulation is necessary, especially where the operator bases decisions on a short time-horizon. *Id.* at 73,592.

Moreover, BLM addressed compliance costs in the 2016 Rule, and addresses compliance costs again in the Proposed Rule. For example, the Proposed Rule addresses compliance burdens on marginal wells by applying the requirements for pneumatic equipment only where a lease is producing enough oil or gas that it would offset the compliance costs within a reasonable payout period. *Id.* at 73,598. Therefore, these costs will not unduly burden operators, and are outweighed by the major benefits of the Proposed Rule in reducing waste of federal resources and increasing royalties payable to the public.

III. The Proposed Rule is Legally Sound.

The Proposed Rule reasonably relies on BLM's broad authority to regulate oil and gas exploration and production activities on federal lands under, in large part, the MLA, FLPMA, and FOGRMA statutes. As described in the Proposed 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. 87 Fed. Reg. at 73,592-93. 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 73,593; *see also 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 MLA 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." 30 U.S.C. § 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 FOGRMA, 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.

FLPMA provides BLM with broad authority to regulate "the use, occupancy, and development of the public lands." 43 U.S.C. § 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.

As such, it is well recognized that BLM has the duty and the authority to adopt regulations preventing wasteful venting, flaring, and leaks, ensuring that the public benefits from mineral production on federally-administered lands. *See* 30 U.S.C. §§ 225, 187 (MLA requires oil and gas lessees to "use all reasonable precautions to prevent waste of oil or gas developed in the land" and observe "such rules … for the prevention of undue waste"); 30 U.S.C. § 1756 (under FOGMA, lessees are liable for 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 [FOGRMA] or any mineral leasing law"). These statutes unambiguously grant BLM the authority to regulate oil and gas production activities for the prevention of waste. *See, e.g.*, *Western Energy Alliance, et al., v. Sec. of the United States. Dep't of the Interior, et al.*, Case No. 2:16-0280 [Dkt. No. 279, p. 20]. Accordingly, the Proposed Rule, which explains how the requirements will result in an additional 15.3 bcf of captured gas per year, is well reasoned to prevent waste of oil and natural gas, and falls well within BLM's regulatory authority.

Moreover, the Inflation Reduction Act ("IRA") provides BLM with additional authority to promulgate regulations such as the Proposed Rule. The IRA contains a suite of provisions specific to onshore and offshore oil and gas development under federal leases, and notably contains provisions to ensure lessees pay fair and appropriate compensation to the federal government in exchange for the opportunity to conduct activities under their leases. One such example is Section 50263, which provides that royalties are owed on all gas produced from federal land for leases issued after the date of enactment of the IRA, including gas that is

consumed or lost by venting, flaring, or negligent upstream releases. This unambiguous grant of authority to assess and collect royalties for waste of oil and gas on federal leases further supports BLM's ability to promulgate regulations to prevent waste and ensure a fair return to the public for the development of public resources.

Focusing on the substance of the Proposed Rule, the main objective of the Proposed Rule is to prevent natural gas waste through venting, flaring, and leaks, rather than improving air quality or achieving other environmental benefits. Although certain environmental benefits are mentioned in the Proposed Rule – including the benefits associated with reducing greenhouse gas emissions – the Proposed Rule stresses that this discussion is intended to present a full analysis of the total costs and benefits of the Proposed Rule to the public. 87 Fed. Reg. at 73,600. BLM has justified the Proposed Rule not on the grounds that it will help address climate change, but on the grounds that the Proposed Rule will prevent waste and update its outdated royalties provision. In addition, the cost-benefit analysis in the Regulatory Impact Analysis which monetizes the Proposed Rule's climate benefits was done to comply with Executive Order 12866, and is not required by the statutes that authorize BLM to regulate the prevention of waste from oil and gas leases. *See id.* at 73,599 n. 90.

IV. There Are Important Financial Benefits from the Proposed Rule.

The Proposed Rule will result in additional royalties that will provide a significant benefit to the public. BLM estimates that the Proposed Rule will increase royalty revenues from recovered and flared gas by up to $39 million per year. This is a significant amount payable to the public and provides an important benefit to taxpayers from the Proposed Rule.

V. The Proposed Rule Will Result in Important Environmental Benefits.

Although the goal of the Proposed Rule is not the prevention or mitigation of climate change, and BLM has expressly excluded the social cost of greenhouse gases from any of the proposed requirements, the Proposed Rule will still result in important environmental benefits. Namely, the Proposed Rule is predicted to capture about 15.3 bcf of gas per year, significantly reducing methane emissions that contribute to climate change. These avoided emissions, and thus avoided climate damages, will provide a monetized benefit of about $427 million per year to the public. This ancillary impact of the Proposed Rule is a substantial benefit to the public and a step in the right direction towards meeting some of the Joint State Commenters' climate goals.

Providing a co-benefit of improved air quality, which happens to be within another agency's jurisdiction, does not mean that the Proposed Rule encroaches on that agency's authority. As the district court in *Wyoming* noted: "Of course, BLM has authority to promulgate and impose regulations which may have ancillary air quality benefits and even overlap with CAA regulations if such rules are independently justified as waste prevention measures pursuant to its MLA authority." *Wyoming v. United States Dep't of the Interior*, 493 F. Supp. 3d at 1067. (citing *Massachusetts v. EPA*, 549 U.S. 497, 531-32 (2007)). For the reasons noted above, the Proposed Rule is so justified. With that in mind, we support the Proposed Rule as a necessary regulatory development that will also result in important climate-related benefits for the public.

CONCLUSION

The Joint State Commenters support the Proposed Rule as a much needed, commonsense, legally and environmentally sound update to BLM's Waste Prevention Rule. Therefore, we respectfully urge BLM to finalize the Proposed Rule as soon as possible.

Sincerely,

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