



November 2, 2022

To: Bureau of Land Management, U.S. Department of the Interior

Subject: Notice of Intent To Amend the Resource Management Plans for the Buffalo Field Office, Wyoming, and Miles City Field Office, Montana, and Prepare Associated Supplemental Environmental Impact Statements, 87 Fed. Reg. 59,818 (Oct. 3, 2022)

The Institute for Policy Integrity at New York University School of Law¹ (“Policy Integrity”) respectfully submits the following comments to the Bureau of Land Management (“BLM”) on the above-captioned Notice of Intent.² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decision-making through advocacy and scholarship in the fields of administrative law, economics, and public policy. We often comment on the assessment of climate impacts under the National Environmental Policy Act (“NEPA”).

BLM issues this Notice of Intent in response to an August 2022 decision from the U.S. District Court for the District of Montana, which found that the agency’s resource management plans for the Buffalo and Miles City field offices failed to comply with NEPA.³ In that decision, the Court ordered BLM to “consider no coal leasing and limited coal leasing” alternatives and to “disclose the public health impacts, both climate and non-climate, of burning fossil fuels from the planning areas.”⁴ This letter offers guidance to BLM on how it can consider the climate impacts of different leasing alternatives, pursuant to the Court’s order.⁵

In particular, BLM should follow these best practices:

- BLM should measure direct and indirect emissions, including both downstream and upstream greenhouse gas emissions;
- BLM should assess actual climate effects and not minimize those impacts through misleading comparisons to national, federal, or state emissions totals; and
- BLM should apply the social cost of greenhouse gases and compare monetized climate impacts against other monetized effects of extraction.
- If BLM performs a substitution analysis, it should follow best practices, avoid common pitfalls, and apply the results of that analysis consistently when assessing both the benefits and costs of leasing.

¹ This document does not purport to represent the views, if any, of New York University School of Law.

² Notice of Intent To Amend the Resource Management Plans for the Buffalo Field Office, Wyoming, and Miles City Field Office, Montana, and Prepare Associated Supplemental Environmental Impact Statements, 87 Fed. Reg. 59,818 (Oct. 3, 2022) [“Notice”].

³ *W. Org. of Res. Councils v. U.S. Bur. of Land Mgmt.*, 4:20-cv-00076-GF-BMM, 2022 WL 3082475 (Aug. 3, 2022).

⁴ *Id.* at *8; *accord* Notice, 87 Fed. Reg. at 59,819 (defining scope of supplemental analysis).

⁵ This letter does not address BLM’s consideration of downstream non-climate pollutants.

BLM Should Measure Direct and Indirect Greenhouse Gas Emissions

Federal courts have consistently held that indirect greenhouse gas emissions from combustion and production fall within the scope of environmental effects that should be analyzed under NEPA.⁶ In fact, several of those decisions have specifically related to the federal coal program.⁷ And in its 2016 guidance on the consideration of greenhouse gas emissions under NEPA, the Council on Environmental Quality directed agencies to “quantify a proposed agency action’s projected direct and indirect [greenhouse gas] emissions,” including emissions from combustion and production.⁸

The District of Montana specifically ordered BLM to consider downstream emissions from the proposed leasing.⁹ In accordance with applicable case law and best practices, BLM should measure all emissions—both direct and indirect—in its supplemental analyses.

BLM Should Not Minimize Climate Impacts Through Misleading Comparisons to Larger Totals

Federal court decisions spell out NEPA’s requirement that agencies assess the real-world environmental impacts of project proposals, and not stop at providing volumetric emissions totals. As the U.S. Court of Appeals for the D.C. Circuit explained, merely listing the quantity of emissions is insufficient if the agency “does not reveal the meaning of those impacts in terms of human health or other environmental values,” since “it is not releases of [pollution] that Congress wanted disclosed” but rather “the effects, or environmental significance, of those releases.”¹⁰

Numerous court decisions have applied this principle in the climate change context, holding an agency’s analysis deficient due to its failure to capture the real-world impact on environmental and health factors. Those decisions have particularly targeted the common agency practice—frequently applied by BLM and other Interior subagencies—of comparing project-level emissions to global, federal, or state emissions totals, and then declaring the project’s climate impacts insignificant based on the resulting small percentages. This includes two decisions from the U.S. Court of Appeals for the Ninth Circuit: one from 2008,¹¹ and another

⁶ E.g., *Montana Env’t Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1094–97 (D. Mont. 2017) (agency must quantify downstream emissions in an environmental analysis for a coal-mine expansion); *Diné Citizens Against Ruining Our Env’t v. U.S. Office of Surface Mining Reclamation & Enforcement*, 82 F. Supp. 3d 1201, 1213 (D. Colo. 2015) (“[F]ind[ing] that the coal combustion-related impacts of [the mine’s] proposed expansion are an ‘indirect effect’ requiring NEPA analysis”), *vacated as moot*, 643 Fed. Appx. 799 (10th Cir. 2016); *WildEarth Guardians v. United States Office of Surface Mining, Reclamation & Enforcement*, 104 F. Supp. 3d 1208, 1229–30 (D. Colo. 2015) (rejecting the argument that “coal combustion is not an actual [indirect] ‘effect’ of the mining plan within the meaning of NEPA”), *order vacated and appeal dismissed as moot* 652 Fed. Appx. 717 (10th Cir. 2016); *Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d 1357, 1373–74 (D.C. Cir. 2017) (FERC must consider downstream greenhouse gas emissions in an environmental analysis for a proposed pipeline).

⁷ See *supra* note 6.

⁸ Final Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change 4 (issued Aug. 1, 2016; withdrawn Apr. 5, 2017; under review Feb. 19, 2021, for revision and update)..

⁹ W. Org. of Res. Councils, 2022 WL 3082475, at *8.

¹⁰ *NRDC v. NRC*, 685 F.2d 459, 486–87 (D.C. Cir. 1982), *rev’d on other grounds* *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 106–07 (1983).

¹¹ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215–16 (9th Cir. 2008) (explaining that such an analysis failed to “evaluate the incremental impact that these emissions will have on climate

from earlier this year on federal coal leasing.¹² Numerous district courts have reached the same conclusion in recent years.¹³

BLM's frequent practice of comparing project-level emissions to national, federal, or state emission totals is particularly problematic because it inappropriately minimizes climate impacts. This is because, as one court explained, "[t]he global nature of climate change and greenhouse-gas emissions means that any single ... project likely will make up a negligible percent of state and nation-wide greenhouse gas emissions."¹⁴ However, the mere fact that a project's emissions make up a small percentage of a larger total does not mean that they are insignificant.¹⁵ By that logic, virtually anything could be considered insubstantial: For instance, Bill Gates's wealth makes up a very small fraction of all wealth globally.

Accordingly, BLM should assess the real-world climate effects of various alternatives, and not resort to misleading comparisons to geographic totals.

BLM Should Apply the Social Cost of Greenhouse Gases to Assess the Climate Impacts of Different Alternatives

The social cost of greenhouse gases provides the context for assessing climate impacts that volumetric estimates and percentage comparisons lack. Consistent with guidance from both Secretary Haaland and an interagency working group, Interior should apply those valuations to assess the climate impacts of different alternatives.

The social cost of greenhouse gases is a scientific and economic assessment tool developed by the federal Interagency Working Group on the Social Cost of Greenhouse Gases. The tool reflects how the emission of an additional unit of greenhouse gases contributes to the various economic and health costs resulting from climate change, presenting these damages in a composite monetary value.¹⁶ Numerous agencies including BLM have applied these valuations to aid their decisionmaking.¹⁷ Last year, in fact, Interior Secretary Deb Haaland issued a

change or on the environment more generally or "provide the necessary contextual information about the cumulative and incremental ... impacts" that NEPA requires).

¹² 350 Montana v. Haaland, 50 F.4th 1254 (9th Cir. 2022) ("[V]irtually every domestic source of [greenhouse gases] may be deemed to have no significant impact as long as it is measured against total global emissions.").

¹³ E.g. High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014) ("Beyond quantifying the amount of emissions relative to state and national emissions and giving general discussion to the impacts of global climate change, [the agencies] did not discuss the impacts caused by these emissions."); Mont. Env't Info. Ctr. v. U.S. Office of Surface Mining, 274 F. Supp. 3d 1074, 1095–99 (D. Mont. 2017) (rejecting the argument that the agency "reasonably considered the impact of greenhouse gas emissions by quantifying the emissions which would be released if the [coal] mine expansion is approved, and comparing that amount to the net emissions of the United States"); California v. Bernhardt, 472 F. Supp. 3d 573, 623 (N.D. Cal. 2020) (rejecting NEPA assessment of greenhouse gas emissions because the agency's approach of quantifying emissions and comparing them to nationwide totals failed to "communicate the actual environmental effects resulting from emissions of greenhouse gas" rather than "just quantify them") (internal quotation marks omitted).

¹⁴ WildEarth Guardians v. Bureau of Land Mgmt., 457 F. Supp. 3d 880, 894 (D. Mont. 2020).

¹⁵ As a federal court recently explained, even a seemingly "very small portion of a gargantuan source of ... pollution" may "constitute[] a gargantuan source of ... pollution on its own terms." Sw. Elec. Power Co. v. Env't Prot. Agency, 920 F.3d 999, 1032 (5th Cir. 2019) (internal quotation marks omitted).

¹⁶ INTERAGENCY WORKING GRP. ON THE SOCIAL COST OF GREENHOUSE GASES, TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS 5 (2010).

¹⁷ E.g. Peter Howard & Jason Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 COLUM. J. ENV'T L. 203, 270-84 (2017) (cataloging agency uses through July 2016).

Secretarial Order recognizing that the social cost of greenhouse gases provides a “useful measure to assess the climate impacts of [greenhouse gas] emission changes for Federal proposed actions,” emphasizing the tool as “relevant to the choice among different alternatives.”¹⁸

The social cost of greenhouse gases is particularly useful because it allows agencies to compare beneficial and adverse impacts of different alternatives using the common metric of dollars. While unmonetized impacts also merit close consideration, monetization facilitates direct comparison and better enables regulators to select the alternative that maximizes net benefits—including, potentially, the no-action alternative.¹⁹ A recent assessment related to the federal coal program illustrates the point: In that assessment, the Office of Surface Mining declined to apply the social cost of greenhouse gases for a proposed coal mine expansion. However, application of that valuation would have revealed that the project’s annual emissions contribute at least \$9 billion in climate harm—vastly exceeding the project’s benefits of under \$3 million annually.²⁰ More broadly, numerous studies have similarly concluded that the social costs of coal production and extraction have exceeded its economic benefits.²¹

Accordingly, BLM should apply the social cost of greenhouse gases to assess climate impacts and facilitate more rational comparison between climate and economic effects.

If BLM Applies a Substitution Analysis, It Should Avoid Common Pitfalls and Apply the Analysis Consistently to Project Benefits and Costs

For oil and gas leasing, BLM on numerous occasions has applied a “substitution analysis” in which it considers how an increase in federal oil and gas production affects the energy market as a whole, and how these various changes ultimately affect greenhouse gas emissions. BLM has not traditionally applied this type of analysis for coal leasing. If it does so here, however, it should adhere to best practices and avoid several common pitfalls.

¹⁸ Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process, Secretarial Order 3399 § 5(b) (Apr. 16, 2021).

¹⁹ As the Ninth Circuit has explained, “[t]he balancing of the environmental costs of a project against its economic and technological benefits is mandated by NEPA,” and “[t]here may well be circumstances in which these goals cannot be achieved unless a sophisticated, numerically-based cost-benefit analysis is provided.” *Columbia Basin Land Protection Ass’n. v. Schlesinger*, 643 F.2d 585, 594–95 (9th Cir. 1981).

²⁰ Richard L. Revesz & Max Sarinsky, *The Social Cost of Greenhouse Gases: Legal, Economic, and Institutional Perspective*, 39 YALE J. REG. 855, 875–76 (2022). The \$9 billion climate-damages figure was derived using the Working Group’s climate-damage valuation at a 3% discount rate. The Working Group has acknowledged, however, that this valuation likely underestimates climate damages, in part because intergenerational climate impacts merit lower discount rates that produce higher valuations. INTERAGENCY WORKING GRP., *supra* note 19, at 4. Consistent with the Working Group’s recommendations, BLM should prioritize discount rates of 2.5% or lower when it monetizes climate damages here.

²¹ See Sebastian Rauner et al., *Coal-Exit Health and Environmental Damage Reductions Outweigh Economic Impacts*, 10 NATURE CLIMATE CHANGE 308, 308 (2020) (concluding that the local environmental and health impacts of coal—not even accounting for coal’s substantial contributions to global climate change—outpace coal’s economic benefits); Nicholas Z. Muller, Robert Mendelsohn & William Nordhaus, *Environmental Accounting for Pollution in the United States Economy*, 101 AM. ECON. REV. 1649, 1670 (2011) (finding that the external damages of U.S. coal-fired electric power generation total \$68 billion annually, which is “clearly larger than [the industry’s value added]”); Paul R. Epstein et al., *Full Cost Accounting for the Life Cycle of Coal*, in *Ecological Economics Reviews* (Robert Costanza, Karin Limburg & Ida Kubiszewski eds., 2011) (external harms from coal extraction, transportation, processing, and combustion exceed or potentially double its market price).

First, BLM should recognize that coal extraction affects consumption, and not treat coal demand and consumption as fixed. Numerous courts have rejected the notion of “perfect substitution”—that is, that one energy source will perfectly substitute for another.²² In reality, fossil-fuel projects move the market and increase total consumption of the targeted commodity by increasing its supply. BLM should not disregard these supply-and-demand effects, nor assume that the proposed leasing will have no effect on climate change based on perfect assumption.

Second, any substitution analysis should be sensitive to long-term policies and trends, and not assume continued coal reliance into the distant future. Agencies have typically assumed long-term reliance on fossil fuels near current levels when applying substitution analysis, despite increasing policies and commitments worldwide to transition sharply away from fossil fuels (and, in particular, away from coal).²³ The result is analyses that assume displacement of other fossil fuels and largely ignore the possibility that increased fossil-fuel production will crowd out renewables.²⁴ Substitution analysis must factor in long-term energy trends and not reflexively assume continued global reliance on fossil fuels. Available scholarship provides suggestions for Interior to model those energy trends.²⁵

Third, if BLM applies a substitution analysis, it must apply the results of that analysis consistently to both the benefits and costs of coal leasing. This is particularly important, since BLM and other agencies often apply substitution analysis to offset the climate costs of a fossil-fuel project, yet rarely apply the results of that analysis when assessing economic benefits. But this is internally inconsistent; if a substitution analysis concludes that much of the production from proposed leasing is merely displacing other production that would occur under the no-action alternative, that conclusion should also be considered when assessing the benefits of the proposed leasing.

Respectfully,

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²² See, e.g., *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003); *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1236 (10th Cir. 2017).

²³ See, e.g., PETER HOWARD, MAX SARINSKY & MINHONG XU, *THE REAL COSTS OF OFFSHORE OIL AND GAS LEASING* 5–6 (2022), <https://policyintegrity.org/publications/detail/the-real-costs-of-offshore-oil-and-gas-leasing> (critiquing Bureau of Ocean Energy Management’s MarketSim model); RACHEL ROTHSCHILD & MAX SARINSKY, *TOWARD RATIONALITY IN OIL AND GAS LEASING* 15 (2021), https://policyintegrity.org/files/publications/Toward_Rationality_in_Oil_and_Gas_Leasing_%282%29.pdf (discussing BLM’s use of substitution analysis).

²⁴ Bureau of Ocean Energy Mgmt., 2023–2028 National Outer Continental Shelf Oil and Gas Leasing Proposed Program 5-28 (2022) (explaining that “substitutions could vary dramatically based on the future energy scenario and pathway,” and recognizing that “a net-zero or similar pathway” could make “the impact of substitutions in the absence of [the proposed offshore] production . . . look very different”); HOWARD et al., *supra* note 23, at 15–21 (constructing illustrative modeling under decarbonization pathways and finding far higher displacement of renewables—and thus far higher net greenhouse gas emissions—from federal oil and gas production than Interior projects based on current-policy baseline).

²⁵ HOWARD et al., *supra* note 23, at 6–10.