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Re: API Comments on “Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements,” 83 Fed. Reg. 7924 (Feb. 22, 2018) (RIN 1004-AE53)

Dear Deputy Director Steed:

API appreciates the opportunity to comment on the Bureau of Land Management’s (“BLM”) February 22, 2018 proposed rule, “Waste Prevention, Production Subject to Royalties, and Resource Conservation” (“Proposed Rule” or “Proposal”), 83 Fed. Reg. 7924. API supports the Proposed Rule, which would significantly improve upon BLM’s 2016 effort to regulate venting and flaring of gas from BLM and Indian lands (“2016 Rule”),¹ and more properly reflect the principles of the previously-applicable 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (“NTL-4A”). API supports BLM’s continued efforts to prevent the “undue waste” of federal mineral resources, and offers these comments in support of those efforts and to recommend improvements in the Proposed Rule that BLM should include in a final rule.

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API member companies are leaders of a technology-driven industry that supplies most of America’s energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and since 2000 has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy. API member companies conduct drilling and

¹ BLM, “Waste Prevention, Production Subject to Royalties, and Resources Conservation,” 81 Fed. Reg. 83,008 (Nov. 18, 2016).

production operations on lands administered by BLM that are subject to the requirements of the Proposed Rule. API has participated in all three federal court cases to date related to BLM's promulgation and implementation of the 2016 Rule.

I. General Comments

A. The Proposed Rule Is Properly Grounded on BLM's Authority to Prevent Undue Waste.

Unlike the 2016 Rule, which impermissibly sought to achieve air quality and climate change enhancement goals in the guise of "waste" prevention,² API supports the Proposed Rule's recognition that air quality and methane regulation are beyond BLM's statutory purview.³ Pursuant to the Clean Air Act's comprehensive regulatory scheme, regulation of air quality and methane is the exclusive province of EPA and the states, and neither the Mineral Leasing Act of 1920 ("MLA"), nor the Federal Land Policy and Management Act ("FLPMA"), give BLM authority to regulate air emissions associated with venting and flaring from existing or future wells. Many of the requirements BLM proposes to remove from the current regulations do not reduce waste of oil or gas, and some even increase waste by forcing operators to utilize additional marketable gas for flares to control emissions.⁴

The Proposed Rule instead properly reflects that the MLA authorizes venting and flaring restrictions for the sole purpose of preventing "undue waste" of federal mineral resources. *See* 30 U.S.C. §§ 187 & 225. The Proposed Rule would incorporate into regulation the lease-specific concept of "waste" as intended by Congress when enacting the MLA, and incorporated by the Department into its oil and gas leases and regulations from the inception of its oil and gas leasing program. *See* Proposed 43 C.F.R. § 3179.3 (definition of "waste of oil or gas").⁵ Accordingly, API supports the Proposed Rule's reinstatement of BLM's pre-2016 understanding that, in the context of venting and flaring, "waste" is an avoidable loss of oil and gas where the cost of capture exceeds the lost economic value of the production, and that the agency may not impose on diligent operators requirements that cost more than the economic value of the resources they are required to conserve.⁶ This approach is also consistent with decades of BLM practice and guidance, including under NTL-4A. This comment letter is intended in part to help ensure that this principle is consistently applied throughout the Proposed Rule.

B. The Scope of BLM's MLA Waste Prevention Authority Compels Revisions of BLM's Waste Prevention Regulations.

² *See* www.regulations.gov, Dkt. No. 2016-01865, Comment No. BLM-2016-0001-9073, at 2-4 (Apr. 22, 2016) ("API Comments on the 2016 Rule"). API hereby incorporates by reference into this comment letter its previous comments on the proposed 2016 Waste Prevention Rule to the extent applicable to the current Proposed Rule and the discussion in its regulatory preamble.

³ *See* API Comments on the 2016 Rule at ES-1 – ES-2, 4-12.

⁴ *See Id.*, at 53-55, 77-79, 90-104.

⁵ *See id.*; *Wyoming v. USDOJ*, No. 16-cv-285 (D. Wyo.), API's Amicus Brief In Support of Pets., at 2-10 (Dkt. No. 153) (discussing the concept of waste as understood in the oil and gas industry and the states at the time of MLA enactment, and as applied by BLM and its predecessors).

⁶ *See* 83 Fed. Reg. at 7928; API Comments on the 2016 Rule at 12-15.

Proper application of BLM’s waste prevention authority compels elimination of those portions of the 2016 Rule that imposed unnecessary regulatory burdens and costs on operators greater than the revenues those operators could recover from the capture and sale of the gas. BLM now appropriately proposes to eliminate portions of existing 43 C.F.R. Subparts 3162 and 3179 and the unenforceable waste minimization plans and the overly complex and arbitrary flaring limits established in the 2016 Rule, including 43 C.F.R. §§ 3179.7 (gas capture targets) and 3179.8 (alternative capture requirements). BLM also proposes to rescind the requirements to detect and capture or flare economically unrecoverable volumes of gas from piping and equipment (portions of § 3179.301 and all of §§ 3179.302-3179.305), vented incident to the operation of pneumatic pumps and controllers (§§ 3179.201-3179.202), or fugitively emitted from petroleum liquids storage tanks (§ 3179.203). These proposed changes to BLM’s regulations are consistent with BLM’s MLA authority to ensure the prevention of “undue waste.”

C. The Proposed Rule Increases Administrative Efficiency.

Consistent with the Administration’s policy to promote and encourage domestic energy production and reduce regulatory burdens on energy producers, and specifically to review and revise the 2016 Rule consistent with this policy,⁷ the Proposed Rule also eliminates burdensome paperwork and reporting requirements imposed by the 2016 Rule. This includes Waste Minimization Plans, the gas capture target process, LDAR records requirements for existing facilities, burdensome and unnecessary well maintenance and liquids unloading Sundry Notice requirements, and annual reporting requirements.

The Proposed Rule also improves upon the system formerly established under NTL-4A by recognizing the efficacy of state venting and flaring control programs for ensuring that federal mineral resources are not unduly wasted.^{8,9} Under the Proposed Rule, operators may vent or flare in compliance with state regulations without constant submission of Sundry Notices for BLM approval. Operators must resort to a Sundry Notice system *only* when: (1) flaring is incident to activities not expressly covered in the Proposed Rule; and (2) where a state lacks applicable venting and flaring requirements that prevent undue waste.¹⁰ BLM currently has a significant backlog of Sundry Notices pending approval, and API supports BLM’s proposed approach to minimize this administrative backlog.

D. The RIA Underestimates the Benefits of the Proposed Rule Because It Did Not Fully Consider Certain Erroneous Economic Assumptions in the 2016 Rule’s RIA.

API also supports BLM’s revisions to the Regulatory Impact Analysis (“RIA”) originally prepared for the 2016 Rule. Although the Proposed Rule’s RIA could be further improved

⁷ Executive Order (“E.O.”) 13,783, “Promoting Energy Independence and Economic Growth” (Mar. 28, 2017); Secretarial Order 3349 (Mar. 29, 2017).

⁸ See Proposed 43 C.F.R. § 3179.201(a).

⁹ Proposed 43 C.F.R. § 3179.201(a) also permits venting and flaring in compliance with applicable Tribal regulations. The MLA does not apply to BLM-managed Indian leases, and BLM therefore is not required to assess whether Tribal regulations prevent “undue waste” specifically for MLA purposes. BLM has a trust responsibility to properly administer Tribal minerals pursuant to 25 U.S.C. § 396a.

¹⁰ See Proposed 43 C.F.R. § 3179.201(c).

consistent with the recommendations below, API supports the emphasis on costs to operators, which is the appropriate focal point for a regulation implementing BLM's MLA waste prevention authority.¹¹ API also supports, consistent with federal policy, reconsidering the costs and benefits of the 2016 Rule in the absence of the Technical Support Documents of the now-disbanded Interagency Working Group on Social Cost of Greenhouse Gases, such as the Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis.¹² API acknowledges BLM's obligation under E.O. 13,783 to monetize the value of changes in greenhouse gas emissions consistent with OMB Circular A-4. However, BLM should fully acknowledge that inclusion of this estimate in the net benefits of the rule is inappropriate. Emission reductions, particularly viewed on a global basis, are outside of BLM's jurisdictional purview and cannot be a proper motive behind a rule intended to prevent the waste of federal minerals. Indeed, the U.S. District Court for the District of Wyoming noted similar concerns with the RIA that accompanied the 2016 Rule.¹³ Although the Proposed Rule may have ancillary perceived environmental benefits, BLM's authority to control venting and flaring is limited to the prevention of undue waste of federal minerals. Accordingly, compliance costs and the cost of capture as measured against the value of the recovered production should be the only relevant determinants of whether the waste prevention rule is rational, reasonable, and advisable.

BLM has yet to incorporate into its Proposed Rule RIA the now-avoided substantial costs associated with potentially widespread well-by-well shut-ins that would likely be triggered by implementation of the 2016 Rule. In the absence of this information, BLM currently underestimates the costs of the 2016 Rule and therefore underestimates the benefits of the Proposed Rule. As explained in API's comments on the 2016 Rule and relevant litigation filings in Wyoming and California federal district courts, which API incorporates herein by reference as applicable, implementation of the 2016 Rule would trigger at least temporary shut-in of potentially thousands of marginal wells. Indeed, such wells of less than 15 barrels of oil equivalent ("BOE")/day of production, or less than \$505/day in revenue (assuming a gas price of \$2.80/Mcf and an oil price of \$50.50/BBL) constitute the majority of wells on BLM-managed leases, accounting for anywhere from 60 percent (Colorado) to 89 percent (New Mexico). *See* Attachment A. BLM has not yet considered the economic harm to operators from this lost production, or to BLM, states, and Tribes from lost royalties. A final rule should expressly correct the 2016 Rule RIA's assumption that the 2016 Rule would increase the amount of gas ultimately recovered, and therefore increase revenues to BLM, states, and Tribes, because the opposite is true. BLM also has not yet considered the now-avoided economic consequences of possible damage to and permanent loss of recoverable reserves associated with temporary shut-ins under the 2016 Rule.¹⁴ API has attached to this comment letter as Attachment A a recent analysis of these issues prepared by Environmental Specialized Solutions ("ESS").

BLM also appears to continue to accept the 2016 RIA's assumption of minimal industry compliance costs. As explained in API's and others' comments on the 2016 Rule, the 2016 RIA grossly underestimates the costs of complying with the 2016 Rule. Indeed, a recent industry

¹¹ API Comments on the 2016 Rule, at 18.

¹² *Id.*, at 12.

¹³ *Wyoming*, No. 16-cv-285, Order on Mots. For Prelim. Inj., at 21-22 (Dkt. No. 92).

¹⁴ *E.g., California v. BLM*, No. 17-7186 (consolidated) (N.D. Cal.), [Proposed] Intervenor-Def. Am. Petroleum Institute Oppo. to Pls.' Mots. for Prelim. Injunction, at 13-16 (ECF No. 64) (explaining the consequences of temporary and permanent shut-in).

estimate put the compliance cost to operators at approximately \$319 million, or about \$21,000 per well.¹⁵ BLM should incorporate these economic impacts into its RIA so that the likely effects of the 2016 Rule, and the consequential benefits of the Proposed Rule, can be properly conveyed.

The RIA for the Proposed Rule also should disavow the notion that compliance with the 2016 Rule would benefit lessees due to increased gas capture and sale.¹⁶ This wrongly assumes that BLM and Tribal lessees are not already prudent operators and instead commit undue waste of otherwise profitably recoverable gas. As explained in prior comments and further below, if capturing and selling the gas were profitable, then the lessees already would be doing so. Indeed, lessees have always been *required* to recover profitable gas. Where the 2016 Rule most departs from previously accepted practice is its unprecedented requirement that operators capture gas *even at a loss*. It added no new provision that would net operators additional profit; it only imposed requirements that force them to incur new losses. The 2016 Rule also offered no solution to the barriers to additional economic capture, including lengthy delays and uncertain permitting processes for new gas pipelines, which are needed to capture and market gas that otherwise are lost. Per the States of North Dakota and Texas, under the 2016 Rule, it would cost operators anywhere from \$28-30 to prevent the loss of each dollar of gas.¹⁷ At that best-case cost-benefit ratio of 28:1 as explained by North Dakota and Texas, any representation in the Proposed Rule's RIA or preamble that the 2016 Rule in any way economically benefitted federal and Tribal lessees through the compelled recovery of "wasted" production is unsupportable and should be modified.

The analysis prepared by ERM that accompanies this letter as Attachment B summarizes the savings (i.e., the avoided net costs) to the regulated industry that would result from rescinding the key provisions of the 2016 Rule as well as the change in social benefits from changes in emissions. The industry savings and social benefits are measured from 2019–2028, the 10 years covered by RIA for the 2018 Proposed Rule, using both a 7 and a 3 percent discount rate. In addition, this analysis provides estimates of the additional oil production from marginal wells that will likely result from rescinding the above rule provisions.

From the work performed by ERM, API estimates that the 2018 Proposed Rule will provide annualized savings or avoided net costs of \$192 million at a 7 percent discount rate (\$222 million at a 3 percent discount rate), totaling \$1.9-2.2 billion in savings over 10 years. In addition, API estimates that eliminating the 2016 Rule's LDAR requirements, and the other requirements of the 2016 Rule that pursue air quality regulatory objectives that fall outside of BLM's authority, will increase oil and gas production on BLM-administered leases by at least 0.3 million BOE per year over the next 10 years, for a total increase of 3 million additional BOE produced. This additional production is currently valued at \$21 million per year and supports approximately \$9 million in annual earnings and 159 jobs nationally. The basis for these estimates as well as the description of the delta between the 2018 RIA and the API estimates are described in more detail in Attachment B.

¹⁵ See www.regulations.gov, Dkt. No. BLM-2017-0002, Comment No. BLM-2017-0002-16496, at 4.

¹⁶ 81 Fed. Reg. at 13,013.

¹⁷ *Wyoming*, No. 16-cv-285, Joint Opening Br. of the States of North Dakota and Texas, at 35 (Dkt. No. 143).

E. The Reasonable and Prudent Operator Standard Requires Lessees to Employ Currently Available Technology and Methods If Doing So Enables Additional Profitable Recovery.

In the preamble to the Proposed Rule, BLM requests comment on “incentivizing” additional capture and use of otherwise lost gas, and expresses an “interest to learn of best practices that could be incorporated into a final rule that would encourage operators to capture, use, or reinject gas without imposing excessive compliance burdens that could unnecessarily encumber energy production, constrain economic growth, and prevent job creation.” 83 Fed. Reg. at 7929. Such practices and technologies are always evolving, and lessees must, as diligent operators, explore reasonably available means to capture gas that they can profitably recover. For now, API is limiting the identification of today’s best practices that could be included in BLM’s regulations to the concept set forth in Section II.D.1 below. Because there are vast regional and geologic differences in the oil and gas industry, and most best practices are more successful in some regions or types of plays than in others, API is not setting forth an exhaustive list for consideration at this time.

BLM’s “waste” criteria already require operators to use whatever best practices are currently available that would allow a reasonable and prudent operator to profitably recover production. All oil and gas leases – including those between BLM and its lessees – are enforceable contracts intended to ensure the mutually profitable development of the lease’s mineral resources.¹⁸ From the inception of the oil and gas industry through the promulgation of the 2016 Rule, “waste” had a lease-specific meaning intended to determine whether the operator was, under the specific circumstances of the lease, diligently developing the leased resources for the mutual benefit of the lessee and lessor. Generally, a lessee that fails to expend reasonable and prudent efforts to capture and market oil and gas produced from the lease commits “waste,” and is liable for any resulting loss.¹⁹ By the same token, a lessor may not compel a reasonable and prudent operator to engage in the unprofitable gathering and marketing of lease production in the name of “waste” prevention. Under the principles of reasonable and prudent lease operation, intentionally taking a loss on production is not “reasonable.”

The MLA was enacted against this background.²⁰ It adopted the prevailing oil and gas industry view at the time that the concept of “waste” is inextricably linked to the prudent operation of a lease. Accordingly, 30 U.S.C. § 187 requires all oil and gas leases to “contain provisions for the exercise of reasonable diligence, skill, and care” in the operation of the lease, and all lessees to take “reasonable precautions to prevent waste of oil and gas.” What constitutes “reasonable diligence, skill, and care,” and “reasonable precaution” can change not only from lease to lease, but also over time as technologies for profitable development improve and become less expensive to implement.

¹⁸ See *Gerson v. Anderson-Prichard Prod. Corp.*, 149 F.2d 444, 446 (10th Cir. 1945) (“the purpose of the [oil and gas lease] contract is the mutual benefit of the lessor and lessee”).

¹⁹ See, e.g., *Craig v. Champlain Petroleum Co.*, 300 F. Supp. 119, 125 (W.D. Okla. 1969), *aff’d*, 421 F.2d 236 (10th Cir. 1970).

²⁰ See Robert E. Sullivan, “The History and Purpose of Conservation Law,” *Oil and Gas Conserv. Law and Practice*, at 1 (Rocky Mtn. Min. L. Found. 1985).

BLM’s oil and gas lease form and regulations further formalize the basic concept that “waste” can only be assessed in light of the operator’s diligence under current physical, economic, and technical circumstances.²¹ Even the 2016 Rule in defining “waste” did not break the connection between “waste” and prudent lease operations:

Waste of oil or gas means any act or failure to act by the operator that is not sanctioned by the authorized officer as necessary for *proper* development and production and which results in: (1) A reduction in the quantity of or quality of oil and gas ultimately producible from the reservoir *under prudent and proper operations*; or (2) *avoidable* surface loss of oil and gas.

43 C.F.R. § 3160.0-5 (emphasis added). The 2016 Rule’s definition of “avoidably lost,” which is BLM’s conceptual proxy for “waste,” also relates back to the prudent operation of the lease:

venting or flaring of produced gas without the proper authorization . . . of the authorized officer and the loss of produced oil or gas when the authorized officer determines that such loss occurred as a result of: (1) *negligence on the part of the operator*; or (2) the failure of the operator to take all *reasonable measures* to prevent and/or control the loss; or (3) the failure of the operator to comply fully with applicable terms and regulations, applicable orders and notices . . . or (4) any combination of the foregoing.

43 C.F.R. § 3160.0-5. Intentionally taking a loss on production is neither “reasonable” nor “prudent” lease operation, and failure to utilize whatever current technology is commercially available to capture gas in an economically rational fashion also would violate the reasonable and prudent operator standard.

Continuing to follow the MLA’s “reasonable and prudent” operator standard as BLM historically did before the 2016 Rule, and currently proposes to resume, will ensure that lessees continue to be required to utilize new technologies to further economically develop their leases. Indeed, this longstanding requirement has spurred operators to develop and utilize recently-available technologies to increase gas capture because evolving technology renders more previously unprofitable gas now economically recoverable.

II. Section-By-Section Analysis

Incorporating the general comments above, below are API’s comments on specific provisions of the Proposed Rule, in the same order that they appear therein.

²¹ See BLM Lease Form 3100-11, Secs. 2 and 4.

A. § 3179.1 – BLM Should Clarify That NTL-4A Is Superseded by the Regulations.

One of the purposes for promulgating regulations is to provide the regulated community greater certainty as to what is required. Although the preamble states that BLM’s intention is to supersede NTL-4A in its entirety, Proposed § 3179.1 states that the regulations supersede “portions” of the provisions of NTL-4A “[that] *pertain[] to, among other things* flaring and venting of produced gas, unavoidably and avoidably lost gas, and waste prevention” (emphasis added). BLM should either clarify that the Proposed Rule superseded the entirety of NTL-4A (as API believes is BLM’s intention) or identify the specific provisions of NTL-4A that are superseded. If the latter, BLM should also identify any portion of NTL-4A that remains in effect and continues to govern operators’ activities.

B. § 3179.3 - Definitions

1. The Definition of “Gas Well” and “Oil Well” as Applied to Proposed § 3179.201 Should Be the Same as That Used by the State or Tribe Where the Gas or Oil Well Is Located.

Except where BLM directly regulates venting and flaring associated with specific operations, such as initial production testing (Proposed § 3179.101), subsequent testing (Proposed § 3179.102), emergencies (Proposed § 3179.103), and downhole well maintenance and liquids unloading (Proposed § 3179.104), Proposed § 3179.201 deems compliance with applicable state and Tribal venting and flaring requirements sufficient to ensure the prevention of undue waste of federal mineral interests. Because BLM has proposed to accept these non-federal regulatory regimes as sufficient to govern what BLM terms “routine” venting and flaring,²² BLM should similarly utilize the corresponding state definitions for “gas well” and “oil well” to ensure continuity and uniformity in applicable federal and state requirements. Accordingly, API recommends that BLM replace the definitions of “gas well” and “oil well” with the following:

Gas well and oil well. For the purposes of this subpart, BLM will denominate a gas or oil well the same as the state in which such gas or oil well is located.

This definition will function equally well for Indian leases within a particular state. However, if a Tribe’s requirements include definitions for gas and oil well, that definition would control.

2. The Proposed Definition of “Waste” Is Consistent with BLM’s Waste Prevention Authority and the Reasonable and Prudent Operator Standard.

API supports BLM’s revised definition of “waste” in Proposed § 3179.3 because it is

²² Because the MLA does not apply to BLM-managed leases on Indian Tribal or allotted lands, BLM need not make this determination for Tribal or allottee mineral interests.

consistent with the concept of “waste” incorporated into the MLA, and as understood by industry and administered by BLM and its predecessors for decades. Like BLM’s proposed definition, for the purpose of limiting venting and flaring, “waste” is generally defined as the “preventable loss of [oil and gas] the value of which exceeds the cost of avoidance.” Stephen L. McDonald, Petroleum Conservation in the United States, An Economic Analysis, Johns Hopkins Press, 1971 (Reprinted in 2011 by Resources For the Future), at 129; *see also id.*, at 117-18, 123-124, 128-129. Consistent with this principle and the lessee’s obligation to prudently operate the lease, statutes and regulations prohibiting waste frequently incorporate the widely understood concept that any “waste” determination must take into account whether it makes economic sense for a prudent operator of the well or lease in question to recover and sell the gas, or instead whether capture and marketing is uneconomic.²³ In fact, this understanding has been so widely held throughout the BLM, states, and the industry over the years, that most statutes defining “waste” make no express exception for the venting and flaring of gas that is uneconomic to capture and produce, and instead focus on other forms of waste such as leaving otherwise recoverable reserves in the ground. This lack of exceptions is due to the presumption that, where individualized findings are made that it is uneconomic to market associated gas, venting and flaring is “necessary” and “reasonable,” and therefore not “waste.” *See McDonald, supra*, at 124 (“In most states . . . actual prohibition or exception for venting and flaring . . . is [generally] based on immediate circumstances”). Although the MLA and its legislative history do not expressly define the term “waste,” no evidence indicates that Congress intended to eschew the commonly established meaning of that term,²⁴ and, except for the 2016 Rule, BLM historically has implemented through its regulations and NTL-4A a concept of waste consistent with prevailing industry practice.

The 2016 Rule impermissibly and indiscriminately imposed general venting and flaring prohibitions without regard for individual lease or well economics. The Proposed Rule properly returns to the well-established concept of “waste” as a lease-specific economic inquiry. Accordingly, under BLM’s Proposed Rule, the lessee commits “waste” only where the value of lost gas is greater than the cost of capture.

The proposed “waste” definition also properly references “prudent and proper” lease operations as the only means by which the commission of “waste” can be assessed (i.e., if the costs of capture outweigh the value of the production because the lessee is imprudent or is developing the lease in an unreasonable manner, then the lessee commits waste). In preserving the linkage between “waste” and reasonable and prudent lease operations, the revised definition also prevents BLM from requiring a diligent lessee to capture production at a loss, which can never be required in the name of waste prevention.

API supports retention of the waste definition but recommends a slight revision from the Proposed Rule. Unlike NTL-4A, which required direct BLM approval of most instances of venting and flaring, the Proposed Rule does not require express permission from BLM for

²³ *See, e.g.*, Wyo. Stat. Ann. § 30-5-101; N.M. Admin. Code. §§ 19.15.2.7 & 19.15.18.12; Interstate Oil and Gas Compact Comm’n, Model Stat. (1940, 1954, 1979).

²⁴ *See Morissette v. United States*, 342 U.S. 246, 263 (1952) (where Congress uses an established term of art, “it presumably knows and adopts the cluster of ideas that [are] attached . . . [the] absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departures from them”).

venting and flaring that occurs in compliance with the regulations. Under the Proposed Rule, compliance with the regulations (and their reliance in some instances on state or Tribal standards) largely determines whether venting and flaring constitutes “avoidable loss,” and therefore “waste.” BLM should make the following revision to reflect this altered regulatory scheme:

Waste of oil and gas means any act or failure to act by the operator that is not authorized by the provisions of this Subpart, or that is not sanctioned by the authorized officer as necessary for proper development and production, where compliance costs are not greater than the monetary value of the resources they are expected to conserve, and which results in: (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 gas.

C. § 3179.4 – BLM Should Ensure that the Definitions of “Waste” and “Avoidable Loss” Are Aligned, and that “Unavoidably Lost” Production Is Never Royalty-Bearing.

Since BLM adopted NTL-4A in 1979, and as required by Congress in 30 U.S.C. § 1756 (1983), lease production that is “avoidably lost” is royalty bearing.²⁵ The obligation to pay royalty on avoidably lost production is not a penalty; it reflects BLM’s determination that a reasonable and prudent lessee *should have* avoided the loss, and therefore was obliged to capture and market the production. This compels not only the payment of royalty, but also supports that the “avoidably lost” gas was waste.²⁶ BLM must ensure that everything deemed “avoidably lost” under § 3179.4 also meets the criteria for waste under the Proposed Rule.

Conversely, there is no legally supportable justification for BLM to compel the capture of, or the payment of royalty on, production that is *unavoidably* lost. If the loss is truly unavoidable, then a reasonable and prudent operator is under no duty to capture the minerals or pay royalties. Therefore, BLM should ensure that its waste prevention regulations do not require recovery of, or royalty payments on, any production deemed “unavoidably lost.”

As discussed above, under the Proposed Rule, compliance with the regulations is largely determinative of whether lost production is “avoidable,” and in turn “waste.” Under BLM’s revised regulatory scheme, express BLM authorization of venting and flaring will be relatively rare, occurring only where a venting or flaring limit is exceeded, or where the state within which a given well is located lacks regulation sufficient to protect the federal mineral interest from “undue waste.” BLM should revise Proposed § 3179.4(a)(1) as follows, to reflect this changed regulatory structure:

²⁵ See 30 C.F.R. §§ 1202.100(b)(1), 1202.150(b)(1) (requiring royalty payment on all “avoidably lost” production).

²⁶ See 30 C.F.R. §§ 1202.100(c), 1202.150(c) (equating “avoidable loss” and “waste”).

- (a) ... (1) Gas that is vented or flared not in accordance with the regulations in this Subpart, or without the authorization or approval of the BLM as provided in this Subpart; or . . .

This revision accommodates Proposed § 3179.201, which allows lessees to vent or flare gas without BLM approval if the gas is vented or flared pursuant to applicable state or Tribal requirements. Although venting or flaring pursuant to state or Tribal requirements could arguably be construed as “authorized” by BLM (though Proposed § 3179.201 is not included under the Proposed Rule’s “Authorized Flaring and Venting of Gas” heading), to avoid confusion, API recommends amending Proposed § 3179.4(a)(1) as indicated above.

Proposed § 3179.4(a)(2) presents the conditions under which BLM authorizations or approvals will determine avoidable loss. BLM should remove Proposed § 3179.4(a)(2)(iii) because it arguably allows BLM to deem a loss as “avoidable” without first demonstrating that a reasonable and prudent operator should have captured the production. As discussed above, BLM may not deem lost production “avoidably lost” without first determining that a reasonable and prudent operator should have economically captured and marketed that production. Proposed §§ 3179.4(a)(2)(i) and (ii) already include the appropriate criteria for avoidable loss and waste, and API’s recommended revisions to Proposed § 3179.4(a)(1) would deem noncompliance with the Proposed Rule “avoidable” loss. Therefore, the provisions of Proposed § 3179.4(a)(1), as amended, and § 3179.4(a)(2)(i) and (ii) already comprehensively address the circumstances under which BLM, consistent with its MLA authority to prevent waste, may determine that a loss is “avoidable.” Thus, Proposed § 3179.4(a)(2)(iii) as written only provides BLM an opportunity to impermissibly promulgate regulations, create lease terms, impose operating plan conditions, or issue orders requiring operators to capture gas that is not waste under the MLA, and mislabel the loss of such gas as “avoidable.” Because Proposed § 3179.4(a)(2)(iii) serves no valid regulatory purpose, it should be omitted from any final rule:

~~(iii) The failure of the operator to comply fully with the applicable lease terms and regulations, appropriate provisions of approved operating plan, or prior written orders of the BLM.~~

At a minimum, if BLM chooses to retain subsection (a)(2)(iii), it should add the phrase “or the regulations in this Subpart” at the end of the subsection.

In addition to the revisions to Proposed § 3179.4(a) suggested above, BLM should re-insert the following language from the definition of “unavoidably lost” in the 2016 Rule as new § 3179.4(b)(2):

(b) *Unavoidably lost* production means:

(2) Produced oil or gas that is lost from the following operations or sources and cannot be economically recovered in the normal course of operations, and

where the operator has taken prudent and reasonable steps to avoid waste:

. . . .

Together with § 3179.4(a) as amended above, this language comprehensively incorporates the appropriate standards for “waste,” and reinforces that lessees are required to reasonably and prudently operate their leases.

The “unavoidably lost” list under Proposed § 3179.4(b) as revised above should also include “all gas vented or flared in compliance with § 3179.201.” Otherwise, gas vented or flared in compliance with applicable state and Tribal regulations under Proposed § 3179.201(a), or a BLM-approved Sundry Notice under Proposed § 3179.201(c), improperly could be deemed royalty-bearing avoidable loss under Proposed § 3179.5, which requires royalty to be paid on all losses not accounted for under Proposed § 3179.4(b).

BLM also should include the following under Proposed § 3179.4(b):

All oil and gas vented or flared pursuant to sundry notices BLM approved as of [INSERT FINAL RULE EFFECTIVE DATE], or submitted for BLM’s consideration before [INSERT FINAL RULE EFFECTIVE DATE] and subsequently approved by BLM, authorizing such venting and flaring.

This will clarify that previously-approved venting and flaring can continue as necessary, and will allow BLM to work through the portion of its backlog of Sundry Notice approvals that would still require review under the provisions of the Proposed Rule.

D. § 3179.4 – BLM Should Reinstate Two Other “Unavoidable Loss” Concepts from the 2016 Rule.

1. Flaring of Gas Where 50 Percent of Natural Gas Liquids (“NGLs”) Have Been Captured Should Be “Unavoidable Loss.”

As API explained in its comments on the 2016 Rule, to incentivize economic means of gas recovery, Section 4(b) of North Dakota Industrial Commission Order #24665 encourages producers to use post-processing residue gas to create valuable NGLs. Responding to industry input, BLM’s final 2016 Rule incorporated a similar incentive into 43 C.F.R. § 3179.4(a)(1)(xii), which deems “[f]laring of gas from which at least 50 percent of natural gas liquids have been removed and captured for market” an unavoidable loss. *See* 81 Fed. Reg. at 83,048, 83,082. In the preamble to the Proposed Rule, BLM asserts that this provision is no longer necessary because the agency is proposing to remove the gas capture percentage requirements of 43 C.F.R. § 3179.7. But this wholesale change goes too far. The provisions of existing § 3179.4(a)(1)(xii) are independent of the gas capture percentage requirements of § 3179.7, and should be retained. Deeming flaring of gas from which at least 50 percent of NGLs

have been removed as an “unavoidable loss” is advisable because recovery of the natural gas liquids from a gas stream reduces waste, increases recoverable energy from the well/lease, and adds energy to the domestic supply.

Accordingly, BLM should insert the following as 43 C.F.R. § 3179.4(b)(2)(x):

Flaring of gas from which at least 50 percent of natural gas liquids have been removed and captured for market, if the operator has notified the BLM through a Sundry Notice that the operator is conducting such capture.

2. BLM’s Regulations Should Treat Flaring from Remote Wells Unconnected to Transportation Infrastructure for Up to One Year as an “Unavoidable Loss.”

BLM proposes to remove from its regulations existing 43 C.F.R. § 3179.4(a)(2), which allows operators to flare from wells that are not connected to pipeline infrastructure. In BLM’s view, in the absence of the gas capture requirements of 43 C.F.R. § 3179.7, retaining § 3179.4(a)(2) would authorize “unrestricted” flaring from such unconnected wells. *See* 83 Fed. Reg. at 7934. BLM also notes that routine flaring from unconnected wells would fall under the purview of Proposed § 3179.201(a), which defers to state and Tribal regulations as a means for ensuring waste is appropriately minimized. *Id.* But in the absence of state and Tribal regulation, Proposed § 3179.201(c) would trigger the need for operators to obtain specific flaring authorization from BLM. This would increase the administrative burden on BLM staff and create uncertainty for operators, potentially leading to administrative backlogs like those experienced under NTL-4A in BLM’s Montana/Dakotas State Office. While API acknowledges BLM’s concern regarding “unrestricted” flaring from unconnected wells, this can easily be addressed through the establishment of a reasonable time limit that will allow for the permitting and construction of the necessary transportation infrastructure to capture the gas.

When a well is located in a new area outside of an existing core development area, operators will need temporary relief from flaring limits until midstream investments can be made to service the well and others throughout the new area. Relief may also be needed if more analysis of production volumes is necessary to establish the economic viability of continuing to develop the new area and related pipeline infrastructure. As API explained in its 2016 comment letter, it is customary for state regulators to permit flaring for up to 1 year in such circumstances. Indeed, Section IV.B. of NTL-4A similarly provided authorization for flaring for up to 1 year in such circumstances unless BLM found the loss to be otherwise avoidable. Accordingly, BLM should re-incorporate such a flaring allowance into a new § 3179(b)(4):

(4) gas that is flared or vented for up to 12 months from a well that is not connected to gas transportation infrastructure, absent a BLM determination that the loss of gas through such venting or flaring is otherwise avoidable.

E. § 3179.6 – BLM Should Permit Reasonable Venting Incident to Maintenance Activities.

Proposed § 3179.6(b)(6) states that an operator must flare rather than vent gas except when the venting is necessary to allow non-routine facility and pipeline maintenance to be performed. This is inconsistent with Proposed § 3179.4(b)(2)(ix) which deems all facility and pipeline maintenance, routine or not, as unavoidable loss. As API noted in its 2016 comments, both routine and non-routine maintenance are equally necessary to prevent damage to equipment and loss of product. Both necessarily involve some venting of gas because gathering, pressurizing, and flaring the otherwise lost gas is frequently wasteful, dangerous, and/or impossible.

BLM should revise Proposed § 3179.6(b)(6) as follows:

(6) When the gas venting is necessary to allow ~~non-~~
~~routine~~ facility and pipeline maintenance to be performed, such as when an operator must, upon occasion, blow-down and depressurize equipment to perform maintenance or repairs; or

...

F. § 3179.101 – Like Proposed § 3179.201, BLM Should Accept State Regulations Regarding Initial Production Testing.

NTL-4A permitted venting and flaring during initial production testing for a period up to 30 days or until 50Mmcf of gas is produced, whichever occurs first. Proposed § 3179.101 would reinstate a similar provision in the amended regulations. However, Proposed § 3179.101 also needs to include the NTL-4A provision that permitted venting and flaring for a longer time period if authorized by a state regulatory agency. This extension provision makes sense because states frequently tailor testing periods based on intimate knowledge of the geology within their jurisdiction. Therefore, while API appreciates BLM’s reinstatement of duration/volume allowances for initial production testing as previously reflected in NTL-4A, we recommend that BLM also authorize extensions beyond the 30-day period in § 3179.101(a)(2) based on state-approved testing durations.

BLM also should provide for flexibility in the allowable volume of gas flared or vented under § 3179.101(a)(3), and considered unavoidably lost and not subject to royalty, to similarly reflect any applicable state authorization for a greater volume. As explained in API’s comments on the 2016 Rule, BLM should avoid fixed volume-based thresholds in its waste prevention regulations to the maximum degree practicable because “waste” is an elastic concept that depends on specific lease attributes, operational circumstances, and well economics. As with duration, states frequently tailor testing volumes based on specific knowledge of local formations and geology. Also, for clarity and consistent with the above comment, BLM should amend § 3179.101(b) to allow for BLM-authorized venting or flaring “volume” increments like for additional time “periods.”

API also recommends that, in proposed § 3179.101 and throughout the Proposed Rule, BLM replace the phrase “royalty free” with “unavoidably lost” to clarify that BLM may only charge royalties where oil or gas is avoidably lost. See Proposed § 3179.5. BLM should revise § 3179.101 as follows:

§ 3179.101(a) Unless a longer test period or greater venting or flaring volume has been authorized by the appropriate state regulatory agency, gas flared during the initial production test of each completed interval in a well is ~~royalty free~~ unavoidably lost until one of the following occurs:

* * * *

(b) The operator may request a longer test period under subsection (a)(2), or a greater volume under subsection (a)(3), and must submit its request using a Sundry Notice.

G. § 3179.103 – “Emergencies” Should Expressly Include Severe Weather Events and Disasters.

The definition of “emergency” should expressly include severe weather events and natural disasters, which are temporary, infrequent, and unavoidable circumstances that may force unintentional loss of gas, or purposeful loss to protect safety, public health, or the environment. Neither loss is due to operator negligence. Accordingly, BLM should add the following language to Proposed § 3179.103(b):

(b) Emergencies including severe weather events (e.g., thunderstorms, tornadoes, hurricanes) and natural disasters (e.g., earthquakes, flooding).

BLM requests comment on how to best determine whether recurring equipment failures constitute emergencies and whether a certain number of failures of the same equipment should provide a standard for when the loss of gas due to equipment failures is “avoidable,” and thus royalty-bearing. API agrees there should be such a threshold, and recommends that BLM adopt the following standard in a final rule:

Failures. If a failure of the same cause or specific component of a piece of equipment occurs three times within a 365-day period, the operator must file a Sundry Notice with BLM describing in detail the nature and extent of the failure, explaining why the failure should not have necessarily been avoided, and estimating the volume of lost production. BLM will

notify the operator in writing if BLM determines that the failure and associated loss was avoidable, and the lost volume on which royalty is due.

H. § 3179.201 – BLM’s Acceptance of State Venting and Flaring Standards as Sufficiently Protective of Federally-Managed Mineral Interests Is Reasonable, Efficient, and Consistent with BLM’s Waste Prevention Authority.

Under the Proposed Rule, BLM would directly regulate venting and flaring associated with four activities: (1) initial production testing, (2) well testing, (3) downhole well maintenance and liquids unloading, and (4) responding to emergencies. In all other cases, pursuant to Proposed § 3179.201(a), the applicable rules, regulations, and orders of the appropriate state or Tribal authorities would control. BLM would consider any venting or flaring conducted in compliance with these requirements “unavoidably lost,” and therefore not “waste” and not royalty-bearing.²⁷ If there are no applicable state or Tribal rules or orders, then the operator must obtain BLM approval to vent and flare pursuant to Proposed § 3179.201(c) – much like the former NTL-4A requirement. BLM may only approve such venting or flaring if, after applying the economic/prudent operator test, the agency determines that the loss is “unavoidable.”

API supports this regulatory construct because it is a reasonable and administratively efficient means for avoiding unnecessarily burdensome and possibly duplicative or inconsistent regulation of “routine” venting and flaring already extensively regulated by states and Tribes. However, BLM should revise the language of Proposed § 3179.201 to make this new regulatory system more complete, workable, and predictable.

1. BLM Reasonably Determined that State Standards - Which Typically Limit Venting and Flaring More Aggressively than BLM’s Waste Prevention Authority Allows – Are Sufficient to Prevent “Undue Waste.”

In crafting Proposed § 3179.201, BLM reviewed the statutory and regulatory restrictions on venting and flaring in the 10 states where more than 99 percent of federally-managed oil and 98 percent of federal gas is produced, and the vast majority of venting and flaring occurs. BLM found that each of these states has legal restrictions on venting and flaring that are sufficient to prevent undue waste as required by the MLA. *See* 83 Fed. Reg. at 7937.²⁸ BLM’s analysis of each state’s restrictions on venting and flaring included in the Proposed Rule docket²⁹ reveals that, although each state regulates venting and flaring differently, each regulates venting and flaring more restrictively than BLM could under its MLA waste prevention authority.

²⁷ BLM should throughout the Proposed Rule recharacterize “royalty-free” venting and flaring as “unavoidable loss.”

²⁸ BLM need not make a determination that Tribal regulations sufficiently protect against “undue waste” before “deferring” to them, because the MLA does not apply to Indian leases. Instead, BLM need only determine that accepting Tribal regulations is consistent with BLM’s Indian trust responsibilities. In this circumstance, acceptance of Tribal regulations governing the production of Tribal resources is consistent with BLM’s trust obligations.

²⁹ *E.g.*, www.regulations.gov, Dkt. No. BLM 2018-0001, ID No. BLM-2019-0001-0004 (Feb. 21, 2018).

For example, similar to the flaring limits imposed under the 2016 Rule, as of the date of filing these comments, North Dakota requires capture of at least 91 percent of associated gas production, allowing only 9 percent of such production to be flared. Violation of this limit triggers severe production limitations, another measure BLM would be unauthorized to impose absent a lease-specific “avoidable loss” determination.³⁰ Alaska has elected to impose a nearly total ban on all venting and flaring except in narrowly prescribed circumstances.³¹ BLM’s MLA waste prevention authority would not authorize such categorical curtailment of venting and flaring without BLM first determining that the lost production is in fact waste.

States may impose venting and flaring regulatory programs that are more restrictive than BLM’s because those states’ authorities to regulate venting and flaring rules are not limited to waste prevention under the MLA. As explained in API’s comments on the 2016 Rule and acknowledged by BLM in the regulatory preamble to the 2016 Rule, states regulate venting and flaring under numerous legal authorities, including those related to public health, air quality, environmental protection, economic regulation, and general state police power, which BLM generally lacks. BLM acknowledges, for example, that Colorado’s and Wyoming’s venting and flaring limitations, volatile organic compound capture/destruction requirements, LDAR regulations, and equipment venting restrictions, are not directed at “waste” at all, and are instead air quality protection requirements. *See* 81 Fed. Reg. at 6633.³² As discussed in API’s comments on the 2016 Rule and herein, BLM may not restrict venting and flaring for such purposes. Accordingly, states may, and do, restrict venting and flaring more severely than BLM may under its MLA waste prevention authority.

While states may regulate venting and flaring for reasons other than waste prevention, BLM may not. When preparing the 2016 Rule, BLM conducted a state-by-state venting and flaring regulatory analysis similar to that prepared for the Proposed Rule, and found that no state venting and flaring regulatory regime was sufficient to protect against undue waste. But the agency reached this conclusion because at the time BLM fundamentally misapplied the concept of “waste” and the scope of its authority to prevent it under the MLA. BLM asserted in the 2016 regulatory preamble that “no State has established a comprehensive set of requirements addressing *all three* avenues for waste – *flaring, venting, and leaks . . .*” (emphasis added). But the referenced waste “avenues” are only three *potential* ways through which gas could be *physically* wasted, and that BLM elected to regulate through the 2016 Rule. They are by no means “all” avenues for “waste.” There are many forms of “waste,” some of which are physical, and others that are economic. If BLM were concerned with limiting “all . . . avenues” of physical waste, it would have attempted to limit one of the most prevalent forms of physical waste – leaving producible volumes of oil and gas in the ground.³³ Instead, BLM promulgated a *venting and flaring* limitation regulation, rather than a waste prevention regulation, that impermissibly

³⁰ *Id.*, “Attachment” at 2-3.

³¹ *See* 81 Fed. Reg. at 6633. BLM represents that Alaska estimates that only 0.4 percent of all gas produced in the State is flared, lower than any other state.

³² Indeed, these regulations are administered by the States’ environmental protection authorities akin to EPA, and not the mineral leasing agencies, which, like BLM, are only authorized to prevent waste and protect correlative rights.

³³ *See e.g.*, McDonald, *supra*, at pp. 121-123 (explaining physical waste generally, and underground waste specifically). BLM acknowledges that the 2016 Rule would force significant underground waste of oil; the agency estimates that the 2016 Rule will reduce oil production from federal leases by up to 3.2 million barrels per year. 81 Fed. Reg. at 83,014.

equated nearly all surface loss of gas with “waste.”³⁴ Because BLM at the time believed that its waste prevention authority obligated it to regulate all venting and flaring as comprehensively as possible, BLM was unwilling to accept that state regulation sufficiently protected against “waste.”

Armed with an improved understanding of basic waste prevention principles, BLM recently revisited these state regulations, and properly concluded that their provisions and states’ enforcement thereof are sufficient to prevent the undue waste of federal mineral resources. This is consistent with the provisions of NTL-4A, which authorized venting and flaring pursuant to the rules, regulations, or orders of the appropriate state regulatory agency when BLM “ratified or accepted” the applicable state standards. NTL-4A, Sec. I. BLM therefore correctly chose to not impose duplicative (at best) or inconsistent (more likely) federal regulations for the prevention of waste in the Proposed Rule.

2. Proposed § 3179.201(a) Appropriately Allows Operators to Rely Upon State and Tribal Regulations That Protect Against Undue Waste.

Under this proposed section, BLM will deem gas vented or flared pursuant to applicable state or Tribal rules, regulations, or orders as unavoidably lost and not subject to royalty. To support this provision, BLM analyzed the requirements of the 10 states in which the vast majority of federally-managed production – and associated venting and flaring – occurs. API agrees that because the venting and flaring regulations of the 10 states surveyed control venting and flaring to a greater extent than BLM could under its MLA waste prevention authority, compliance with these state requirements necessarily protects the federal mineral interest. Before issuing a final rule, BLM should also review and address whether operator compliance with the venting and flaring regulations of other states or Tribes sufficiently protect against the waste of federal or Indian mineral resources³⁵. To facilitate that consideration, in Attachment C to this comment letter, API submits the venting and flaring regulations of the States of Alabama and Louisiana, which, like the regulations of the 10 states already considered by the agency, sufficiently protect against waste and warrant inclusion within the scope of Proposed § 3179.201(a).

API recommends that BLM add the phrase “now or hereafter in effect” to the end of § 3179.201(a). This addition would avoid any uncertainty as to whether changes to state and Tribal requirements that occur after a final rule is adopted will apply as they are made without the need for further rulemaking action from BLM. Based on its review of state and Tribal requirements underlying this rulemaking, BLM is adopting the concept of reliance on state and Tribal requirements and the consistency that provides for operators on BLM-managed leases. That reliance is not fixed as of the date a final rule is issued.

3. BLM May Not Retain Discretion to Deem Gas “Avoidably Lost” After the Operator Demonstrates that Recovery Is Uneconomic or if Flaring Is Consistent With a BLM-Approved Action Plan,

³⁴ See API Comments on the 2016 Rule at 1.

³⁵ It should also be noted that in certain states, for example Colorado and Utah, requirements under some state regulations do not apply to wells on Tribal land.

In the absence of applicable state or Tribal standards, Proposed §§ 3179.201(c)(1) and (c)(2) would permit flaring where: (1) the operator affirmatively demonstrates that recovering the gas would cost more than could be obtained through capture and sale (i.e., the loss is not “waste”); or (2) the flaring is conducted consistent with a BLM–approved Action Plan intended to minimize the loss of gas. But BLM also proposes in these subsections to reserve the authority to deem flared volumes in excess of 10Mmcf/well/month as “avoidable loss” *even if* the lessee successfully demonstrates that capture would be uneconomic or that the gas was flared in compliance with the BLM-approved Action Plan. This reservation is inconsistent with BLM’s authority to prevent waste. As explained throughout these comments, if a reasonable and prudent operator could not economically recover the gas, then it is by definition not “waste,” and BLM may not deem such lost production as a royalty-bearing avoidable loss, no matter the volume involved. Likewise, because the MLA prohibits BLM from approving the waste of federal mineral resources, any gas flared in compliance with a BLM-approved Action Plan cannot be waste, and therefore cannot be deemed a royalty-bearing “avoidable loss.” Because BLM has no authority to assess royalties on lost gas that is not waste, BLM must remove the last sentence of both §§ 3179.201(c)(1) and (c)(2) from any final regulation.

4. Consistent With BLM Policy Under NTL-4A, BLM Should Expressly Provide for Unavoidable Determinations When Agency Decisions on Applications for Rights-Of-Way Are Delayed.

As explained in API’s 2016 Comments, much of today’s venting and flaring is due to constrained pipeline capacity and unavailability of pipelines.³⁶ Pipeline unavailability is due in large part to lengthy delays in approving operator and lessee pipeline ROW applications. Because delays in processing ROW applications are caused by circumstances beyond the operators’ control, BLM should include a provision in Proposed § 3179.201(c) expressly stating that BLM will approve an application to flare gas if the need to flare is due to the unavailability of a pipeline, and the operator properly filed a ROW application. Doing so would simply incorporate into the regulations BLM determinations that flaring during the pendency of an operator’s pipeline ROW application constitutes unavoidable loss. *See* Feb. 11, 2016 Decision of the Montana State Director, SDR-922-15-07, at 12 (“when a Sundry Notice flaring request and a right-of-way application have both been properly filed, the venting and flaring of gas will be considered ‘unavoidably lost,’ pending the right-of-way approval”).

Accordingly, BLM should revise Proposed § 3179.201 as follows:

§ 3179.201 Oil-well gas.

(a) Except as provided in §§ 3179.4(b), 3179.101, 3179.102, 3179.103, and 3179.104 of this subpart, vented or flared oil-well gas is ~~royalty-free~~ unavoidably lost if it is vented or flared ~~pursuant in~~ compliance with applicable rules, regulations, or

³⁶ API 2016 Comments at 44-48, 63, 65-68, 72, 76-77, 82-84.

orders of the appropriate State regulatory agencies, now or hereafter in effect.

~~(b) With respect to production from Indian leases, vented or flared oil-well gas will be treated as royalty free pursuant to paragraph (a) of this section only to the extent it is consistent with the BLM's trust responsibility.~~

(c) Except as otherwise provided in this subpart, oil-well gas may not be vented or flared royalty free without BLM written approval. The BLM will approve an application for royalty free to venting or flaring of oil-well gas if it determines that it is justified by the operator's submission of either:

(1) An evaluation report supported by engineering, geologic, and economic data that demonstrates to the BLM's satisfaction that the loss of such gas is unavoidable or the expenditures necessary to market or beneficially use such gas are not economically justified. ~~If flaring exceeds 10 MMcf per well during any month, the BLM may determine that the gas is avoidably lost and therefore subject to royalty;~~ or

(2) An action plan showing how the operator will minimize the venting or flaring of the oil-well gas within 1 year. An operator may apply for approval of an extension of the 1-year time limit, if justified. If the operator fails to implement the action plan, the gas vented or flared during the time covered by the action plan will be subject to royalty deemed avoidably lost. ~~If flaring exceeds 10 MMcf per well during any month, the BLM may determine that the gas is avoidably lost and therefore subject to royalty.~~

(3) When a Sundry Notice flaring request and documentation that a pipeline right-of-way application have both been properly filed, the venting and flaring of gas will be considered "unavoidably lost," pending the right-of way approval.

...

(d) An approval to flare royalty free, which is in effect as of the effective date of this rule, will continue in effect unless:

(1) The approval is no longer necessary because the venting or flaring is authorized by the applicable rules, regulations, or orders of ~~an~~ the appropriate

State regulatory agencies or Tribe, as provided in paragraphs (a) and (b) of this section; or
(2) The BLM requires an updated evaluation report under paragraph (c)(2) of this section and determines to amend or revoke its approval. In such cases, only volumes vented or flared in noncompliance with BLM's final amendment or revocation are deemed avoidably lost, and only after BLM officially notifies the operator of its decision to amend or revoke its approval.

III. BLM Should Allow Operators to Request an Exemption Where the Federal or Indian Mineral Interest Is *de Minimis*.

BLM's waste prevention regulations should include a provision that allows operators to seek an exemption for well facilities where the federal or Indian mineral interest in a BLM-approved unit or communitized area ("CA") is *de minimis*, or where any other circumstance supports such an exemption. State or Tribal standards would still apply. An exemption process would provide the operator an opportunity to alleviate unnecessary regulatory burden associated with compliance with at best duplicative, and at worst inconsistent, federal regulation where the potential for waste of federal or Indian mineral interests is extremely low.

Without such an opportunity, many facilities on units or CAs throughout the U.S. – some producing as little as 1 percent federal or Indian minerals – would be brought under the purview of the Proposed Rule. Lessees in those small percentage federal/Indian agreements conducting operations already regulated by the state, such as production testing, downhole maintenance, or liquids unloading, would be required to comply with both federal and state regulations, despite negligible federal mineral interest and BLM's acknowledgment that state venting and flaring limitations generally are sufficient to protect against the waste of those mineral interests. 83 Fed. Reg. at 7937-7938. In some cases, well facilities in these units and CAs would be forced to comply with the federal rules even where federal minerals are not penetrated at all. Establishing an exemption process for minimum federal/Indian ownership would be an administratively efficient and reasonable means for ensuring that federal waste prevention rules govern only where there is significant federal or Indian lease production, and would avoid imposing duplicative and potentially inconsistent regulatory burdens on operators.

BLM should establish a general exemption provision that will allow the agency broad discretion to allow departures from the regulations where it deems necessary to facilitate the continued prudent development and operation of leases while preventing undue waste.

Accordingly, BLM should insert a new § 3179.401 as follows:

§3179.401 – Individual requests for exemptions from the requirements of this subpart.

(a) The operator may make a written request to the authorized officer for an exemption from one or more of the sections of this subpart. A request for an individual exemption must specifically identify the regulatory provision(s) of this subpart for which the exemption is being requested and explain the reason the exemption is needed. After considering all relevant factors, the authorized officer may approve the exemption, or approve it with one or more conditions, if the BLM determines that the exemption meets the objectives of this subpart. The decision whether to grant or deny the exemption request will be made in writing.

(b) An exemption from any requirement of this subpart does not constitute an exemption from provisions of other regulations, laws, or orders, unless the approved exemption indicates otherwise.

IV. BLM Should Expand the Scope of Beneficial Purposes or Beneficial Use.

The BLM is also seeking comment on the royalty-free use regulations, which were codified at 43 CFR Subpart 3178 as part of the 2016 final rule. 83 Fed. Reg. 7928. BLM's stated purpose for 43 CFR Subpart 3178 was to develop in more detail a list of uses to reflect BLM's "beneficial purposes" practice under NTL-4A, and which should not require prior written approval. *See* 81 Fed. Reg. at 6663 ("This proposed section identifies uses of produced oil or gas that would not require prior written BLM approval for royalty-free treatment [t]he uses listed in this section involve standard and routine production and related operations."). But BLM did not include in the final 2016 Rule several standard routine beneficial uses that are widely acknowledged by BLM's own field offices. Consistent with BLM's previously-stated intent to decrease administrative burdens associated with beneficial purpose use, BLM should, at a minimum, include the following standard and routine practices on the list of purposes that do not require BLM pre-approval:

- **Power:** BLM should include natural gas fuel used to generate power used on lease, because doing so benefits the operation of equipment and facilities on the lease and other leases in the surrounding area without placing burdens on regional public power supplies.
- **Pilot and Assist Gas:** BLM should acknowledge the use of pilot and assist gas as well as assist gas for flares, combustors, thermal oxidizers and other combustion devices as a beneficial purpose for which pre-approval is not required.
- **Heating:** Gas is also commonly used to provide heat for drilling, completions, and production operations, including pipeline heating, all of which are beneficial purposes.
- **Fuel source for ancillary equipment:** It is also common practice to utilize gas powered pumps to transport production (e.g., gas powered oil shipping pumps) and other

fluids, which is a beneficial purpose.

Accordingly, 43 C.F.R. § 3178.4(a) should be modified to read as follows:

- (a) Uses of produced oil or gas for operations and production purposes that do not require prior written BLM approval for the used volumes to be treated as royalty free under § 3178.3 include:
- (1) Use of fuel to power artificial lift equipment;
 - (2) Use of fuel to power equipment used for enhanced recovery or pipeline transportation;
 - (3) Use of fuel to power drilling rigs;
 - (4) Use of fuel for power generated or used on lease, unit or CA;
 - (5) Use of gas to actuate pneumatic controllers or operate pneumatic pumps at production facilities;
 - (6) Use of fuel to heat, separate, or dehydrate production, for drilling, completions, or production operations including piping;
 - (7) Use of pilot fuel or assist gas for the flare, combustor, thermal oxidizer or other control device;
 - (8) Use of fuel to compress gas to place it in marketable condition; and
 - (9) Use of oil that an operator produces from a lease, unit, or CA and pumps into a well on the same lease, unit, or CA to clean the well and improve production, e.g., hot oil treatment. The operator must document the removal of the oil from the tank or pipeline under Onshore Oil and Gas Order No. 3 (Site Security), or any successor regulation.

* * *

Should you have any questions regarding API's comments, please contact me at 202.682.8057, or via e-mail at rangerr@api.org.

Very truly yours,

A handwritten signature in black ink that reads "Richard Ranger". The signature is written in a cursive, flowing style.

Richard Ranger
Senior Policy Advisor
Upstream and Industry Operations
American Petroleum Institute

cc:

Attachment A Earth System Sciences LLC Analysis in Support of API Comments April 23, 2018

Attachment B Analysis of the Benefit-Cost Analysis in the Regulatory Impact Analysis of 2018 Proposed Revisions of 43 CFR Subpart 3197 ERM Analysis in Support of API Comments April 23, 2018

Attachment C Venting and Flaring Regulations for the States of Arkansas and Louisiana, Presented in Support of API Comments April 23, 2018