Karin Foster, Esq.
Executive Director
IPANM
5805 Mariola Place, NE
Albuquerque, NM 87111
Fosterassociates2005@Yahoo.com

April 22, 2016

Neil Kornze, Director
Bureau of Land Management
US Department of the Interior
Washington, DC 20240

Re: Bureau of Land Management's "Waste Prevention, Production Subject to Royalties, and Resource Conservation" Proposed Rule at 81 FR 6616 (February 8, 2016) **Docket ID Number 1004-AE14**

Submitted to the Federal eRulemaking Portal (www.regulations.gov)

Dear Director Kornze;

The Independent Petroleum Association of New Mexico ('IPANM') appreciates this opportunity to comment to the Bureau of Land Management's (BLM) proposed Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule ("Proposed Rule"). These comments fully adopt the comments filed by the Independent Petroleum Association of America (IPAA), the Western Energy Alliance (WEA), the US Oil and Gas Association (USOGA) and the American Exploration & Production Council (AXPC), collectively "the Associations" or "Joint Trades", on April 21, 2016.

As the most urgent preliminary matter, we join the Associations to urge BLM to suspend its rulemaking efforts until the Environmental Protection Agency (EPA) has finished the work on regulations governing the emissions of air pollutants from existing oil and gas sources. As the primary stated purpose of the BLM's proposed rule is to reduce venting and flaring. However, on March 10, 2016, President Obama

announced that, as part of his climate change agenda, that the EPA must immediately develop methane reduction regulations.

In accordance with BLM's own policy, that insures that the regulated community is not subjected to "conflicting or redundant federal mandates", the BLM should not further this proposed rule. Moreover, IPANM strongly urges the BLM to review the Joint Trades Regulatory Impact Analysis ("RIA") on which the Proposed Rule is based. The Joint Trades analysis demonstrates that the proposed Rule will impose costs of $1.26 billion annually to the economy, and that those costs far outweigh even the highest BLM benefit estimate of $384 million.[1] Instead of promulgating this flawed policy, BLM should redirect its resources towards processing applications for the pipeline rights-of-way across federal and Indian lands that are essential for the building of gas capture technology. Timely processing of such applications would have a much greater and more immediate impact on reducing flaring levels than BLM's proposed one-size-fits-all, command-and-control regulation.

I. IPANM Background

The Independent Petroleum Association of New Mexico, IPANM, represents several hundred independent oil and gas producers who live, work and employ New Mexicans. IPANM represents the 'voice of the independent oil and gas producer' in New Mexico. We are sensitive to increases in the amount of regulation and to increases in the cost of complying with additional regulations. We would urge the agency to be cognizant of the Internal Revenue Service definition of "independent oil and gas producer" which is a non-integrated oil and gas producer that does not own pipeline facilities. Generally IPANM member companies are small, with, on average, 25 employees who often wear multiple proverbial hats, but we provide enough

[1] This is based on a price for natural gas of $2.00/Mcf. See Joint Trades, Regulatory Impact Analysis attached to their comments.

revenue to the State of New Mexico to support 31% of the General Fund[2]. We strive to be stewards of the land in a state where nearly 41.8% of the land is federally owned. The Bureau of Land Management New Mexico office manages one of the largest oil and gas programs in the agency controlling 13.4 million acres of public lands and 26 million subsurface acres of federal oil, natural gas, and minerals. There are currently 31,052 active wells on federal lands, 2,766 on Indian lands, 10,754 on private lands and 15,156 on State Trust Lands totaling just under 60,000 active wells in our state.[3] The Energy Information administration data for 2015 ranks New Mexico sixth in crude oil production and seventh in natural gas production.[4]. New Mexico's marketed production of natural gas accounted for 4.3% of U.S. marketed natural gas production in 2012, despite a decline in production of 30% from its peak in 2001[5]. According to the Office of Natural Resources Revenue, in FY 2015, the Federal Government distributed a total of $9.87 billion with the Federal Government disbursed $496,043,426 in revenues to New Mexico[6], which is only 48% of the total royalty revenues collected for oil and gas operations on NM federal lands.

II. General comments:

A. The BLM may have a statutory mandate to prevent 'waste' but it can not regulate methane emissions or air quality.

Regulation in the air quality arena is not new, however, IPANM would contend that the process by which the Whitehouse, through the EPA and the BLM, is seeking to implement new or substantially expanded methane reduction strategies, is not

[2] "Fiscal Impacts of Oil and Natural Gas Production in New Mexico: Preliminary report", New Mexico Tax Research Institute, Jan 2014.
[3] http://www.emnrd.state.nm.us/OCD/documents/OCDWellStatisticsJan2016.pdf
[4] http://www.eia.gov/state/?sid=NM
[5] Id.
[6] http://statistics.onrr.gov/ReportTool.aspx

tenable. Subsequent to the US Supreme Court decision in Massachusetts v. EPA[7], IPANM does not contest the authority of the EPA to regulate Greenhouse Gas emissions, of which methane is a part of those emissions[8] however, we strongly contest the BLM's contention in this proposed regulation that it may regulate venting and flaring of methane gases from oil and gas wells. The authority under the Clean Air Act and a growing body of case law, grants the complex balancing of "national and international policy against environmental benefit, our nation's energy needs and the possibility of economic disruption" solely to the Environmental Protection Agency. *Emphasis added*. *See*, *American Electric Power v. Connecticut*, 131 S.Ct. 2527, 564 U.S. ___ ,slip op. 10-174 at 13 (2011). Indeed, through out the *American Electric* decision, the US Supreme Court justices refer to the EPA as the "experts"[9] in greenhouse gas and air quality matters including methane emissions. EPA is currently developing regulations for existing oil and gas operations and has announced modifications of the petroleum and natural gas systems methane estimates in the GreenHouse Gas Inventory. This effort includes estimating emissions from gathering and boosting activities and refining data reported under EPA 40 CFR part 98, Subpart W. Clearly, BLM's attempt to characterize this proposal as simply a regulation to prevent the 'waste' of methane and yet impose reporting requirements, limits and enforcement action on oil and gas operators would be duplicative, burdensome and most likely violative of substantive due process.

[7] In *Massachusetts v. EPA*, 549 U. S. 497 (2007), the US Supreme Court held that the Clean Air Act, 42 U. S. C. §7401 et seq., authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases, including methane.

[8] IPANM does, however, contest the science behind the policy for reducing human caused methane sources. Several of our members pointed out in response to this exercise that the science of global warming and impacts of human activities have not been settled yet. In 2012, CH4 accounted for about 9% of all U.S. greenhouse gas emissions from human activities. But water vapor in the atmosphere is responsible for 95 percent ofthe greenhouse effect and CO2 is responsible for 3.6 percent. A study from MIT reported on 5/30/07 said that 97% of all greenhouse gases are naturally occurring, and the remaining 3% are caused by man. So methane is only 3% of the 9%. Insignificant.

[9] American Electric Power v. Connecticut, 563 US _____, slip op. at p. 3, 16,17,18

B. States, not the BLM, have the authority, granted by EPA, to regulate air quality issues.

At the public outreach sessions, several commenters suggested that the BLM has the authority to regulate oil and gas emissions through the Federal Land Policy and Management Act (FLPMA)[10] or the Clean Air Act (CAA). BLM also seems to suggest that it has an obligation under the Federal Land Policy and Management Act ("FLPMA") to manage public lands under the principle of multiple use, which is defined as "management in a 'harmonious and coordinated' manner 'without permanent impairment to the quality of the environment. [11] However, a legal review of these Acts indicate that they limit BLM to solely advisory roles to condition oil and gas approvals in compliance with CAA requirements established by the EPA and the states. In 42 U.S.C §7491(a)(2)&(d), federal land managers are "required to consult with the EPA regarding designation of Class I areas for visibility and consult with states on proposed revisions of state implementation plans" *emphasis added*. Even the USFWS, the National Parks Service and US Forest Service, all sister DOI agencies to BLM have stated that "[federal land managers] have no permitting authority under the Clean Air Act, and they have no authority under the Clean Air Act to establish air quality-related rules or standards"[12]

Moreover, BLM's reference to "permanent impairment of the environment," is found only in the definition section of FLPMA. The BLM may not use this sole definition as subsequent justification for venting and flaring regulations based on a concern for climate change impacts. There is nothing in the substantive provisions of FLPMA that would support such a reading, and it is unlikely that Congress would have granted the Department of Interior any authority to regulate air issues given the complex regulatory system it has imposed on the EPA under the Clean Air Act. At

[10] 43 U.S.C 35(1976)
[11] 81 Fed. Reg. 6629.
[12] Federal Land Managers Air quality related values workgroup. PhaseI report – revised 2010 at xxi (Oct. 2010) at http://www.nature.nps.gov/air/pubs/pdf/flag/FLAG_2010.pdf.

42 U.S.C §7401(a)(3), "Congress finds that air pollution prevention … and air pollution control at its source is the primary responsibility of States and local governments …". Although if a state is unable to submit an approvable state implementation plan, or SIP, the EPA does have the authority under the CAA to promulgate a Federal implementation plan or FIP (42 U.S.C §7410(c)) but the CAA does not allow for any other agency to issue a FIP. The SIPs, which are approved by the EPA, allow states to achieve primacy over air issues and grant more authority to the state to promulgate and regulate air issues than is allowed to the BLM.

1. New Mexico already has Gas Capture regulations in place

The proposed BLM regulation ignores all aspects of State regulations currently in place in New Mexico. In New Mexico Oil Conservation Division Rule 19.15.18.12 NMAC, no operator is allowed to vent or flare casinghead gas from a well after 60 days following the well's completion. However, an operator may ask for an exception, provided that the district supervisor determines the exception of reasonably necessary to protect correlative rights, prevent waste or prevent undue hardships on the applicant. In addition, at the direction of Governor Martinez, the Administration convened a statewide Gas Capture Plan Committee (GCPC), which is composed of representatives of the BLM, NMOCD and industry personnel including a representative from IPANM. The Gas Capture Plan Committee has recently updated several forms in the interest of increasing reporting of venting and flaring volumes in the state. As this effort is ongoing, working collaboratively with BLM, IPANM would respectfully request that the BLM grant a general deferral to existing state and tribal programs. However, if the BLM is unwilling to defer to existing programs, that it consider and adopt the variance provisions of the Association's comments at page 75.

2. New Mexico's unique operational landscape should be exempt from this proposed regulation as the BLM has not considered impacts on split estate or mixed ownership lands.

In the Land Commissioner's comments filed April 15, 2016, he notes that the proposed rule will severely impact production on State Trust Lands. Commissioner Dunn notes in his comments, "New Mexico is unique in that there is a near parity in production levels between state and federally managed lands" which has resulted in mixed use, with significant overlay in regulations and enforcement by the New Mexico Oil Conservation Commission, the New Mexico State Land Office, the Bureau of Reclamation, Tribal entities, the BLM and the EPA. The May 2014 GAO report, upon which the BLM relies heavily in this proposal, notes that:

> *"severance of mineral and surface estates has occurred through various means, including the transfer of surface or mineral interests through private party contracts, federal land grants acts, homesteading laws, and other congressional actions. Specifically, federal land grant acts and homesteading laws created split estates by granting surface rights to homesteaders while reserving mineral rights for the federal government. In a number of states, mineral rights are considered the dominant estate, meaning those rights take precedence over the rights of surface owners. For instance, the Stock Raising Homestead Act of 1916 allowed a settler to claim 640 acres of land designated by the Secretary of the Interior as ranch land, but where the federal government retained mineral rights. Tribal and individual Indian estates were split through several congressional acts, including the General Allotment Act of 1887, the Indian Reorganization Act of 1934, and legislation to create or dissolve Indian reservations.11 Split estates and changing ownership for both surface and mineral estates have created a patchwork of ownership patterns, and it is not uncommon to find federal, Indian, private, state, and county parcels of land intermingled*

> *together in some areas of the country—giving land ownership maps the appearance of a checkerboard.*"[13]

With respect to the proposed rules' applicability to a situation where a well pad may be on state or private lands with a lateral well bore passing through federal lands, it is unclear whether the proposal would apply. In addition, Commissioner Dunn points to the frequent use of Communitization agreements or CA's that commingle state, private and federal lands in one unit for purposes of conservation regulations, minimization of surface impacts and economical extraction of the resource – thereby preventing 'waste'. However, the proposal would impact these existing agreements which would burden the properties with additional costs, delays and would ultimately reduce the state benefit of such agreements. IPANM would contend that these locations should be exempt from compliance with the proposed rule. As noted by the Joint Trades, should BLM apply the Proposed Rule to these locations, it would need to revise its cost-benefit analysis to reflect that decision, as that would add significant costs for operators in New Mexico.

C. The proposal fails to address bureaucratic delays or the nature of the cost and time to build gatherer systems.

One of BLM's solutions to what it determines to be excessive venting and flaring in the proposed Rule is that additional permanent infrastructure can be built to capture the incremental flare volumes. However, gas pipeline projects require long term planning and substantial investment including a long rights of way and permitting process. Often the slowest permits are related to the BIA and BLM jurisdictions. In fact, in New Mexico, the Land Commissioner Dunn points out that the amount of time required to obtain a federal right of way for the BLM can be as long as six months to a year prior to starting to build additional infrastructure. The timeframes for approvals on Indian lands are even longer. Thus, Commissioner

[13] *GAO Report*, "Oil and Gas: Updated Guidance, Increased coordination, and comprehensive data could improve BLM management and oversight*" May 2014, p. 6*

Dunn states, "it is hypocritical of the BLM to find fault with hydrocarbon producers and to impose an essentially punitive and costly new rule when [the agency's] own actions have been responsible for a large part of the problem"[14].

The BLM also claims that during economic downturns, activity is reduced and therefore, the gathering and midstream companies can 'catch up'. This statement, in and of itself, demonstrates the lack of understanding the Washington BLM bureaucracy has of the oil field. When commodity prices are low, both producers and midstream companies have less cashflow and there is less capital investment.

There is also a significant misunderstanding with gas gatherer economics in the proposed rule which is attempting to require a one-size fits all, no venting and almost no flaring policy. Under current NTL 4A, BLM may approve venting or flaring of oil well gas without incurring a royalty obligation based on engineering, geologic, economic, and recoverable reserves information. Even in a recent appeal to a BLM State Director of a BLM North Dakota Field Office Decision Record regarding the Field Office's proposed plan for processing flaring sundry notices, the State Director issued a decision ("State Director Decision") concluding, among other things, that the costs and economics of gas capture must be considered in making an "avoidably lost" or "unavoidably lost" determination[15]. " In addition, the "North Dakota Industrial Commission Order 24665 Policy/Guidance" document issued by the NDIC expressly provides for temporary exemptions for ROW delays. The local BLM authority in the Bakken and the State both recognize that flexibility is required for ROW delays. In addition, midstream companies must also answer to shareholders and often require dedications from producer when wells in some basins may have rapid decline rates. It would be difficult and uneconomic for any single operator to pay for a dedicated gas pipeline and processing system with a few wells that quickly decline to low volumes. To

[14] April 15, 2016 letter from NM Land Commissioner A. Dunn to N. Kornze regarding proposed BLM Waste rule.

[15] *See* SDR No. 922-15-07 issued February 11, 2016 by Aden L. Seidlitz, Acting State Director, at 9, 10, 12.

support infrastructure investment, gas gatherers require commitments from producers to ensure gas will flow through their infrastructure. These commitments vary by agreement and market but almost universally limit alternate gathering options. Furthermore, most dedicated contractual obligations make it difficult to bring a long-term secondary gathering system to the same pad location. If such a secondary agreement were allowed, it would only be allowed on an interruptible basis and would only be used sporadically, thereby making a secondary system even more uneconomic and infeasible.

D. Climate change and reliance on EPA's future rulemakings are not valid justifications for this proposal

The BLM may not, under the Mineral Leasing Act or the Clean Air Act add the alleged climate change benefits that society might realize from the incidental reduction in methane emissions from this proposal to justify its waste prevention measures. Congress has given authority to consider climate change effects, to the extent it exists, exclusively to the EPA under the Clean Air Act. By relying on the benefits of methane reduction to justify its waste prevention measures, BLM is clearly "rel[ying] on factors which Congress [did] not intend it to consider" when developing such measures under the MLA, and is therefore acting arbitrarily and in violation of law.

"Even if BLM somehow had authority to require federal oil and gas lessees to reduce methane emissions out of a concern for the effect they might have on climate change," the Joint Trades comments accurately point out that "BLM would still have to provide a reasonable justification for doing so, which it has not." According to the BLM fact sheet for the proposed rule, it is unlikely that the proposed rule will have any meaningful impact on global greenhouse gas (GHG) emissions. Global methane emissions are estimated at 6,875 million metric tons CO_2-eq per year, whereas U.S. methane emissions are about 708 million metric tons per year, or about 10.2% of global emissions. BLM estimates that the Proposed

Rule will reduce between 4.1 and 4.2 million metric tons of CO_2-eq per year. [16] Taking BLM's 4.2 MMT CO_2-eq per year, the Proposed Rule provides a reduction of 0.061% of global methane emissions. More importantly, methane emissions make up only a small portion of total global GHG emissions. EPA estimates put annual global greenhouse gas emissions at approximately 45,863 million metric tons of CO_2-equivalent (CO_2-eq) in 2010[17]. By BLM's most ambitious estimates, which are likely overstated, the proposed Rule will reduce greenhouse gas emissions by 4.2 million metric tons of CO_2-eq or approximately 0.0092% of global greenhouse gas emissions.

While BLM asserts that "[v]enting and leaks of natural gas in the oil and gas production process also contribute to climate change," the empirical evidence on this record contradicts BLM's assertion. BLM's proposal is devoid of any discussion or evidence demonstrating how significantly less than a 1% reduction in domestic methane emissions will have any impact on climate change. The APA demands far more than regulation via the precautionary principle. See e.g., *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1145 (9th Cir. 2013) (striking down Plaintiff's arguments that "any and all contribution of greenhouse gases must be curbed," and noting the common-sense notion that, as articulated in *Massachusetts v. EPA*, regulatory action should focus on reducing "meaningful contributions" of GHGs). One must question whether the significant cost of this regulation can justify a 0.0092% reduction and whether there would be any impact on global climate change at all.

E. The Mineral Leasing Act, NTL-4A and long standing practice requires an "economically recoverable" standard to categorize venting or flaring as 'avoidable loss'

BLM does not have plenary authority to regulate the venting and flaring of gas on federal leases. Pursuant to the Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181-287,

[16] Fact Sheet on Methane and Waste Reduction Rule. Bureau of Land Management. January 2016.

[17] U.S. EPA, Climate Change Indicators in the United States, https://www3.epa.gov/climatechange/science/indicators/ghg/global-ghg-emissions.html (last visited Apr. 6, 2016)

and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359, BLM has the authority to "ensure conservation of the oil and gas resource, prevent waste, and obtain a fair return to the government, including ensuring that the United States receives proper royalties on production from federal leases. See 30 U.S.C. §§ 187, 359. This is the basis of BLM's authority to regulate venting and flaring of natural gas on BLM-managed leases. See United States Geological Survey Conserv. Div. Manual, 644.5.1, .2, Waste Prevention, Beneficial Use ("USGS Division Manual") (June 23, 1980); Notice to Lessees ("NTL")-4A "Royalty or Compensation for Oil and Gas Lost" (Jan 1, 1980).

It is a longstanding principle at common law and under the MLA that a lessee commits "waste" if it vents or flares gas that is otherwise economically recoverable. See 30 U.S.C. § 225; USGS Division Manual at 1-3. Accordingly, BLM's longtime standard has been whether it is economic for the lessee to recover the gas. See, e.g., NTL-4A.3 If not, the loss is considered "unavoidable" and the lessee has no royalty or other obligation with respect to the vented or flared gas. See id.; Texaco, Inc., 135 IBLA 112 (1996). BLM has reiterated this key economic principle in prior notices, instruction memoranda, and guidance on venting and flaring. See, e.g., NTL-4A. BLM's latest outreach materials also acknowledge this concept. Despite this longstanding and consistent interpretation of the statutory standard for "waste," BLM is now considering whether to change existing standards for determining whether recovery of gas is economic for a lessee, and hence the definition of "waste." For example, BLM's presentation materials suggest the creation of a "clear and rigorous economic test" to address venting and flaring of casing head and associated gases. See BLM Outreach Materials at 16. BLM cannot interpret the economic standard in a manner inconsistent with its decades-long interpretation and longstanding accepted usage in the regulated community, which involves an

assessment of the actual economic conditions relating to an oil and gas operation on a case-by-case basis[18]. See NTL-4A; Maxus Exploration Co., 140 IBLA 124 (1997).

F. The NTL-4A process allows for flexibility and compliance

As noted in several points above and in the American Petroleum Institute's comments to the Venting and Flaring proposal of 2014, NTL-4A "provides a precedent that implements the intent of "prevention of undue waste" of the natural resource as required by MLA § 187, while obtaining "maximum ultimate economic recovery" of the resource as required by 43 C.F.R. §§ 3160 & 3161". NTL-4A allows operators to identify circumstances under which venting and flaring are permissible, requiring reporting, documentation, and consultation with the BLM Supervisor.

In a current analysis under NTL-4A, venting and flaring is generally prohibited and may only take place with BLM's written approval. However, an operator may apply for the ability to flare based on "an evaluation report supported by engineering, geologic, and economic data, that the expenditures necessary to market or beneficially use such gas are not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be recovered if the venting or flaring were permitted to continue." Hundreds of operators have made the demonstration required by NTL-4A to BLM's satisfaction and are currently venting or flaring with BLM's written approval.

BLM is now proposing, to find, as a matter of law, that any venting, regardless of the circumstances of the operator and any approval that has been given to it by BLM under NTL-4A, is a "waste" of gas. Second, it is proposing to limit all routine flaring of gas, subject to certain narrow exceptions, to 1,800 Mcf/month per well. In other

[18] See NTL-4A; Maxus Exploration Co., 140 IBLA 124 (1997

words, it is proposing to find, as a matter of law, that "very high rates of flaring from a lease—that is, rates above the proposed 1,800 Mcf/month limit—constitute unreasonable waste under the MLA," regardless of the fact that the BLM may have already given approval under NTL-4A.

G. Federal Lessees have the right to develop resources subject to the 'reasonable precautions' standards to prevent waste.

As noted in the IPAA comments, "Federal oil and gas lessees have a right to develop the oil and gas resources on their leases, subject to the requirement that they take "reasonable precautions" to prevent the "waste" of those resources. Operators must also comply with other applicable federal laws and regulations, like the ones adopted by EPA to regulate air emissions". If the resources can not be economically captured, the BLM has other remedies, such as rescinding the lease but is not free to create 'waste mitigation' measures because of claims that society may benefit from incidental methane reductions. The oil and natural gas industry has and will continue to work voluntarily to address methane emissions, but federal oil and gas lessees may not be made to bear the costs of reducing those emissions under the guise of BLM's authority to impose "reasonable precautions" to prevent the "waste" of gas.

H. The 'benefits' espoused by the BLM in this proposal are speculative at best

The benefits as laid out by BLM are also speculative as they rely on passage of EPA Subpart OOOO and on certain flawed assumptions that methane gas reductions have a social cost benefit. In addition to not completing the RIA in accordance with published OMB guidelines, BLM included a number of assumptions that were on their face either false, or should not have been used as part of this type of analysis. *See John Dunham & Associates cost benefit analysis of the impact of Onshore Oil and Gas Leasing (43 CFR 3100), Onshore Oil and Gas Operations (43 CFR 3600), Royalty-Free Use of Lease Production (43 CFR 3178), and Waste Prevention and Resource Conservation (43 CFR*

*3179)(*JDA estimates that the costs exceed $1.26 billion, while the benefits as estimated by the BLM are between $115 - $384 million (assuming either a 3 percent or 7 percent discount rate, EPA finalizing or not finalizing of Subpart OOOOa, and various methane reduction assumptions). A more reasonable estimate of the benefits suggest that they are at best $90 million, hence the cost-benefit ratio of the proposed rules is nearly 14:1 cost to benefit. The most glaring problem, however, is BLM's inflated commodity price estimates of $4/mcf which underlie the economic benefit estimate. BLM's failure to conduct a comprehensive alternative analysis was clearly in violation of the OMB guidelines. An alternatives analysis may have shown that the proposals could actually lead to increased and significant economic costs to the oil and gas industry.

I. Operators have a duty to market gas

Further, the Mineral Leasing Act, at 43 CFR §3162.7, requires operators to market hydrocarbons, but only if doing so would be 'economically reasonable'. In the MLA, "waste of oil or gas" is defined as "… (1) A reduction in the quantity or quality of oil and gas ultimately producible from a reservoir under prudent and proper operations; or (2) avoidable surface loss of oil or gas"[19].

While the BLM generally contends in its proposal that oil and gas operators seem to be unnecessarily venting or flaring gas, the agency ignores the fact that methane emissions from oil and natural gas exploration and production (E&P) are 1.07 percent of total U.S. GHG emissions and the natural gas sector alone has reduced methane emissions by 38 percent since 2005.[20]According to a study by the University of Texas, Austin[21],., methane emitted from all upstream source categories at natural gas production sites represents just 0.42 percent of gross natural gas production volumes . On a national

[19] 43 CFR §3160.0 Definition of "Waste of oil or gas"
[20] See EPA, 2014 GHG Reporting Data (2014).
[21] David T. Allen et al., Measurements of Methane Emissions at Natural Gas Production Sites in the United States, 110 Proc. of the Nat'l Acad. of Sci. of the U.S. 18023 (2013)

scale, despite significant growth in production in this sector over the past several years, methane and other emissions have continued to decline.

J. IPANM opposes the fluctuating royalty rate provisions in the proposal

Although it has not been formally proposed, BLM is asking for comment from industry regarding establishing a royalty rate, 'higher than 12.5%' in order to 'allow royalty rates on new competitively issued leases to vary after the first year, based on the lease holder's record of routine flaring of associated gas from the lease during the previous year."[22] The purpose of the provision, which BLM refers to as a "royalty adder provision," would be: "(1) To create an incentive for bidders to consider the availability of gas capture infrastructure and the proximity of gas processing facilities as attributes that add significant value to Federal oil development leases; and (2) To create an incentive for Federal lease holders to plan for gas capture prior to or in conjunction with the development of oil wells." As noted in the Joint Association comments, "such a provision would be both an abuse of the Secretary's discretion and inconsistent with the Rule, and should not be given any further consideration by BLM. The MLA gives the Secretary the discretion to set the royalty rate for competitive leases, as long as the rate is not less than 12.5%. The Secretary is to use her discretion to set the rate at a level that will insure a fair return to the government for the use of public resources. It would be an abuse of that discretion for the Secretary to use her authority instead to promote her policy to reduce flaring." In essence, the proposed 'adder provision' will be informing operators that if they flare less than the 1,800 mcf/month level that gas will not be considered 'wasted' while operators would also have to pay a higher royalty rate unless they flare at a significantly lower rate, the "threshold flaring rate". BLM gives no adequate explanation for this disconnect; it justifies the adder provision solely in terms of its ability to incentivize lease holders to plan ahead for gas capture. But the flaring limit in the rule and the requirement that operators develop waste minimization plans

[22] 81 Fed. Reg. at 6660.

were supposed to provide that incentive. It would be arbitrary to say that flaring in compliance with the rule's 1,800 Mcf/month limit is not a "waste" of gas, and to then turn around and say that compliance with anything less than the adder provision limit would be a "waste" of gas, and would subject operators to a royalty increase.

We, along with the Associations, endorse the comments submitted to OMB by the Council of Petroleum Accountants Societies on this subject. They demonstrate the impracticability of this provision from an accounting perspective.

K. IPANM strongly opposes the new requirement for Waste minimization plans

Prior to drilling a new development oil well, under the proposed rule, "an operator would have to evaluate the opportunities and prepare a plan to minimize waste of associated gas from that well, and the operator would need to submit this plan along with the Application for Permit to Drill or Reenter" (APD). [23] This plan must include a "[c]ertification that the operator has provided one or more midstream processing companies with information about the operator's production plan, including the anticipate completion dates and gas production rates of the proposed well or wells."[24] However, in attempting to find a solution to a non-existent problem, the BLM, "entirely failed to consider [two] important aspect[s] of the problem," [25]and its solution is therefore arbitrary and destined to fail. First, BLM assumes that if only operators would discuss their project production rates with third party pipeline companies prior to submitting an APD, the gas capture infrastructure will be developed in advance of proven oil production and increased field development. However, in reality, many operators and especially small independent operators whom IPANM represents, must first prove production for a new play and initiate larger scale development before the midstream processing companies are willing to

[23] 81 Fed Reg. 6620 col 1
[24] Id. At 3162.3-1(j_(4)(v)
[25] Motor Vehicle Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 43 (1983).

invest capital in new facilities or in the expansion of existing facilities for what is nominally an oil field. Just sharing "projected gas production rates" with midstream processing companies is not enough. Second, as noted above, the BLM completely overlooks the most significant reason why new production outpaces infrastructure capacity, namely, the time-consuming process of obtaining the necessary pipeline rights-of-way from BLM. In these situations, operators are left with no choice but to flare associated gas from production or shut in their wells.

As noted in the Joint Association comments "Section 3162.3-1 would require operators "[w]hen submitting an Application for Permit to Drill an oil well" to "also submit a plan to minimize waste of natural gas from that well." In their plans, operators would be required to "set forth a strategy for how the operator[s] will comply with the requirements … regarding control of waste from venting, flaring, and leaks and must explain how the operator[s] plan to capture associated gas upon the start of oil production, or as soon thereafter as reasonably possible." Although the waste minimization plans would not be enforceable, "[f]ailure to submit a complete and adequate waste minimization plan [would be] grounds for denying or disapproving an Application for Permit to Drill."[26] The proposed requirement is objectionable for several reasons and must not be promulgated.

1. Requiring waste minimization plans is unnecessary – Requiring waste minimization plans is not necessary to achieve BLM's stated goal and is therefore not a "reasonable precaution" against "waste" of gas and is beyond BLM's authority to impose under the MLA..

However, preparing the plan for BLM will simply be a needless bureaucratic exercise that will waste the time and resources of operators in preparing the plan, as well as the time and resources of BLM in reviewing the plans to determine if they are "adequate and complete." Moreover, many independent operators who, by

[26] 81 Fed. Reg at 6679.

definition are non-integrated companies, might not be able to obtain the information required for the Waste Integration Plan due to the fact that information may be exchanged only through contractual obligations with third party midstream companies.

2. Requiring waste minimization plans will further slow an already slow APD approval process – Waste minimization plans will not be enforceable, but a failure to submit an "adequate and complete" plan will be grounds for denying an APD. BLM will therefore have to review each plan before it can approve an APD, thus slowing down the APD approval process, which already often takes more than a year to complete. BLM should not assign itself a new task when it has demonstrated that it is not capable of performing the tasks it already has in a timely manner, nor should it assign itself a new task without establishing a deadline by which it is completed and without demonstrating that it will have the resources to meet that deadline.

Moreover, because it already takes so long to get an APD approved, the information in a waste minimization plan may well be stale by the time the APD is approved, and will thus serve no useful purpose. On average, it takes BLM three to six months to approve an APD on federal lands and 12 to 18 months to approve an APD on Indian lands. The difference with NDIC's gas capture plan is that the NDIC approves APDs within 15-45 days and meets with midstream companies on a regular basis.

By the time BLM approves an APD, most of the information BLM has requested will be out of date. Moreover, some information BLM is requesting in the waste minimization plans is not information an exploration and production company has at the time of submitting an APD.

3. Waste minimization plans should not contain confidential and unnecessary information - The information that must be included in a plan pursuant to section 3162.3-1(j)(4)(i-iv and vi), (5)(ii-iv), and (6) is confidential business information

and should not be required to be included in a plan. Moreover, the information that must be included in the plan pursuant to section 3162.3-1(j)(4)(i-iv and vi) is in the control of the pipeline companies. Thus, even if it were not confidential, operators would likely not be able to obtain the information based on competitive business concerns.

4. Some of the information required in a waste minimization plan is duplicative and does not achieve the purpose of reducing flaring. For example, an operator does not need to identify for BLM "all existing gas pipelines within 20 miles of the well," and "the location and name of the operator of each gas pipeline within 20 miles of the proposed well;" it only needs to identify the pipeline to which it intends to connect. The Associations and IPANM would argue that information about existing pipelines in an areas is, as a practical matter, irrelevant because BLM cannot force an operator's gas to be delivered to a nearby pipeline owned by a third party gas gatherer where there is no contractual relationship, except after a full hearing pursuant to 30 U.S.C. 185(r)..

5. Due process concerns are raised when the BLM believes it may exercise authority to delay action on the APD if gas capture is not yet available on a given lease. IPANM would strenuously contend that if the BLM were to indefinitely suspend action on a lease due to a lack of infrastructure that this would be violative of all due process rights the lessee obtains when winning a lease at a BLM sale. This provision of the rule would allow BLM to stifle exploration in frontier areas distant from gas gathering infrastructure. Although the Proposed Rule also allows BLM to suspend a non-producing lease while action on the APD is held in abeyance (authority BLM already has under 30 USC §209), gathering infrastructure will not be built in an area until there is a proven supply of gas to transport, and the existence of that gas cannot be shown until wells are drilled. In addition, as noted in the Association comments, "§3179.10 seems to ignore Sec. 366 of the Energy Policy Act which requires BLM to issue the permit within 30 days after receipt of a complete APD "if

the requirements under the National Environmental Policy Act of 1969 and other applicable law have been completed within such timeframe" or defer a decision and provide the applicant a notice that specifies any steps the applicant could take for the permit to be issued AND a list of actions that BLM needs to complete together with timelines and deadlines for completing such actions". In frontier areas, smaller independent operators will effectively be shut out of development areas as there will be nothing the applicant can do to make "gas capture capacity" available unless it is willing to bear the expense of installing electricity generation or gas liquidation facilities in advance of knowing whether the well will produce sufficient quantities of gas to power those facilities.

III. Conclusion

In conclusion, IPANM thanks the BLM for the opportunity to comment on this rule, however, due to pending EPA rules and the inadequacy of the data used to develop justifications for the rule, we strongly recommend that it be completely revised. IPANM contends the following: A. that the BLM may have the statutory authority to prevent waste, but it can not regulate methane emissions or air quality; B. The states, not BLM, have the authority, granted by the EPA, to regulate air quality issues; B.1. IPANM would strongly suggest that New Mexico operators be able to use the New Mexico Gas Capture Plans rather than the provisions of this rule; B.2. the uniqueness of New Mexico and the significant mixed land use also requires that BLM defer to local authorities; C. the proposal fails to address bureaucratic delays; D. that climate change and future EPA rulemakings are not justifications for the rule; E. the Mineral Leasing Act, NTL-4A and long standing practice requires an "economically recoverable" standard to categorize venting or flaring as 'avoidable loss'; F. The NTL-4A process allows for flexibility and compliance; G. Federal Lessees have the right to develop resources subject to the 'reasonable precautions' standards to prevent waste; H. The 'benefits' espoused by the BLM in this proposal are speculative at best; I. Operators have a duty to market gas; J. IPANM opposes the

fluctuating royalty rate provisions in the proposal and K. IPANM strongly opposes the new requirement for Waste minimization plans.

We would be interested in participating in any stakeholder/taskforce/peer review groups convened for the purpose of addressing these policy proposals. We look forward to providing additional comments as the agency drafts of these proposed regulations materialize. Please feel free to contact me at Karin@ipanm.org or at (505) 238-8385 if you have any questions regarding the issues.

Respectfully submitted on this date of April 22, 2016,

INDEPENDENT PETROLEUM ASSOCITION OF NEW MEXICO

By: Karin V. Foster, esq.
Executive Director