

United States Senate  
WASHINGTON, DC 20510

April 13, 2016

The Honorable Shaun Donovan  
Director  
Office of Management and Budget  
725 17th Street, NW  
Washington, D.C. 20503

Dear Mr. Donovan:

We write today with questions about your office's role in the review of the Bureau of Land Management (BLM) proposed rule for waste prevention of methane emissions. The Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management (RAFM) conducts oversight of federal agencies' regulatory processes to ensure that federal regulations are promulgated in an efficient manner and produce the best regulatory outcomes for all stakeholders and the American people, while the Committee on Environment and Public Works (EPW) is the principal Senate committee with jurisdiction over the EPA and U.S. environmental policy, and the Public Lands, Forests, and Mining Subcommittee oversees public lands administered by BLM. Accordingly, we appreciate the important role the Office of Management and Budget and its subagency, the Office of Information and Regulatory Affairs (OIRA), play in ensuring regulatory fitness and efficiency.

Drawing on your expertise in these affairs, we have a number of questions regarding OMB's role in reviewing BLM's proposed rule "Waste Prevention, Production Subject to Royalties, and Resource Conservation."<sup>1</sup> The Waste Prevention proposed rule was logged in Fall 2015's Unified Regulatory Agenda as a significant rule, subject to OIRA review, and published in the *Federal Register* February 8, 2016. Final action is projected in June of this year. We request you answer the following questions and provide the appropriate documents by noon on April 27, 2016. Please also include a copy of your response to the following requests in the docket for the proposed rule.

1. Executive Order 12866 defines "significant regulatory action," in part, as one that is likely to result in a rule that may have an annual effect on the economy of \$100 million or more (known as "economic significance"); may create a serious inconsistency or interferes with an action taken or planned by another agency; or may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set

---

<sup>1</sup> Dept. of the Interior, Waste Prevention, Production Subject to Royalties, and Resource Conservation; Proposed Rule, 81 Fed. Reg. 6616 (Feb. 8, 2016).

forth for regulatory review and analysis. On its site, OMB designated the proposed rule economically significant.<sup>2</sup>

- a. What analysis informed OMB's decision to designate the rule economically significant?
  - b. Did OMB scrutinize whether the rule creates a serious inconsistency or interferes with existing actions taken by other agencies? If so, which agency or agencies, and which action(s)?
  - c. Did OMB scrutinize whether the rule raises a novel legal or policy question? If so, please provide the Subcommittee with documentation that articulates the novel question the proposed rule raises.
2. Is it OMB's position that the rule is "major" for purposes of the Congressional Review Act?
3. One of OMB's big-picture management objectives is to facilitate the coordination of the administration's regulatory initiatives across government. To do so effectively, OMB presumably referees jurisdictional disputes and regulatory gray areas between and among agencies. One such gray area appears to be BLM's ability to regulate air quality through methane emissions regulations—BLM's directive under the Mineral Leasing Act is only to "prevent waste" of its oil and gas resources.<sup>3</sup>
- a. Because the definition of waste sets the bounds of BLM's jurisdiction in this regulatory space, BLM should not be able to unilaterally define what is within its own authority, and consequently what is *ultra vires*. Did OMB discuss BLM's jurisdictional authority in regulating methane emissions in connection with its review of the Waste Prevention proposed rule, and if so, with which agencies?
  - b. BLM says, in justifying the need for regulatory action, that "[w]asting gas also produces air pollution,"<sup>4</sup> which, putting aside the attenuated connection between BLM's estimates of "wasted" natural gas and its contributions to "climate, health, and welfare impacts," encroaches on what is decidedly EPA's mandate. Has OMB scrutinized this justification in light of EPA's plenary authority over air

---

<sup>2</sup> Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Order Reviews Completed Between January 01, 2016 to March 31, 2016, RIN 1004-AE14, REGINFO.GOV (last accessed Apr. 13, 2016).

<sup>3</sup> 30 U.S.C. § 225. "Waste" has long been defined as vented or flared gas that is "economically recoverable." See NTL-4A. Economic recoverability, in turn, is often dependent on the specific regulatory requirements placed on lessees, such as the rigor and frequency of audits and re-verifications. If the requirements BLM imposes go beyond what is economically recoverable—that is, if the mandates imposed by the Waste Prevention rule were to render leases too expensive to maintain—those measures would exceed BLM's statutory mandate to prevent waste.

<sup>4</sup> U.S. BUREAU OF LAND MGMT., REGULATORY IMPACT ANALYSIS FOR ADDITIONS OF 43 CFR 3178 (ROYALTY-FREE USE OF LEASE PRODUCTION) AND 43 CFR 3179 (WASTE PREVENTION AND RESOURCE CONSERVATION) 2 (Jan. 14, 2016).

quality regulation, especially in light of the forthcoming New Source Performance Standards (NSPS) Subpart OOOOa?

4. BLM's regulatory impact analysis estimates annual monetized costs for Waste Prevention rule ranging from \$117,000,000 (if EPA finalizes NSPS Subpart OOOOa) to \$147,000,000 (if EPA does not finalize the rule) using a 3 percent discount rate, through 2026. Has OMB considered that this \$30,000,000 difference in estimated annual costs, dependent on the promulgation of a related EPA regulation, suggests at least a partial duplication of efforts between the Waste Prevention rule and EPA clean air initiatives?
5. Although it acknowledges that "the rule will affect a substantial number of small entities," BLM estimates that the rule would "not have a significant economic impact on a substantial number of small entities," citing low reductions in profit margins calculated using SEC disclosure data.<sup>5</sup> BLM's initial regulatory flexibility analysis estimates per-entity compliance costs to range from \$27,000 per year if the EPA finalizes NSPS Subpart OOOOa, to \$36,000 per entity per year if the EPA does not finalize the rule.<sup>6</sup> Yet, many stakeholders and industry groups indicate that this significantly underestimates their projected compliance costs.
  - a. Has OMB had the opportunity to scrutinize the data and assumptions BLM used to arrive at this cost estimation, especially in light of comments from stakeholders arguing that compliance costs will be not only more significant, but potentially render sites economically inoperable? For example, BLM's estimates of profitability impacts were calculated using SEC disclosure data. Are these data representative of the small businesses that would be affected by the implementation of BLM's rule?
  - b. BLM states that "we may choose not to prepare a final regulatory flexibility analysis for the final rule, if our best estimate at the time is that the final rule would not have a significant economic effect on a substantial number of small entities."<sup>7</sup> Given that many stakeholders are concerned that the rule would have a significant economic effect—possibly rendering sites economically inoperable prohibitive for many—would you commit to advising BLM to conduct such an analysis on the final rule?
6. The Waste Prevention proposed rule could have significant detrimental effects on state, local, and tribal governments. For example, New Mexico Governor Susana Martinez estimates that costs of compliance could render 10 percent of New Mexico's production

---

<sup>5</sup> "From data in the companies' 10-K filings to the SEC, the BLM was able to calculate the companies' profit margins for the years 2012, 2013, and 2014.... For these 26 small companies [that currently hold BLM-managed oil and gas leases], a per-entity compliance cost increase of \$31,400 would result in an average reduction in profit margin of 0.087 percentage points... and a per entity cost increase of \$37,600 would result in an average reduction in profit margin of 0.105 percentage points." *Id.* at 159.

<sup>6</sup> *Id.* at 159 (using a 7 percent discount rate).

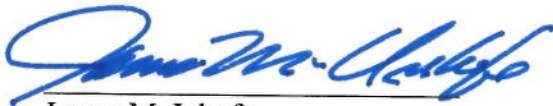
<sup>7</sup> *Id.* at 167.

uneconomic.<sup>8</sup> The North Dakota Industrial Commission estimates that compliance could negatively affect as much as one-third of the state's leases.<sup>9</sup> Has OMB estimated the costs borne by state, local, and tribal governments, including foregone revenues if wells are shut down as a result of the additional requirements posed by the Waste Prevention rule?

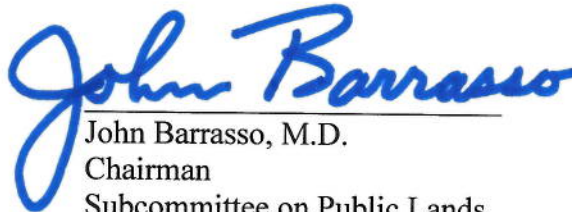
7. It is my understanding that, if finalized, the Waste Prevention rule would apply retroactively, effectively changing the terms of existing leases. Has OMB considered the economic and legal ramifications of changing leasing agreements in such a significant way as to potentially render operations for many lessees uneconomic, including defending against resulting constitutional and contractual claims?

We value your office's technical expertise in these issues, and look forward to your reply. If you have any questions about this request, please contact Elizabeth Gorman with RAFM at (202) 224-2862. Thank you for your attention to this matter.

Sincerely,



James M. Inhofe  
Chairman  
Committee on Environment and  
Public Works



John Barrasso, M.D.  
Chairman  
Subcommittee on Public Lands,  
Forests, and Mining,  
Committee on Energy and Natural  
Resources

---

<sup>8</sup> Waste Prevention, Production Subject to Royalties, and Resource Conservation, REGULATIONS.GOV, Docket No. BLM-2016-0001-0080 (last accessed Apr. 13, 2016).

<sup>9</sup> Waste Prevention, Production Subject to Royalties, and Resource Conservation, REGULATIONS.GOV, Docket No. BLM-2016-0001-0074 (last accessed Apr. 13, 2016).

The Honorable Shaun Donovan

April 13, 2016

Page 5



James Lankford

Chairman

Subcommittee on Regulatory Affairs

and Federal Management,

Committee on Homeland Security and

Governmental Affairs

cc: The Honorable Heidi Heitkamp  
Ranking Democratic Member  
Subcommittee on Regulatory Affairs and Federal Management