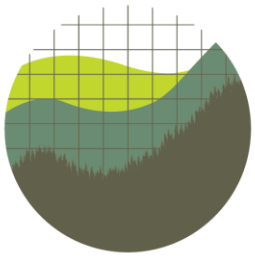

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

April 23, 2018

To: Catherine Cook, Acting Division Chief, Fluid Minerals Division, BLM

Subject: Comments on the Proposed Rescission or Revision of Certain Requirements for Waste Prevention and Resource Conservation, RIN 1004-AE53

The Bureau of Land Management ("BLM") proposes to rescind or revise crucial sections of the 2016 Waste Prevention Rule, which was designed to prevent private industry from wasting natural gas resources owned by the public and to prevent significant methane emissions and the associated costs to public health and the environment. To justify its proposal, BLM relies on various false assumptions and irrational conclusions. The Institute for Policy Integrity at New York University School of Law[1]—a non-partisan think tank dedicated to improving the quality of government decisiomaking through advocacy and scholarship in administrative law, economics, and public policy—respectfully submits these comments in response:

- As detailed in our comments submitted separately with other organizations on the social cost of methane, BLM seeks to justify its proposed rescission based on a deeply flawed miscalculation of the climate damages of forgone reductions of waste and emissions.
- BLM's estimate of the supposed cost savings from the proposed rescission relies on an unexplained inflation of administrative burdens.
- BLM failed to consider meaningful alternatives and to weigh adequately the prior judgments of the agency during the last rulemaking, particularly with respect to marginal wells.
- BLM makes misleading statements about supposedly duplicative federal and state standards.
- BLM's reinterpretation of "waste" is divorced from statutory text and structure.

1. BLM Fails to Justify Its Revised Estimates of Costs and Benefits

BLM professes that, in the mere eighteen months since the agency's careful and rigorous analysis of the 2016 rule, the implementation costs for the 2016 rule have inexplicably become much more "expensive," while the 2016 rule's climate benefits have suddenly shrunk to miniscule levels.[2] BLM seeks to justify its proposed rescission based on this new, deeply flawed cost-benefit analysis.

[1] No part of this document purports to present the views, if any, of New York University School of Law.
[2] 83 Fed. Reg. 7924, 7925-26 (Feb. 22, 2018).

BLM severely underestimates the 2016 rule's climate benefits by irrationally manipulating the value of the social cost of methane. Comments submitted separately by Policy Integrity, together with several other organizations, thoroughly explain why the agency's decimation of the social cost of methane is inconsistent with best available science, best practices for economic analysis, and legal standards for rational decisionmaking.[3] Those comments are incorporated herein.

As for the revised cost estimate, BLM identifies only two major changes in its calculation of monetized costs, and otherwise "generally uses the same underlying assumptions as in the RIA prepared for the 2016 final rule."[4] First, BLM updated its time horizon from the original period of analysis (2017-2026) to 2019-2028, reflecting the fact that the 2016 rule has been delayed and not yet taken effect. Second, while BLM "maintained the underlying assumptions used in analyzing the LDAR [leak detection and repair] requirements," the agency revised its assumptions about administrative costs.[5]

Specifically on administrative costs, the agency has failed to explain why it has disregarded the facts and circumstances that underlie the agency's 2016 rule.[6] The 2016 regulatory impact analysis had calculated the burden to industry at about $5.5 million, from 85,170 hours of administrative effort,[7] and the burden to the agency at $1.3 million, from 30,117 hours.[8] The new 2018 regulatory impact analysis increases those totals drastically and without explanation: doubling the industry burden to $10.7 million based on 164,100 hours of administrative effort,[9] and more than doubling the agency burden to $3.3 million, from 72,746 hours.[10] Breaking down the individual increases, the estimated hours per response for developing plans to minimize waste have inexplicably tripled, from the 2016 estimate of 8 hours per response,[11] to the 2018 estimate of 24 hours per response.[12] The estimated response time for the storage vessel requirements shot up six-fold, from 4 hours to 24 hours.[13] Besides a terse reference to "consultation with States and BLM field offices to determine the level of expected response per provision,"[14] no explanation for these increases is given. Note that the 2016 estimates had also

[3] *See* Comments from Policy Integrity et al., on the Failure to Use the Social Cost of Greenhouse Gas Metrics in the Proposed Rule, Regulatory Impact Analysis, and Environmental Assessment on the Rescission or Revision of Certain Requirements for Waster Prevention and Resource Conservation (submitted April 23, 2018).

[4] BLM, *Regulatory Impact Analysis for the Proposed Rule to Rescind or Revise Certain Requirements of the 2016 Waste Prevention Rule* at 29 (2018) [hereinafter 2018 RIA].

[5] *Id. See also id.* at 32 ("While these estimates [of the LDAR program] are highly uncertain, due to their use in the 2016 RIA the BLM carried forward those assumptions in this RIA for the purposes of consistency.").

[6] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (on the legal standard for changing policy course in a rulemaking).

[7] BLM, *Regulatory Impact Analysis for: Additions of 43 CFR 3179 (Waste Prevention and Resource Conservation)* at 99 (2016) [hereinafter 2016 RIA].

[8] *Id.* at 102.

[9] 2018 RIA at 67.

[10] *Id.* at 70.

[11] 2016 RIA at 96.

[12] 2018 RIA at 64.

[13] *Compare* 2016 RIA at 98 *with* 2018 RIA at 66.

[14] 2018 RIA at 64.

been developed in consultation with BLM program staff,[15] and the agency fails to explain how or why the consultation resulted in vastly inflated estimates this time around.

In addition, the 2016 analysis had also cautioned that administrative burdens are "expected to decrease slightly over time,"[16] a warning that appears nowhere in the 2018 analysis. Furthermore, BLM connects its changed assumptions about administrative burdens to its review of the LDAR requirements,[17] and yet the 2018 analysis fails to mention the finding of the 2016 analysis that, because of some incomplete data, estimates of costs associated with LDAR "are likely to overstate the true costs of the rule."[18]

Overall, BLM's changed assumptions about the 2016 rule's costs are not explained. Even if the purported increased administrative burdens were real, they hardly seem so expensive as to justify rescinding the 2016 rule (which the agency found in 2016 to be tremendously net beneficial).[19] BLM has not identified any changed circumstances, changed technology, or changed economic conditions that so substantially alter the original cost estimates as to justify reconsidering the 2016 rule.[20]

BLM's reliance on administrative cost savings to justify the proposed rule is further inappropriate because the estimated cost savings are only available due to the agency's issuance of two illegal suspensions of the 2016 rule.[21] Without the illegal suspensions, industry would have already begun implementing the 2016 rule. The question to be decided in this proposed rule is whether the 2016 rule, "which had been in effect for some time," should be repealed, not whether it can be repealed as if it had not been implemented.[22] Courts will place the "parties in the positions they would have been in if the APA had not been violated," and that requires BLM to provide an analysis and justification for the proposed repeal that explains why it is justified in a world where industry has been in compliance without the illegal suspensions.[23] Without that explanation, the proposed repeal is arbitrary and capricious.

2. BLM Failed to Consider Alternatives and to Weigh the Past Record

BLM next attempts to justify the rescission by alleging that the 2016 rule's requirements would disproportionately hurt operators of "marginal," or low-producing, wells. BLM in particular complains that some 68,972 wells on federal lands are marginal wells that, under the 2016 rule, would either have to comply with costly LDAR requirements or else seek an exemption through a burdensome administrative process.[24] These statements reflect both a willful ignorance to the fact that BLM rejected these precise arguments in 2016, as well as an unwillingness to consider

[15] 2016 RIA at 96 n.81.
[16] *Id.* at 96.
[17] 2018 RIA at 29.
[18] 2016 RIA at 105.
[19] 2016 RIA at 111 (finding the rule's benefits exceed its costs by as much as $200 million per year.)
[20] To the extent the cost increases stem from changing the timeframe for analysis from 2017-2026 to 2019-2028, that was a circumstance of BLM's own making, by illegally staying the rule's implementation dates.
[21] *See California v. BLM*, 277 F. Supp. 3d 1106, 1127 (N.D. Cal. 2017) (vacating first suspension for failure to follow notice and comment requirements and for lack of statutory authority); *California v. BLM.*, No. 17-07186, 2018 WL 1014644, at *17 (N.D. Cal. Feb. 22, 2018) (enjoining second suspension for failure to provide a reasoned explanation).
[22] *Nat. Res. Def. Council, Inc. v. E.P.A.*, 683 F.2d 752, 768–69 (3d Cir. 1982).
[23] *Id.*
[24] 83 Fed. Reg. at 7926.

meaningful alternatives.[25] These two irrational failings—not considering alternatives and not weighing the past administrative record—repeatedly infect BLM's justification for the proposed rescission: this section uses the case of marginal wells and LDAR as just one example.

BLM cites the Interstate Oil and Gas Compact Commission (IOGCC) and the Energy Information Administration (EIA) for statistics showing that up to two-thirds of wells are low-producing, marginal wells—some 68,972 wells on federal lands.[26] BLM, however, ignores equally important statistics: according to the EIA, all of the country's marginal oil and gas wells, whether located on federal, state, or private lands, together produce only about 7.5% of the country's total oil and gas.[27] The IOGCC report confirms that marginal wells produce a relatively small and dropping share of national oil and gas,[28] noting in particular a "downtrend" in marginal natural gas production.[29]

BLM fails to explain why a total rescission[30] of the LDAR requirements is justified to protect wells responsible for just 7.5% of production, thereby allowing the wells responsible for the remaining 92.5% of oil and gas production to avoid these sensible, net beneficial requirements. Even if BLM had some legitimate concern about the burden to marginal wells (and they do not, since the agency already rejected such concerns in 2016; see next paragraph), BLM fails to consider any meaningful alternative to complete rescission.[31] BLM could have considered and assessed alternatives like: different standards designed specifically for marginal wells, variance procedures for marginal wells including general permits, exemptions specific for marginal wells, or even market-based mechanisms like averaging and trading that would have allowed operators to identify which marginal wells might be too costly to bring into compliance while still taking advantage of low abatement-cost opportunities that may exist at other marginal wells.

Moreover, BLM already considered in 2016 the special treatment of marginal wells, and rejected it as unnecessary and net costly. In 2016, BLM responded to comments on the allegedly disproportionately greater costs and lower risks at marginal wells, and to the idea of a

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[25] *See Fox*, 556 U.S. at 516 (holding that agencies are required to explain the basis for disregarding facts and circumstances that underlying a previous rule); *Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984) (holding that an agency must provide an explanation for rejecting an alternative that it previously adopted).

[26] 83 Fed. Reg. at 7926.

[27] EIA, *The Distribution of U.S. Oil and Natural Gas Wells by Production Rate* at table b17 (2016 statistics, data updated November 2017), *available at* https://www.eia.gov/petroleum/wells/pdf/full_report.pdf (showing oil wells producing under 10 barrels per day are responsible for 7.4% of national production, though they constitute 76% of the nation's wells; and gas wells producing the equivalent of less than 10 barrels per day are responsible for 7.6% of national production, though constitute 71.6% of all gas wells).

[28] IOGCC, *Marginal Wells: Fuel for Economic Growth* 19, 21 (2015), *available at* http://iogcc.ok.gov/websites/iogcc/images/MarginalWell/MarginalWell-2015.pdf.

[29] *Id.* at 23.

[30] 83 Fed. Reg. at 7932 ("BLM is proposing to rescind §§ 3179.301 to 3179.305 in their entirety.").

[31] BLM considers only one alternative to either taking no action (keeping the 2016 rule) or else adopting the proposed action. That lone alternative ("Alternative 2") would retain gas capture requirements and metering requirements, while still rescinding LDAR and other operational and equipment requirements relating to venting in their entirety. 2018 RIA at 14. That is hardly a meaningful alternatives analysis. OMB's Circular A-4 recommends agencies always consider a variety of different enforcement methods, different degrees of stringency, different requirements for different sized firms, different requirements for different geographic regions, and performance standards or market-oriented approaches in lieu of direct controls. *Circular A-4* at 7-8 (2003).

special exemption for them.[32] After "carefully consider[ing] numerous and varied approaches that might improve the program's cost-effectiveness by narrowing the coverage of the LDAR program while maintaining its benefits," in 2016 BLM found no data that would support exclusion of marginal wells from LDAR.[33] To the contrary, BLM found that marginal wells could be responsible for substantial leaks, and further found no evidence that the LDAR requirements would cause a significant number of premature well shut-ins, given that LDAR services are offered "at a relatively modest cost," much of which is recouped through saved gas.[34] BLM concluded that the variance and exemption procedures it offered in the 2016 rule adequately addressed the industry's concerns about marginal wells.[35] Now, in this 2018 proposed rescission, BLM fails to adequately respond to the agency's prior judgments or to the evidence from the record of the 2016 rulemaking showing that LDAR requirements for marginal wells are justified.

3. BLM's References to Supposedly Duplicative Federal and State Standards Are Misleading and Do Not Justify Rescission

BLM's next attempt at justifying the rescission is that the 2016 rule duplicates various federal and state standards. These assertions are misleading.

With respect to federal standards, BLM repeatedly refers to potential overlap with EPA's new source performance standards for oil and gas wells.[36] But BLM previously decided to finalize the 2016 rule despite that potential overlap. BLM has failed to explain why it is proposing to change course now. Moreover, BLM never acknowledges the fact that EPA is actively considering repealing those new source performance standards.[37] Should EPA succeed in repealing those standards, BLM's rationale for the proposed rule would be unavailable. BLM must explain its basis for repealing this rule, should EPA eliminate its standards.

With respect to state standards, BLM claims that "some States with significant Federal oil and gas production have similar regulations addressing the loss of gas from these sources."[38] However, as BLM acknowledges, almost all of these state standards pre-dated the 2016 rule, were fully considered by BLM in finalizing the 2016 rule, and were dismissed as not as comprehensive or effective as the 2016 rule's national standards.[39] BLM must explain why it

[32] 81 Fed. Reg. 83,008, 83,029 (Nov. 18, 2016).
[33] *Id.*
[34] *Id.* at 83,030.
[35] *Id.* Notably, BLM did grant commenters' request for an exemption from LDAR for sites with only wellheads and not other production equipment, given the lower risk of leaks. *Id.*
[36] 83 Fed. Reg. at 7926; 2018 RIA at 21-23, 55.
[37] 82 Fed. Reg. 51,788 (Nov. 8, 2017) (notice of data availability supplementing proposal to stay certain requirements for two years while EPA reconsiders the new source performance standards for the oil and gas sector); *see also* 82 Fed. Reg. 16,331 (Apr. 4, 2017).
[38] 83 Fed. Reg. at 7926.
[39] *Id.*; *see also* 81 Fed. Reg. at 83,019 (considering various state standards and concluding that "of the States with extensive oil and gas operations on BLM-administrative lands, only one has comprehensive requirements to reduce flaring, and only one has comprehensive statewide requirements to control losses from venting and leaks. Furthermore, State regulations do not apply to BLM-administrated 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. . . . There is therefore a need for uniform, modern waste reduction standards for oil and gas operations on public and Indian lands across the country.").

has changed course now and why the existence of these state rules would somehow excuse the agency from its statutory responsibility to ensure that all reasonable precautions are taken to prevent waste.

BLM cites only one new state rule issued since the 2016 waste prevention standards: a California requirement for monitoring, with some limits on venting.[40] But that new California rule could only have a small impact on the implementation of the 2016 rule. In fiscal year 2016, California hosted only 324 producing leases of 23,926 total producing leases on federal lands (1.3%),[41] hosted 0 of 520 new leases on federal lands (0%),[42] and just 30 of 847 well bores started on federal lands (3.5%).[43] A single new rule in California hardly seems to obviate the need for a national standard for federal leases.

4. BLM's Reinterpretation of "Waste" Is Divorced from Statutory Text and Structure

BLM's final justification for the proposed rescission is a concern that the 2016 rule would not survive judicial review—particularly whether the rule was authorized by the statutory language on preventing "waste." In fact, BLM's 2016 rule was on sound statutory footing. By comparison, the proposed reinterpretation, which mirrors petitioners' arguments in a U.S. District Court of Wyoming challenge to the 2016 rule by linking the definition of "waste" to the value to private lessees of the resource conservation benefits alone,[44] misunderstands both the meaning of "waste" and what constitutes a "resource conservation benefit."

The 2016 rule prevented waste of a valuable natural resource: natural gas. Conserving that resource, regardless of its marketable value, falls squarely within the meaning of "preventing waste," as demonstrated by multiple statutory provisions delineating BLM's authority and duties.[45] BLM not only has the power but the affirmative duty to prevent waste from oil and gas development on federal lands.

Under BLM's relevant statutory authority, environmental considerations are an important aspect of the problem of preventing undue waste. For example, the Federal Land Policy and Management Act directs that "the public lands be managed in a manner that will protect the quality of . . . ecological, environmental, air and atmospheric . . . values."[46] Lessees of federal lands are instructed to "use all reasonable precautions to prevent waste of oil or gas developed in the land."[47] In addition, BLM is tasked with managing public lands according to the principle of "multiple use," which requires BLM to avoid "permanent impairment to the productivity of

[40] 83 Fed. Reg. at 7926-27.

[41] BLM, *Oil and Gas Statistics*, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics (last visited Apr. 23, 2018) at table 5 (number of producing leases).

[42] *Id.* at table 3 (number of new leases issued by BLM).

[43] *Id.* at table 8 (wells spud).

[44] 83 Fed. Reg. at 7927.

[45] *See* 30 U.S.C. § 225 ("[a]ll leases of lands containing oil or gas, made or issued under [the MLA], shall be subject to the condition that the lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land.").

[46] 43 U.S.C. § 1701(a)(8).

[47] 30 U.S.C. § 225.

the land and the quality of the environment."[48] To determine what is a "reasonable precaution," and to avoid "permanent impairment" to the quality of the environment, BLM must consider the full consequences of the waste, including the climate and environmental effects.

A ruling of the U.S. Court of Appeals for the Seventh Circuit on the use of the social cost of carbon in setting energy efficiency standards is instructive here. In *Zero Zone Inc. v. Department of Energy*, the Seventh Circuit found that "the expected reduction in environmental costs *needs* to be taken into account" for the Department of Energy "[t]o determine whether an energy conservation measure is appropriate under a cost-benefit analysis."[49] In other words, while the Department of Energy's statutory authority did not specifically mention environmental concerns, the court found that environmental concerns were an essential factor in determining appropriate regulations to prevent the wasting of energy.[50]

Here, too, BLM needs to consider environmental concerns to determine appropriate regulations to prevent the wasting of oil and gas. To determine how much "degradation of the lands" is "unnecessary or undue,"[51] the agency must consider environmental consequences. To determine which "reasonable precautions" to impose on preventing waste,[52] the agency must consider environmental consequences. As BLM explained in issuing the 2016 rule, the agency's "regulations governing oil and gas operations on the public lands have always required operators to avoid damaging other natural resources or environmental quality."[53]

Finally, reinterpreting "waste" as BLM now proposes—by tying the definition strictly to the net private benefits that accrue to current lessees from recapturing the wasted gas[54]—misunderstands the economic logic behind the statutory requirement to prevent waste. While it is certainly true that at times industry fails to maximize its own profits so that government regulations can deliver private net cost savings to industry,[55] industry undeniably has strong incentives to seek out net private gains wherever it can. A statutory requirement to prevent waste, therefore, almost certainly is directed at more than just protecting the profits of current leaseholders. Instead, at least two other motivations underpin a requirement to prevent waste. One, as discussed above, wasted gas has significant consequences for environmental quality and social welfare, and even if leaking or venting makes financial sense for the current lessee, such waste can be tremendously net costly to the public. And, two, the ultimate owners of the natural resources—i.e., the American public—have a different timeframe for analyzing their

[48] 43 U.S.C. § 1702(c); *see also Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1187 (10th Cir. 2008) ("BLM must strike a balance that avoids 'permanent impairment of the productivity of the land and the quality of the environment.").

[49] 832 F.3d 654, 677 (7th Cir. 2016) (emphasis added).

[50] Similarly, in 1988, the D.C. Circuit highlighted that the Department of Transportation interprets language on the need to conserve energy as "requir[ing] consideration of . . . environmental . . . implications." Pub. Citizen v. Nat'l Highway Traffic Safety Admin., 848 F.2d 256, 263 n.27 (D.C. Cir. 1998) (R.B. Ginsburg, J.) (quoting 42 Fed. Reg. 63,184, 63,188 (Dec. 15, 1977) and adding emphasis to the word requires).

[51] 43 U.S.C. § 1732(b).

[52] 30 U.S.C. § 225.

[53] 81 Fed. Reg. at 83,020.

[54] 83 Fed. Reg. at 7946 (defining "waste" as "where compliance costs are not greater than the monetary value of the resources they are expected to conserve").

[55] *See, e.g.*, 77 Fed. Reg. 28,928, 28,972-28,975 (May 16, 2012) (calculating cost savings to industry from energy efficiency standards for commercial heating, air-conditioning, and water-heating equipment).

economic interests than the current lessees. Many current lessees will prioritize immediate profits based on near-term forecasts on the market price of natural gas. However, the market price of gas fluctuates and is uncertain, and the cost of capturing the resource may decrease over time with technological advancements. These uncertainties create long-term option value in conserving gas for possible future sale or use.[56] Defining "waste" solely by reference to current market values ignores the option value of preserving society's long-term economic interest in preventing waste until the financial terms for using the resource are most favorable from the perspective of U.S. public welfare.[57]

For these reasons, the proposed repeal should not move forward, and the vastly net-beneficial 2016 rule should be implemented immediately and with its original compliance deadlines.

Sincerely,

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[56] *See, e.g.* Jayni Foley Hein, *Harmonizing Preservation and Production: How Modernizing the Department of the Interior's Fiscal Terms for Oil, Gas, and Coal Leases Can Ensure a Fair Return to the American Public* at 13-18 (2015), http://policyintegrity.org/files/publications/DOI_LeasingReport.pdf.

[57] *Cf.* 30 U.S.C. § 187 (directing the agency to establish lease provisions "for the protection of the interests of the United States . . . and for the safeguarding of the public welfare").