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Katharine S. MacGregor
Acting 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-AE54

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

RE: Comments on the Proposed Delay and Suspension of Final Rule, “Waste Prevention, Production Subject to Royalties, and Resource Conservation,” 82 Fed. Reg. 46,458 Regulation Identifier Number: 1004–AE54

Dear Ms. MacGregor:

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 delay and suspend certain requirements of its 2016 final rule governing the prevention of waste from oil and gas operations on federal and Indian lands. 82 Fed. Reg. 46,458 (Oct. 5, 2017) (“Proposed Suspension”). Promulgated less than 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.

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 delay and suspend 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 valid basis for suspending 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, nor has it explored alternatives to address any alleged deficiencies in the Rule. Moreover, BLM's stated justification of avoiding "substantial" compliance costs for operators to meet the requirements of the Rule is contradicted by its own findings that such costs are minor and represent a tiny fraction of the profit margin for even the smallest companies.

BLM's reliance on Executive Order 13783 and Secretarial Order 3349 also provides no basis for suspension or delay of the Waste Prevention Rule's requirements, given the agency's own admission that the Proposed Suspension will have no impact on energy development on federal or Indian lands. Furthermore, BLM has improperly predetermined the outcome of this Proposed Suspension, as exposed through its assurances in court filings — prior to considering any public comments on this issue — that the suspension is in essence a done deal. For all of these reasons, Attorney General Becerra and Attorney General Balderas strongly recommend that BLM halt its arbitrary rush towards delay and suspension, 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.

I. BLM Has Failed to Explain How Delay and Suspension 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.

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). Moreover, an agency cannot suspend a validly promulgated rule without first "pursu[ing]

available alternatives that might have corrected the deficiencies in the program which the agency relied upon to justify the suspension.” *Public Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984).

Applying these rules, in *Humane Soc. of U.S. v. Locke*, the Ninth Circuit vacated a National Marine Fisheries Service determination that contradicted earlier factual findings by the agency. 626 F.3d 1040, 1051 (9th Cir. 2010). The court noted that “[d]ivergent factual findings ... raise questions as to whether the agency is fulfilling its statutory mandates impartially and competently.” *Id.* at 1049. The Ninth Circuit also overturned an exemption to the Department of Agriculture’s roadless rule because the agency failed to justify a conclusion that contradicted factual findings it made on the same topic two years earlier. *Organized Village of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956 (9th Cir. 2015). The court emphasized that the agency had reached opposite conclusions “[o]n precisely the same record,” and that such an “unexplained inconsistency” was arbitrary and capricious. *Id.* at 966-67. The court went on to note that “even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.” *Id.* at 968.

As described in the Waste Prevention Rule, BLM is charged by statute with ensuring that the public benefits from mineral production on public lands by preventing waste of oil and gas resources and securing 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.

Furthermore, 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.

As BLM recognized in the Waste Prevention Rule, while oil and gas production in the United States has increased dramatically over the past decade due to technological advances such as hydraulic fracturing and directional drilling, the 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.” 81 Fed. Reg. at 83,009, 83,014. For example, between 2009 and 2015, nearly 100,000 oil and gas wells on federal land released approximately 462 billion cubic feet 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.

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, specifically 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.*

BLM responded to these reports by initiating the development of a rule in 2014 to update its existing regulations on these issues. *Id.* The final Waste Prevention Rule, promulgated in November 2016, 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 billion cubic feet 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 volatile organic compounds (“VOCs”), including benzene and other hazardous air pollutants, by 250,000–267,000 tons per year. *Id.*

The Proposed Suspension achieves none of BLM’s statutory mandates and, without explanation, simply ignores the important reasons articulated for promulgation of the Waste Prevention Rule less than one year ago. BLM provides absolutely no justification regarding how the Proposed Suspension 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 not be achieved. 82 Fed. Reg. at 46,464-65 (“BLM’s proposed rule would temporarily suspend or delay almost all of the requirements in the 2016 final rule that we estimated would generate benefits of gas savings or reductions in methane emissions.”).

While BLM claims that it “is exercising its inherent authority to reconsider the 2016 final rule,” *id.*, it has failed to provide any “reasoned analysis” for this drastic change in position. *See State Farm*, 463 U.S. at 43. The unexplained inconsistencies between the Waste Prevention Rule and the Proposed Suspension 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; *see also Fox*, 556 U.S. at 515. Moreover, BLM’s citation to *Ivy Sport Med., LLC v. Burwell*, 767 F.3d 81 (D.C. Cir. 2014) as a legal basis for this “inherent authority,” 82 Fed. Reg. at 46,460 n.3, is unhelpful given that the court was discussing an agency’s “authority for timely administrative reconsideration” and ultimately found that the agency had violated the APA by ignoring notice and comment requirements. *Ivy Sport Med.*, 767 F.3d at 86-89. BLM has also failed to consider alternative solutions to address any alleged problems with the Rule, such as through the issuance of guidance or making adjustments necessary to clarify certain provisions, rather than suspending the key provisions of the Rule. *See Public Citizen v. Steed*, 733 F.2d at 103.

II. BLM’s Primary Rationale for the Proposed Suspension Regarding Costs to Operators Does Not Justify Suspension of the Waste Prevention Rule and is Contradicted by the Agency’s Own Findings.

The primary rationale cited in the Proposed Suspension is that “BLM is currently reviewing the 2016 final rule and wants to avoid imposing temporary or permanent compliance costs on operators for requirements that may be rescinded or significantly revised in the near future.” 82 Fed. Reg. at 46,458. However, this is not a legitimate basis for suspending the requirements of a validly promulgated rule. In the rulemaking record for 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 it may have “underestimated costs” and that the Rule “poses a substantial burden on industry,” 82 Fed. Reg. at 46,459, its updated regulatory impact analysis (“2017 RIA”) for the Proposed Suspension admits that the agency has “not revisited the estimated compliance costs of the 2016 final rule.” 2017 RIA at 25. To the contrary, BLM’s new analysis “draws heavily” on the previous analysis conducted for the final Rule, concludes that the Proposed Suspension will increase the profit margin for small operators by just 0.17 percentage points, and admits that such an amount is insignificant. 2017 RIA at 2, 45 n.30 (increase in profit margin is “unlikely to achieve the level of being significant”); *see* 82 Fed. Reg. at 42,465 (“We do not believe that the proposed rule would substantially alter the investment or employment decisions of firms”), 42,466 (“BLM believes that the proposed rule would not have a significant economic impact on a substantial number of small entities... [T]he average reduction in compliance costs associated with this proposed rule would be a small fraction of a percent of the profit margin for small companies, which is not a large enough impact to be considered significant.”).

In sum, 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 Suspension runs counter to the evidence before the agency and fails to provide a reasoned basis for suspending 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.” *Locke*, 626 F.3d at 1049.

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

BLM also contends that its ongoing review of the Waste Prevention Rule, during which time it seeks to delay or suspend the Rule’s requirements, is based on direction from Executive Order 13783 and Secretarial Order 3349 to review any rules that unnecessarily burden domestic energy production. 82 Fed. Reg. at 46,459.³ However, BLM’s decision to rely on these orders

³ BLM also cites direction from Executive Order 13771, entitled “Reducing Regulation and Controlling Regulatory Costs,” which requires federal agencies to take proactive measures to reduce the costs associated with complying with federal regulations. 82 Fed. Reg. at 46,459. However, it is unclear how the Proposed Suspension achieves the goals of this order given that it
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to justify the Proposed Suspension fails to provide the “reasoned explanation” required by the APA. This is especially true given that BLM has yet to detail what, if any, regulations it may propose as a result of this ongoing review.

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 “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.

BLM claims that its “initial review” of the Rule “found that some provisions of the rule appear to add regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation.” 82 Fed. Reg. at 46,459. However, this “initial review” has not been made public and is otherwise not part of the rulemaking record.⁴ Moreover, elsewhere BLM states that the Proposed Suspension will not “significantly impact the price, supply, or distribution of energy,” or “substantially alter the investment or employment decisions” of operators. *Id.* at 46,465; *see* 2017 RIA at 2 (“The proposed rule would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, [or] jobs... . Additionally, the proposed rule would not have a significant economic impact on a substantial number of small entities.”), 40 (“we do not expect that the proposed rule would significantly impact the price, supply, or distribution of energy”); 44 (“We do not believe

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is not tied to any new regulations. *See* Executive Order 13771, Sec. 2, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

⁴ On October 24, 2017, the U.S. Department of the Interior released a document entitled, “Final Report: Review of the Department of the Interior Actions that Potentially Burden Domestic Energy” (“Final Report”), *available at*: https://www.doi.gov/sites/doi.gov/files/uploads/interior_energy_actions_report_final.pdf. The Final Report states that “BLM conducted an initial review of the rule and found that it was inconsistent with the policy stated in [Executive Order 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.’” Final Report at 8. The Final Report then states that “BLM is currently drafting a proposed rule that would eliminate overlap with the Environmental Protection Agency’s (EPA) Clean Air Act authorities while also clarifying regulatory provisions related to the beneficial use of gas on Federal and Indian lands.” *Id.* at 8-9. BLM has not indicated when this proposed rule would be released.

that the proposed rule would substantially alter the investment or employment decisions of firms”), 51 (“BLM believes that the rule would not have a significant economic impact on a substantial number of small entities”).

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 Suspension, 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. As the U.S. District Court for 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.” *State of California, et al. v. U.S. Bureau of Land Mgmt., et al.*, --- F. Supp. 3d ---, 2017 WL 4416409, *11 (N.D. Cal. Oct. 4, 2017) (quoting *Organized Village of Kake*, 795 F.3d at 966). No such explanation has been provided here.

In sum, BLM’s alleged compliance with Executive Order 13783 or Secretarial Order 3349 cannot provide the reasoned basis for the Proposed Suspension required by the APA. *State Farm*, 463 U.S. at 42.

IV. BLM Has Improperly Predetermined the Outcome of its Proposed Suspension.

Finally, while BLM has published the Proposed Suspension for notice and comment pursuant to Section 553 of the APA, 5 U.S.C. § 553, it has already publicly stated its intention to suspend and delay the Rule’s requirements and thus predetermined the outcome of this rule making. Among other things, in two documents filed in federal district court on October 20, 2017 — weeks before the close of the comment period — BLM or its counsel stated that:

- “BLM anticipates that the final Suspension Rule *will be published* in the Federal Register *no later than* December 8, 2017.”⁵
- “BLM *expects to publish* the final [Suspension Rule] by December 8, 2017.”⁶

⁵ Declaration of Timothy R. Spisak, Acting Assistant Director, Energy, Minerals & Realty Management Directorate of the Bureau of Land Management, Dkt. No. 155-1, *State of Wyoming, et al. v. U.S. Dept. of the Interior, et al.*, Case No. 16-cv-00285-SWS, at ¶ 11 (emphasis added).

- “BLM *will utilize* the twelve-month period while the majority of the Waste Prevention Rule is suspended to prepare and complete the Revision Rule... .”⁷
- “*Once the Suspension Rule is completed, it will provide* the immediate relief sought by [Industry] Petitioners... .”⁸
- “*Once the final Suspension Rule has been published, and* Petitioners have thereby been afforded relief from the regulatory requirements underlying their complaints... .”^{9, 10}

BLM has left no doubt regarding what the outcome of the Proposed Suspension will be, regardless of the public comments that it receives during the rulemaking process. This prejudged, political conclusion precludes any meaningful public participation in the rule making process and violates the APA. *See Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1261-64 (D. Wyo. 2004) (agency comments made before administrative process was complete “indicate a prejudged political conclusion” in violation of the APA).

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⁶ Federal Respondents’ Motion for an Extension of the Merits Briefing Deadlines, Dkt. No. 155, *State of Wyoming, et al. v. U.S. Dept. of the Interior, et al.*, Case No. 16-cv-00285-SWS, at 3 (emphasis added).

⁷ *Id.* at 3 (emphasis added).

⁸ *Id.* at 4 (emphasis added).

⁹ *Id.* at 5 (emphasis added).

¹⁰ According to BLM, the Proposed Suspension is “a major rule under 5 U.S.C. § 804(2).” 82 Fed. Reg. at 46,466. Consequently, any final suspension or delay of the Waste Prevention Rule cannot take effect until at least 60 days after publication in the Federal Register. *See* 5 U.S.C. § 801(a)(3).

CONCLUSION

In sum, BLM has failed to articulate a valid basis for suspending 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 reconsider its Proposed Suspension and retain the Waste Prevention Rule in its entirety.

Sincerely,



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