

PROPOSED ACTION
MEMORANDUM

Rescission of Methane Waste Prevention Rule

Bureau of Land Management, Department of Interior
December 2020

I. Summary

The Trump administration has attempted to delay and roll back an Obama-era regulation restricting the venting, flaring, and leakage of methane from oil and natural gas production on federal and Indian lands. That 2016 Waste Prevention Rule (“the 2016 Rule”) imposed new obligations on lessees under the Mineral Leasing Act (MLA), which requires the Bureau of Land Management (BLM) to prevent “waste of oil or gas developed in the land.”¹ Separate federal district courts have struck down both the original 2016 Rule and the Trump administration’s most recent regulatory action attempting to rescind the 2016 Rule (hereafter, “the 2018 Rescission”), leaving BLM and the Department of Justice (DOJ) with a complex litigation landscape to navigate in a new administration.

Still, rather than scrap the 2016 Rule and start a new rulemaking process—a time-consuming affair that would likely end up in litigation—this memo recommends that the next administration should attempt to revive the 2016 Rule by joining the litigants seeking reversal on appeal; by contrast, BLM should abandon its appeal of the decision vacating the 2018 Rescission, and if necessary, support the original plaintiffs in further litigation. While the litigation plays out, BLM can exercise its discretion under the pre-existing regulatory scheme to clamp down on methane emissions.

Rollbacks

- Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, [83 Fed. Reg. 49184](#) (2018 final rule).

Agency

- Bureau of Land Management, Department of Interior

Impact

- Reversed almost the entirety of a 2016 Obama-era methane regulation, Waste Prevention, Production Subject to Royalties, and Resource Conservation, [81 Fed. Reg. 83008](#) (2016 final rule)
- The Obama rule would have restricted operators’ ability to vent or flare excess gas on federal oil and gas leases, practices that are significant sources of methane emissions. Among other requirements, the Rule would have also mandated that operators update equipment to prevent methane leakage.

Recommended Action

- BLM and DOJ should reverse their position in multiple suits, to join litigants attempting to uphold the vacatur of the 2018 Rescission and reverse the near-complete invalidation of the 2016 Rule.
- BLM should exercise its discretion under the current regulatory scheme to minimize methane emissions.

¹ 30 U.S.C. § 225.

II. Justification

During oil and gas extraction, operators frequently vent (i.e., release into the atmosphere) or flare (i.e. burn off) the associated gas generated during production, which contains methane.² Sometimes venting and flaring is unavoidable, the result of emergency actions taken for safety measures; often, however, producers vent and flare associated gas because they lack the infrastructure to transport the gas to market.³ Methane also can leak into the atmosphere from production facilities that use outdated equipment.⁴ In order to curtail the venting, flaring, and leakage of methane from these facilities, the 2016 Rule imposed new obligations on oil and natural gas production located on federal and Indian lands.

From a climate perspective, reviving the 2016 Rule is vital, because methane is among the most potent greenhouse gasses; though it has a shorter lifespan than carbon dioxide, its climate impacts are roughly twenty-five times higher over a one hundred-year period, and eighty-six times higher over a twenty-year period.⁵ BLM estimated that the 2016 Rule would reduce methane emissions by 175,000-180,000 tons per year, roughly a 35% reduction from 2014 estimates.⁶ Over the past several years, domestic production of oil and natural gas has increased dramatically; in fiscal year 2018, “8 percent of all oil, 9 percent of all natural gas, and 6 percent of all natural gas liquids produced in the United States,” were produced from over 96,000 wells on federal and Indian lands.⁷

III. Current State

The 2016 Methane Waste Prevention Rule

The Mineral Leasing Act (MLA) requires BLM to ensure that lessees “use all reasonable precautions to prevent waste of oil or gas developed in the land.”⁸ The MLA also instructs that leases include “a provision that such rules ... for the prevention of undue waste as may be prescribed by [the] Secretary shall be observed.”⁹

It became clear during the Obama administration that the then-existing regulatory regime for venting and flaring, established in 1979, was insufficient, given the boom in domestic production of oil and natural gas. In 2007, the Department of the Interior’s Royalty Policy Committee recommended that BLM update its rules.¹⁰ In 2010, the Government Accountability Office (GAO), alongside the Department’s Inspector General, echoed that recommendation, finding that up to 40% of gas vented and flared by federal lessees at onshore sites could

² Wyoming v. U.S. Dep’t of Interior, Case No. 2:15-CV-0285-SWS, slip op. at 10 (D. Wyo. Oct. 8, 2020) (“Venting is the release of gases into the atmosphere, such as opening a valve on a tank to relieve tank pressure. Flaring is the controlled burning of emission streams through devices called flares or combustors, releasing the byproducts of that combustion into the atmosphere.”), available at: <http://blogs.edf.org/climate411/files/2020/10/D-WY-WPR-Decision.pdf>.

³ *Id.*

⁴ Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83008, 83011 (Nov. 18, 2016), <https://www.federalregister.gov/documents/2016/11/18/2016-27637/waste-prevention-production-subject-to-royalties-and-resource-conservation>.

⁵ 81 Fed. Reg. at 83009.

⁶ 81 Fed. Reg. at 83014. The Rule would also reduce the release of volatile organic compounds, including hazardous air pollutants.

⁷ “About the BLM Oil and Gas Program,” Bureau of Land Management (last visited Nov. 22, 2020), <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about>.

⁸ 30 U.S.C. § 225.

⁹ 30 USC § 187.

¹⁰ 81 Fed. Reg. at 83017.

be economically captured using current technologies, costing taxpayers about \$23 million in lost royalties.¹¹ A subsequent GAO report found that BLM’s guidance for reporting lost gas was unclear.¹²

Consequently, late in the Obama administration, BLM launched a rulemaking process to update its regulations to prevent the waste of methane on oil and natural gas facilities located on federal and Indian lands, promulgating a final rule in November 2016.¹³ The 2016 Rule prohibits venting, except in the case of emergencies or where flaring—which, compared to venting, has fewer climate impacts is not possible.¹⁴ As regards flaring, the Rule adopts North Dakota’s regulatory scheme, requiring operators to capture a certain percentage of the associated gas produced each month on a ten-year phase-in plan; operators can choose to comply on lease-wide, county-wide, or state-wide basis.¹⁵ It adds new reporting requirements.¹⁶ The 2016 Rule preserves the pre-existing distinction between “avoidably” and “unavoidably” lost gas—royalties are only owed on the former—but eliminates BLM’s discretion to make “unavoidable loss” determinations; instead, the Rule provides a list of twelve unavoidable loss categories.¹⁷ Finally, in an effort to reduce methane leakage, the 2016 Rule requires operators to update outdated equipment, conduct regular inspections, and minimize the gas lost at various stages of operations.¹⁸

The 2016 Rule drew an immediate legal challenge from industry groups, and eventually from the states of North Dakota and Texas, in the U.S. District Court for the District of Wyoming (D. Wyo.); California, New Mexico and several environmental organizations eventually intervened to defend the Rule.¹⁹

Trump Administration Response and Ensuing Litigation

The Trump administration quickly embarked on a series of regulatory actions to delay, suspend, and ultimately rescind most of the 2016 Rule.²⁰ Proponents of the 2016 Rule challenged each of these moves, but in the interest of brevity, this memo focuses on the most recent and consequential of those actions, BLM’s 2018 rescission of the Methane Waste Prevention rule.

On September 28, 2018, BLM published a final rule rescinding almost the entirety of the 2016 Rule, with the notable exceptions of the venting prohibitions and the narrowing of emergency carveouts—provisions which remained mostly unchanged.²¹ California, the Sierra Club, and other allies challenged the Rescission on multiple grounds in the U.S. District Court for the District of Northern California (N.D. Cal.). On July 15, 2020, the N.D. Cal. Court vacated the 2018 Rescission, effectively striking it down on a nationwide basis, on the grounds that the rule: (1) “ignored its statutory mandate under the Mineral Leasing Act”; (2) “failed to justify numerous reversals in policy positions” as required by the Administrative Procedure Act (APA); and (3) failed to adhere to the National Environmental Policy Act.²²

¹¹ *Id.*

¹² *Id.*

¹³ 81 Fed. Reg. 83009.

¹⁴ 81 Fed. Reg. at 83082.

¹⁵ 81 Fed. Reg. 83082–83.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 81 Fed. Reg. at 83085–88.

¹⁹ Wyoming at 2.

²⁰ For an exhaustive run-down of the litigation and rulemaking history, see Wyoming at 2–10; California v. Bernhardt, No. 4:18-CV-05712-YGR, 2020 WL 4001480, at *2–9 (N.D. Cal. July 15, 2020), available at:

<https://oag.ca.gov/system/files/attachments/press-docs/MSJ%20Order%20BLM%20Methane%20Rule%20Rescission.pdf>.

²¹ Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 49184 (Sep. 28, 2018),

<https://www.federalregister.gov/documents/2018/09/28/2018-20689/waste-prevention-production-subject-to-royalties-and-resource-conservation-rescission-or-revision-of>; Bernhardt at 8.

²² Bernhardt at 1–2.

Meanwhile, the D. Wyo. litigation had proceeded in fits and starts as the Trump administration pursued its regulatory delay and rollback strategy. In April 2018, several weeks after the agency proposed its 2018 Rescission, the D. Wyo. Court decided to stay both implementation of the 2016 Rule's phase-in requirements and the pending case until finalization of the Rescission (and, eventually, once again pending the subsequent legal challenge to the validity of the 2018 Rescission).²³ Upon the N.D. Cal. decision vacating the 2018 Rescission, the D. Wyo. Court lifted its stay on the original proceedings challenging the 2016 Rule.²⁴

On October 8, 2020, the D. Wyo. Court vacated most of the 2016 Rule, finding that it exceeded BLM's statutory authority under the MLA and that the agency violated the APA by acting arbitrarily and capriciously.²⁵ Specifically, the Court found that the 2016 Rule was primarily intended to reduce methane emissions and improve air quality, a mandate Congress directed toward the Environmental Protection Agency (EPA) via the Clean Air Act, not BLM through the MLA.²⁶ The Court relatedly found that the agency failed to adequately justify its definition of "waste" and "avoidably lost" under the MLA, which the Court claimed historically required consideration of whether it would be economic for the lessee to capture and market the associated gas.²⁷ Finally, the Court held that the BLMC acted arbitrarily and capriciously, thereby violating the APA, because the agency: (1) failed to fully analyze the effect of the 2016 Rule on marginal wells; (2) failed to adequately justify the capture requirements; and (3) leaned on the rule's ancillary air benefits, calculated using a global cost of methane—which, again, the Court reasoned cannot serve a primary role in the rule's justification because the MLA does not directly address air quality or emissions—in its cost benefit analysis.²⁸ The Court also held the 2016 Rule's application to private interests, a result of state regulatory regimes that create pooled mineral interests, to be unlawful.²⁹ Finally, the Court left intact provisions concerning royalty-free use of production and technical alignments of the prior regulation with the text of the MLA.³⁰

The N.D. Cal. vacatur of the 2018 Rescission has been appealed to the 9th Circuit³¹; intervenor-respondents are likely to appeal the D. Wyo. vacatur of the 2016 Rule to the 10th Circuit as well.

IV. Proposed Action

BLM should shift its litigation position in these cases. First, in the D. Wyo. litigation, it should join Democratic states' and environmental groups' likely appeal to the 10th Circuit, where the agency should vigorously defend the 2016 Rule. Second, in the N.D. Cal. litigation, BLM should abandon its appeal; if the GOP states are able to carry the appeal forward, then BLM should support the original plaintiffs.

Appeal D. Wyo. Case about 2016 Rule

In theory, a new administration could sidestep thorny litigation strategy questions by re-proposing a new or revised version of the 2016 Rule. However, all that is likely to accomplish is delay an inevitable court decision: at the minimum, it will take BLM several months to finalize a new rule, at which point industry interests and

²³ Wyoming at 8-9.

²⁴ Wyoming at 10.

²⁵ Wyoming at 2.

²⁶ Wyoming at 20.

²⁷ Wyoming at 34.

²⁸ Wyoming at 38-47.

²⁹ Wyoming at 47.

³⁰ Wyoming at 55.

³¹ "BLM Methane Waste Prevention Rule," Harvard Law School Environmental & Energy Law Program, <https://eelp.law.harvard.edu/2017/09/bam-methane-waste-prevention-rule/> (last visited Nov. 22, 2020).

conservative attorneys general will assuredly challenge the regulation in federal court—quite possibly in the very same D. Wyo. Court Especially considering the climate impacts that accrue with every year of delay, proponents of the 2016 Rule may as well pursue appeal now rather than risk spending years only to end up in a similar litigation posture. Advocates in part want to challenge the D. Wyo. opinion because they believe it seriously mischaracterizes the interaction between BLM and the MLA, and EPA and the Clean Air Act.

Consequently, BLM should join the intervenor-respondents in appealing the D. Wyo. vacatur, a shift in position that the agency should announce publicly via press release or sub-regulatory guidance at the same time it informs the Court.

Withdraw Notice of Appeal in 9th Circuit Case 2018 Trump Rescission

BLM has filed a notice of appeal to the 9th Circuit.³² If the agency does not do so before the end of the Trump administration, the agency should abandon its appeal on or shortly after Jan. 20th; court notice should be shortly followed by some form of public notice, perhaps sub-regulatory guidance, announcing the agency's new belief that the 2018 Rescission was properly struck down by the lower court. If BLM's co-defendants in the case below, Wyoming and two industry groups, are able to carry the appeal forward, then the agency should consider changing its position to support the original plaintiffs in attempting to preserve the ruling below. Regardless, it is possible that the 9th Circuit will stay the case pending the outcome of the 10th Circuit appeal in the challenge to the 2016 Rule, since that decision has the potential to largely moot out this case (although, not entirely, as the 2018 Rescission retained parts of the 2016 Rule, in effect re-proposing them).

Another, albeit resource-intensive, route would be for BLM to begin the formal rulemaking process to withdraw the 2018 Rescission. This would allow BLM to seek an abeyance, and forestall a potentially unfavorable appellate opinion (if, for example, litigants draw a particularly conservative panel).

If the agency is undertaking a new rulemaking to rescind the 2018 Rescission, an abeyance allows the agency to avoid defending the rule while it proposes a new rule rescinding the challenged regulation, takes comments, and issues a new final rule. Abeyance also saves the court from expending resources to consider a rule that will soon be replaced.

A request to hold a case in abeyance can be made in one of two ways: The agency can file its own motion requesting that the court hold the case while a new rulemaking proceeds, or the agency and plaintiff can file a joint motion asking the court to stay the case. The latter often will be done in conjunction with a settlement. Such a settlement typically would involve the agency and plaintiff agreeing to a timeline for a new rulemaking. The existence of a timeline for the new rulemaking is generally crucial for arriving at an agreement with the plaintiffs and, in addition, makes the request for an abeyance more reasonable to a court, which knows that the case will not languish on its docket indefinitely.

The argument for an abeyance is strongest—and thus most likely to be granted by the court—in the early stages of the case, before briefing and oral argument is complete. In contrast, if all of the briefs have been filed and the court has held argument, the argument that the abeyance will conserve judicial resources is weaker. Nonetheless, the Trump administration has successfully requested stays and abeyances in several cases after briefing was complete and, in one case, successfully requested multiple abeyances after oral argument had taken place. In addition, agency motions have been granted even when opposed by intervenors who support the rule being challenged or by the challengers themselves.

³² *Id.*

Exercise Discretion to Stick to the Spirit of the 2016 Rule

With most of the 2016 Rule vacated, the pre-2016 regulatory guidance has mostly been restored.³³ That scheme grants BLM substantial discretion to make “avoidably lost” determinations, to essentially approve or reject requests to avoid paying federal royalties for venting and flaring activities that exceed established limits³⁴; while the litigation plays out, BLM should use its discretion to minimize wasted methane gas by only granting “avoidably lost” requests that would have merited royalty-free venting or flaring under the 2016 Rule.

³³ See NTL-4A, “Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases,” BLM, https://www.blm.gov/sites/blm.gov/files/energy_noticetolessee4a.pdf.

³⁴ *Id.*

