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August 11, 2015

Office of Management and Budget
Office of Information and Regulatory Affairs
Desk Officer for the Department of the Interior
Attention: OMB Control Number 1004-XXXX
725 17th Street, NW
Washington, DC 20503

Re.: Paperwork Reduction Act, Information Collection Requirements, Proposed Rule Onshore Oil and Gas Operations and Site Security; OMB Control No. 1004-XXXX

To Whom It May Concern:

Western Energy Alliance ("Alliance") and the Independent Petroleum Association of America ("IPAA") (together, the "Associations"), appreciate the opportunity to comment to the Office of Management and Budget ("OMB") on the information collection requirements that would be mandated under proposed changes to Bureau of Land Management ("BLM") Onshore Order No. 3, which would be codified in the Code of Federal Regulations through modifications to 43 C.F.R. Part 3160 and the addition of new Part 3170.[1] The Associations are concerned that the proposed rule change would result in substantial costs and burdens to domestic oil and natural gas producers, the vast majority of which are small, independent businesses, in violation of the requirements of the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521 ("PRA" or "Act").

I. *The Associations*

Western Energy Alliance represents over 450 members involved in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independent oil and gas producers, the majority of which are small businesses with an average of fifteen employees.

[1] 80 *Fed. Reg*. 40767 (July 12, 2015). We would add that BLM states that this proposal will work together with proposed changes to Onshore Orders 4 and 5 on the measurement of oil and gas, yet BLM has not published those proposed changes. *Id.* It is difficult to assess the impacts of the proposed rule without this information.

IPAA represents 9,000 independent oil and natural gas producers and service companies across the United States. Independent producers develop 95 percent of domestic oil and gas wells, produce 68 percent of domestic oil and produce 82 percent of domestic natural gas. A recent analysis has shown that independent producers are investing 150 percent of their domestic cash flow back into domestic oil and natural gas development, borrowing funds to enhance their already aggressive efforts to find and produce more domestic energy. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The Associations' member companies have valid existing leases, current oil and natural gas production, and plans for future leasing, exploration, and production activities on federal and Indian lands and will be directly affected by the proposed rule change.

II. BLM Compliance with Paperwork Reduction Act: Background

The purpose of the PRA is to "minimize the paperwork burden for individuals, *small businesses*, educational and nonprofit institutions, Federal contractors, State, local, and tribal governments, and other persons resulting from the collection of information by or for the Federal Government" and to "strengthen the partnership between the Federal Government and State, local, and tribal governments by minimizing the burden and maximizing the utility of the information" collected. 44 U.S.C. § 350(1) and (6). (Emphasis added). In the proposal, BLM states the recordkeeping requirements of the proposed rule, "would apply to lessees, operators, purchasers, transporters, and any person directly involved in producing, transporting, purchasing, selling or measuring oil or gas through the point of royalty measurement or the point of first sale, whichever is later."[2] BLM recognizes that "the preponderance of firms involved in developing, producing, purchasing, and transporting oil and gas from Federal and Indian leases are small entities as defined by the [Small Business Administration]. *As such, it appears a substantial number of small entities would be potentially affected by the proposed rule to some degree*." 80 *Fed. Reg*. 40792. (Emphasis added).

BLM confirms that "this proposed rule contains information collection requirements that are subject to review by OMB under the PRA."[3] Some of the proposed requirements would add new uses and burdens for BLM Form 3160-5, Sundry Notices and Reports on Wells currently authorized in OMB control number 1004-0137, Onshore Oil and Gas Operations. "[T]he BLM intends to ask OMB to combine the activities associated with the new control number with existing control number 1004.0137."[4] The BLM proposed rule summarizes the increase in paperwork burden in two charts listing seventeen (17) new information collection activities and estimates that the total hours required on an annual basis, even after eliminating three existing requirements, would be over three-quarters of a million hours (753,952 hours).[5] As discussed below, these new requirements are burdensome, unnecessary and do not meet the standards of the Act to "minimize the paperwork burden" on small businesses and "strengthen the partnership" between the federal government and state and tribal governments.

[2] 80 *Fed. Reg.* 40796.
[3] *See* BLM discussion of PRA compliance, 80 *Fed. Reg.* 40793-40799, 40793.
[4] *Id.* at 40793.
[5] *Id.* at 40797-40799.

As detailed below, the Associations question whether these seventeen new information collection requirements will have substantial practical utility, particularly when weighed against the enormous impact they will have on the regulated community. The Associations further question the accuracy of BLM's estimated total time burden for compliance with the information collection requirements and believe that BLM underestimates the true amount of time it will take operators, transporters, and purchasers to comply. Many operators do not currently have systems in place to track the information required by BLM and would have to create new recordkeeping procedures and modify sophisticated automated software systems used to track field production, tasks that are not factored into BLM's estimated burden.

As to transporters and purchasers, industries that are not currently regulated under Onshore Order No. 3, identifying the required information, developing procedures to track and report this data, training personnel on new procedures, and altering current recordkeeping systems and procedures will be an enormous undertaking. In spite of the tremendous impact the rule would have on transporters and purchasers, the impacts of the proposed rule to these industries are not evaluated in BLM's PRA analysis of the proposed rule. *See* § V *infra*. The limited utility of many of the proposed changes is further challenged by a lack of clarity in the information submission requirements. As addressed below, some of the proposed changes are inconsistent with other statutory and regulatory requirements, causing confusion regarding compliance.

III. *Inadequate Outreach with the Regulated Community and Request to Meet with OMB*

In spite of the fact that the proposed rule will have a substantial impact on the information collection requirements applicable to oil and gas operators, transporters, and purchasers, BLM engaged in very little public outreach or discussion with the regulated industries prior to releasing the proposed rule. The operations and facilities that will be affected by these sweeping changes in procedures are predominately located in the western states, where 90 percent of federal public lands are located. Nevertheless, BLM chose to hold its only public forums on the proposal over two consecutive days in Washington, D.C., which prevented many interested parties from meaningfully participating. While BLM provided a webcast of the proceedings, it was scheduled for the convenience of BLM and not the regulated entities in the West. This limited outreach prevented adequate participation by knowledgeable people working in the field, particularly given that the forums began at 8:30 a.m., eastern daylight time, outside of normal working hours for individuals in the western states.[6]

Further, the BLM-suggested comment period within which to submit comments to OMB on the proposed rule's new information collection requirements was very short, consisting of only thirty days.[7] Given the complexity and technical nature of the proposed rule, this is an insufficient amount of time for affected parties to review the rule, consult with the company individuals responsible for measurement and related site security measures and evaluate how it will impact their operations, recordkeeping policies, and information submission practices. As discussed in more detail *infra*, the rule also expands recordkeeping and record retention requirements to two

[6] IPAA, the American Exploration and Production Council, and America's Natural Gas Alliance did submit a comment letter dated May 31, 2013 on the proposed revisions to Onshore Orders 3, 4, and 5.
[7] 80 *Fed. Reg*. 40768.

entirely new industries not normally regulated by BLM—transporters and purchasers of oil and natural gas—but BLM failed to engage in any direct outreach with these industries.

In light of the insufficient opportunities and time afforded industry to comment on the impact of the proposed rule under the PRA, we request a meeting with OMB at which the Associations can more fully explain the impact the information collection and submission requirements will have on affected industry.

IV. *The Additional Paperwork Burden would be Substantial and without a Concomitant Benefit to the Public*

BLM estimates that the proposed rule would result in requiring a total of 147,181 responses, which would translate into 849,452 hours of work for the regulated community.[8] BLM calculated this time burden by estimating the amount of time it believes would be necessary for operators to fill out sundry notices with newly required information, produce facility diagrams, and prepare requests for approvals. However, we believe that BLM's estimate fails to consider the true impact of the rule, which changes the way in which federal approvals to conduct oil and gas operations are granted, would require that many operators modify software and automated systems to track new information, and requires substantial new information regarding existing facilities that may no longer be available to operators. Even *if* BLM's calculations are accurate, this is a huge new burden to the regulated community and, in many cases, it is less than clear that the procedures would provide any benefit the public.

While almost every facet of the rule would result in increased information collection and submission burdens to operators, transporters, and purchasers, we highlight a few of the primary impacts below.

i) Expansion of Federal Regulation to Non-Federal Tracts

The proposed regulations would substantially increase the paperwork operators would be required to submit in order to receive drilling authorizations on state and private lands committed to federal units or included within federally approved communitization agreements.[9] Currently, only a subset of the regulations found in 43 CFR Part 3160 apply to non-federal wells committed to federal units and CAs. However, the proposed rule would appear to amend 43 CFR § 3161.1 to state "all of the regulations in this part [*i.e.*, all of the Part 3160 regulations] apply to [among other categories] State or private tracts committed to a federally approved unit or

[8] 80 *Fed. Reg*. 40799. The elimination of three existing requirements, BLM states, would reduce this burden to a net of 753,952 hours per year.

[9] A communitization agreement is an agreement to combine small tracts that include at least one or more federal and/or Indian leases, "for the purpose of committing enough acreage to form the spacing and proration unit necessary to comply with the applicable state conservation" requirements and "to provide for the development of separate tracts that could not be independently developed or operated in conformity with well spacing patterns established in the area or by order of the state regulatory agency." Cox, "Unitization and Communitization," *Law of Federal Oil and Gas Leases,* §18.01[2] (Mathew Bender 2014); *see also* Mineral Leasing Act of 1920 ("MLA") at 30 U.S.C. § 226(m) (2013).

communitization agreement."[10] Accordingly, under the proposed rule, all of Part 3160 would apply to state and private tracts included within federal units or communitization agreements, regardless of whether a wellbore in fact penetrates federal or tribal minerals. If this is not BLM's intent, it should clarify this language to make this clear.

Several key provisions related to onshore operations are contained within Part 3160, including the requirement that operators obtain a federal drilling permit ("APD") prior to commencing operations.[11] Similarly, BLM's new hydraulic fracturing rule, which is currently stayed pending resolution of a motion for a preliminary injunction, is also located in Part 3160.[12] The proposed extension of these requirements to non-federal lands represents an enormous, unjustified, and legally questionable expansion of federal regulation. One member of the Associations estimates that this change would expand federal regulation to over 1.2 million acres of state and private land in the Williston Basin of North Dakota and Montana alone.

As to the requirement that operators obtain federal APDs for non-federal wells committed to federal units and communitization agreements, this requirement would be in addition to state permits operators are already required to obtain in order to drill state and fee wells. Current BLM policies require that, when drilling state or fee wells that are committed to federal units or communitization agreements, operators submit copies of state-approved permits to BLM. Instead of embracing this efficient practice, the proposed rule would require time-consuming, duplicative federal permitting efforts. Not only is it highly questionable whether BLM has the jurisdiction to impose such a requirement on private and state-owned minerals, it would fundamentally change the way in which operators plan for development given the incredibly long lead times it takes BLM to process APDs, to say nothing of the enormous increased workload to BLM.[13] This requirement also would undermine numerous memoranda of understanding BLM has entered into with state oil and gas regulatory bodies delegating downhole permitting authority for federal leases to the states.[14] We also note that this requirement is directly contrary to a July 17, 2015 Instruction Memorandum issued by BLM specifically stating that "in situations where a proposed well will not penetrate federal or Indian minerals, a federal APD is not required."[15]

The BLM has not provided any estimate of the time or cost burden on industry for obtaining APDs on non-federal wells within federal units or communitization agreements for which federal APDs are not currently required. A federal APD requires a $9,000 filing fee, plus the time and costs for archaeological and biological surveys and the time to complete the surface use plan of operations and drilling plan required by the regulations and Onshore Oil and Gas Order No. 1.

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[10] 80 *Fed. Reg.* 40800 (containing proposed language amending 43 C.F.R. § 3161.1, *Jurisdiction.*
[11] 43 C.F.R. §3162.3-1.
[12] *See* 43 C.F.R. § 3162.3-3 (stayed pursuant to order in *Western Energy Alliance v. Jewell*, No. 15-cv-41-F (D. Wyo., filed March 20, 2015).
[13] "Average Application for Permit to Drill (APD) Approval Timeframes: FY 2005-2014," http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/statistics/apd_chart.html
[14] *See, e.g.*, July 10, 2009 Memorandum of Understanding ("MOU") among the Colorado Oil and Gas Conservation Commission ("COGCC"), BLM, and the Forest Service August, amending and reaffirming July 22, 1991 MOU between COGCC and BLM, granting the COGCC primary jurisdiction over downhole regulation of matters involving federal lands and minerals in Colorado.
[15] BLM Instruction Memorandum No. 2015-124, July 17, 2015.

Not only would this new burden be costly and onerous, but it would often fall on operators who generally do not operate on federal lands and therefore do not have the staff or expertise to efficiently comply with the regulations pertaining to federal drilling permits. For example, there are isolated, small tracts of severed federal minerals in a number of Eastern states. A communitization agreement would be required for a well drilled in a state spacing unit containing such a tract and, therefore, a federal APD would be required under this proposed rule. Preparing a federal APD would be, for many operators in the Eastern states, a one-off process which would be more time-consuming than it would be for an average operator in the public lands states where some economies of scale can be developed.

In addition to amounting to a federal grab of regulatory power away from the states, the expansion of federal jurisdiction that would accompany the proposed change to 43 CFR § 3161.1 does not meet the purpose of the PRA to "strengthen the partnership between the Federal Government and State, local, and tribal governments *by minimizing the burden* and maximizing the utility of information created, collected, maintained, used, disseminated, and retained by or for the Federal Government" and should be rejected by OMB. 44 U.S.C. § 3501(6). (Emphasis added).

ii) Commingling

As drafted, the proposed rule would radically change the way in which small or fractionalized mineral tracts are developed under communitization agreements and federal unit participating areas, and by doing so would violate the Mineral Leasing Act ("MLA"), would thwart the conservation programs of western states, and inhibit the development of Indian leases in violation of BLM's trust responsibilities to the tribes. When Congress amended the Mineral Leasing Act of 1920 to allow for the communitization of federal and Indian leases, it was, in effect, recognizing the importance of the state conservation statutes for spacing of oil and natural gas wells and the desirability of pooling disparate ownerships to more efficiently develop small federal and Indian tracts.[16] But BLM's proposal appears to prohibit "commingling" of production from separate ownerships and would eviscerate the communitization agreement and federal unit provisions of the MLA. This provision would violate the PRA's direction concerning the partnership between states and tribes and OMB should reject the rule as drafted and require BLM to clarify these sections in conformity with the MLA and the PRA. 44 U.S.C. § 3501(6).

BLM outlines the procedures for authorizing communitization agreements at 43 C.F.R § 3105.2-3(a) and in BLM Manual 3160-9, *Communitization*. BLM will authorize a communitization agreement in cases where a drilling and spacing unit contains a combination of federal, tribal, state and/or fee leases and BLM's current practice is to accept a simple one-page ratification or an applicant "self-certification" statement that all the signatures of the necessary parties have been received. The communitization agreement will affirmatively permit commingling of production from these multiple leases and set forth the allocation method for the well. Communitization agreements are very commonly used to develop highly fractionalized Indian

[16] 30 U.S.C. § 226(m)("When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or a portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement . . . ."

allottee minerals and patchwork tribal minerals, which are often combined with state or federal mineral tracts within a single drilling unit. However, the language of the proposed rule would prohibit BLM from approving communitization agreements in these cases.

Proposed section 3170.3 defines "commingling" as:

> Commingling, for production accounting and reporting purposes, means combining production from multiple leases, unit [participating areas], or [communitized areas], or combining production from one or more leases, unit [participating areas], or [communitized areas] with production from State, local governmental, or private properties before the point of royalty measurement. Combining production from multiple wells on a single lease, unit [participating area], or [communitized area] before measurement is not considered commingling for production accounting purposes. Combining production downhole from different geologic formations on the same lease, unit [participating areas], or [communitized area] is not considered commingling for production accounting purposes.

Similarly, "communitization agreement" is defined as:

> Communitization agreement means an agreement to combine a lease or a portion of a lease that cannot otherwise be independently developed and operated in conformity with an established well spacing or well development program, with other tracts for purposes of cooperative development and operations.

Under these definitions, BLM would be required to authorize commingling (*i.e.*, grant a commingling and allocation approval ("CAA")) in order to authorize a communitization agreement or establish a federal unit participating area that includes a combination of federal, tribal, state, and/or private leases. However, proposed section 3173.14(a) would permit BLM to "grant a CAA only if":

> (1) The proposed commingling includes production *from only:*
> *(i) Federal leases, unit [participating area], or [communitized area] with 100 percent Federal mineral ownership and the same fixed royalty rate and revenue distribution; or*
> *(ii) Indian tribal leases, unit [participating areas], or [communitized areas] wholly owned by the same tribe and with the same fixed royalty rate;*

(Emphasis added).

The first clause of proposed section 3170.3's definition of "commingling" states that "commingling" under the rule would include "combining production from multiple leases," an action that is necessary to authorize a communitization agreement or establish a federal unit participating area. This leads to the nonsensical result that a communitization agreement could not be approved, and a unit participating area could not be established, unless there is 100% consistent federal or tribal ownership in the well's drilling and spacing unit, which, if true, would

obviate the need for a communitization agreement in the first place. While informal conversations with BLM officials have indicated that this was not the "intent" of the rule, the proposed sections 3170.3 and 3173.14 simply state that commingling, which is a prerequisite to a communitization agreement and establishment of a federal unit participating area, is prohibited for any tracts with anything other than unitary ownership. The paperwork burden necessary to comply with this new standard would be substantial, requiring most operators with approved communitization agreements and authorized unit participating areas, of which we estimate there to be many thousands, to re-apply, only to find that they no longer qualify for approval. In these cases, operators would then need to seek variance approval from BLM, which BLM estimates would take 40 hours per request to complete,[17] creating a massive undertaking for operators with approved communitization agreements.

The proposed rule should be amended to make clear that a CAA is not required for BLM approval of communitization agreements or to establish federal unit participating areas. We suggest that the first sentence of proposed section 3170.3's definition of "commingling" be amended to make clear that "multiple leases" with a combination of federal, tribal, state and/or fee ownership can be combined together to create single communitization agreements and single unit participating areas. This would clarify the obligations of operators in conformity to the MLA and significantly reduce redundant and unnecessary paperwork.

Even if these requirements are revised as suggested to conform to the MLA, there would remain a substantial increased paperwork burden imposed by the retroactive effect of the rule. Current BLM policy outlined in IM 2013-152 applies only to *new* commingling requests. In contrast, the proposed rule would apply to all CAAs, and operators would need to submit applications for approval of existing CAAs as well as new CAAs. BLM states that applying the rule retroactively is justified because "operators are sometimes unaware of existing commingling approvals or the provisions in the approvals . . . [and] many approvals have involved allocation methods that are difficult or impossible to inspect and verify for a variety of reasons" including "lack of a well-defined allocation method," are "overly complex" or contain an "unverifiable allocation method[]."[18]

However, BLM's stated justification for making the rule retroactive as to existing CAAs does not stand up to scrutiny. BLM itself estimates that of the approximately 10,541 existing CAAs, only 710 of them would not meet the new requirements.[19] Thus, it is difficult to determine why every operator with an existing CAA must re-apply for approval when the vast majority of CAAs already comply with the new requirements. This is particularly true given that BLM estimates that re-application for existing CAAs would result in a total hour burden of 80,000 hours.[20] To the extent BLM's intent is to make operators aware "of existing commingling approvals or the provisions in the approvals,"[21] mandating re-application is not an efficient or proper way to achieve this goal and only results in an unnecessary exercise in violation of the PRA's purposes to "minimize paperwork," "improve the productivity, efficiency, and effectiveness of

[17] 80 *Fed. Reg*. 40797.
[18] 80 *Fed. Reg*. 40784.
[19] 80 *Fed. Reg.* 40791.
[20] 80 *Fed. Reg*. 40798.
[21] 80 *Fed. Reg.* 40791.

Government programs," and "minimize the cost to the Federal Government" of the collection of information (44 U.S. C. § 3501(1), (3), and (5)).

As to the 335 CAAs that BLM estimates would be terminated because they do not meet the new criteria,[22] operators would be forced to completely revise the way in which production from wells within these CAAs is metered and allocated. This would, in and of itself, create an enormous paperwork burden for operators and, in some cases, could require operators to change infrastructure and metering facilities to comply with the proposed rule's prohibition on multiple party ownership within a single CAA. We further question whether BLM has the authority to invalidate existing CAAs. The United States Supreme Court has a well-established ban on statutes and regulations that apply retroactively to affect vested property rights. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 224, 270 (1994); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 45 (2006). A regulation has an impermissible retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *INS v. St Cyr*, 533 U.S. 289, 321 (2001). Because CAAs outline parties' rights and interests under leases, modification of these agreements under the proposed rule would be impermissibly retroactive.

While it is possible that the new rule, if corrected as discussed above, would result in some increased allocation transparency, given BLM's own assessment that most CAAs already comply with the new rule, it is very unlikely that the limited utility of the proposed rule would outweigh its burden on operators.

iii) Site Facility Diagrams

Under current Onshore Order No. 3, operators are already required to submit site facility diagrams to BLM with information intended to assist BLM with verification of production data. These include, among other things, a requirement that diagrams contain: (1) an identification of the header, the vessels, piping, and metering systems located on the site, including valves and any other equipment used in the handling, conditioning, and disposal of oil, gas, and produced water; (2) identification of "which valve(s) shall be sealed and in what position during the production and sales phases and during the conduct of other production activities"; and (3) a description of co-located facilities and describe the equipment at the facility.[23] However, the proposed rule would increase the level of detail currently required under Onshore Order No. 3 by requiring much additional data, including information about the make, model and serial number of major facility components powered by production from the lease, including the compressor, separator, dehydrator, heater-treater, or tank heater. In addition, these requirements would apply to both existing and new facilities.

BLM estimates that this requirement would result in 42,000 responses, each taking an operator eight hours to complete, resulting in a total hour burden of 336,000 hours and an estimated cost to operators of $63.3 million, spread over 3 year.[24] We do not think this is a reasonable estimate

[22] 80 *Fed. Reg*. 40791.
[23] Onshore Order No. 3 § III (I).
[24] 80 *Fed. Reg*. 40798.

of the time it would take to comply with these information submission requirements. To the contrary, this has the potential to be an enormous undertaking for Association members because of its retroactive requirement. Many existing facilities were constructed years ago and have changed hands numerous times. As such, it is extremely unlikely that operators have ready access to the information that must be submitted for existing facilities. It is likely that to obtain this information, operators would have to travel to the field and hope serial numbers are legible on existing equipment. BLM states that this information "would provide greater consistency in how the volume of oil and gas used royalty free is determined and enable the BLM to more easily verify those volumes."[25]

While we understand BLM's desire to improve production accountability and accurately measure beneficial use of oil and natural gas, it is difficult to determine how all of the information required under the new rule would improve accountability. For example, we do not understand how having the serial number for production equipment, in addition to make and model, would increase BLM's ability to measure production. Other complications are introduced any time equipment is moved to between multiple locations within a field. Under the proposed rule, operators would need to provide a new site facility diagram any time a facility is modified.[26] It is common for operators to move equipment to different locations, particularly during the completions period. Many BLM field offices encourage the use of green completions, an operation that requires the one-time use of specific equipment on site. In these cases, operators would be required to submit new facility diagrams very frequently and often for equipment that is only on site for a few days.

Finally, while current Onshore Order No. 3's facility diagram requirement is not applicable to dry gas production facilities where no liquids are produced or stored, diagrams for these facilities would be required under the proposed rule. Because operators of existing dry gas production facilities have not previously been required to produce facility diagrams, these operators would need to draft new diagrams for all such facilities. This would be a significant undertaking that is not analyzed in BLM's PRA analysis.

iv) Facility Measurement Point (FMP) Designation

The proposed rule would require operators to apply for facility measurement point ("FMP") designation for all measurement points on new and existing measurement facilities used to determine royalties. Operators would be required to apply to BLM for approval of such points, which would be granted if the proposed FMP meets specific criteria. The FMP would then need to be visibly marked, and all required reporting must reference the FMP numbers used to calculate royalty associated with the oil or natural gas. For new measurement facilities, the rule would require the operator to apply for, and BLM to assign, an FMP number before any production leaves the lease. For existing measurement facilities, operators would have nine months, eighteen months, or 27 months from the effective date of the final rule within which to apply for BLM approval of its FMP, depending on the production level of the lease, unit PA,

[25] 80 *Fed. Reg.* 40781.
[26] 80 *Fed. Reg.* 40807.

CA, or CAA that the measurement facility serves. BLM estimates that compliance with these requirements would require approximately 310,000 hours, spread over three years.[27]

First, the Associations believe that BLM's timeframe for obtaining FMP numbers is unrealistic. The time periods within which operators must apply for FMP designation is tied to the amount of production from the leasehold, with operators of leases, units or communitization agreements that have more than 6,000 Mcf of gas or 40 barrels or more of oil per day having to apply within nine months. For leases with production between 3,000-6,000 Mcf or 20-30 barrels, operators would need to apply within 18 months; for leases with production less than 3,000 Mcf or 20 barrles per day, operators would have 27 months to comply. However, because BLM's proposed thresholds for production are so low and the vast majority of wells produce more than 6,000 Mcf or 40 barrels per day, the majority of the work required to comply with this rule would be within the first nine months, not spread evenly over three years as assumed by BLM. This is a particularly important issue because compliance with all other portions of the proposed rule is tied to the date that BLM assigns the FMP.

Operationally, the requirement that every data point used for royalty calculation be designated as an FMP is unnecessary and overly burdensome. For example, it is not uncommon for several wells to feed into common locations. If the royalty interest is the same for multiple wells feeding into a common location, then only the common location should be designated as an FMP. The act of creating FMP designations for each allocation meter in these instances will add additional administrative burden with no value to BLM or the operator. As to new wells, under the proposed rule, operators would be required to obtain approval of an FMP for new measurement facilities *before* any production leaves the facility. Given the long lead times that it takes the majority of BLM field offices to process many applications, we are very concerned that this requirement would lead to delay in production from leases, costing the both the operator and the federal government revenue.

While BLM's estimated 310,000 hours is in and of itself significant, we believe this may be an underestimate of the actual burden to operators. For many operators, this would be a massive undertaking, which would require a complete analysis of current metering practices, an internal check to ensure that current practices are consistent with the rule, and then the preparation and submission of applications (sundry notices) seeking approval of FMPs. After FMP assignment, because all reporting would have to reference FMP numbers, many operators would need to completely revise accounting and reporting software systems to reference metering points by FMP number. One Association member estimates that the burden of upgrading its automated field measurement and accounting systems to include reference to FMP number, as well as lease, unit or communitization agreement number, would take one highly skilled information technology employee a period of 1-3 months. Accordingly, this is not simply a matter of operators filling out new sundry notices, as assumed by BLM.

v) Off-Lease Measurement

There are currently no national standards governing off-lease measurement, but current rules require that BLM approve all requests for off-lease measurement and the vast majority of state

[27] 80 *Fed. Reg.* 40797.

offices have established criteria for doing so.[28] The proposed rule would permit off-lease measurement under a rigid, nationally set standard, taking away the ability of individual state offices to approve these operations in a manner that makes sense in the context of the field. Operators measure gas off-lease for a variety of reasons related to production efficiencies, environmental concerns, and topography. Applying nationally-set standards for off-lease measurement would take away considerable operational flexibility while at the same time imposing significant paperwork burdens for operators. We question whether such a change will "improve the quality and use of Federal information to strengthen decisionmaking, [and] accountability . . ." 44 U.S.C. § 3501(4).

The proposed rule would apply to new applications for off-lease measurement, as well as existing authorizations, meaning that operators would need to re-apply for authorizations that have already been obtained, resulting in duplication of paperwork already provided to BLM. This does not "minimize the cost to the Federal Government" of the collection of the information. 44 U.S.C. § 3501(5). BLM estimates this time burden at approximately 15,000 hours.[29] Given that BLM state offices currently have all data related to off-lease measurement approvals, including lease numbers, point of measurement, and other information specifically required by the state office, it is unclear what would be gained under the proposed rule. BLM states that the rule would assist with the accuracy of the follow-up audits it performs, but, given that BLM already collects this data, it is difficult to determine why this new submission is required.

vi) De-watering and Hot Oiling, Clean-up, and Completion Operations

The proposed rule contains new recordkeeping requirements for de-watering and hot oiling, clean-up and completion operations. While operators typically do keep records of de-watering operations, the vast majority of operators do not currently track all of the information required by the new rule. For example, most operators do not keep records of the time of the opening and closing of the gauge, and it is not readily apparent how this information would assist BLM in tracking royalties. Thus, this requirement would not assist BLM, but would require operators to substantially revise their electronic recordkeeping and automated system software to identify this information.

Similarly, most operators do not keep any records of hot oiling, clean-up and completion operations, and no retention of this information is currently required by BLM. The Associations do not understand how this information would assist BLM because, during such operations, 100% of the oil stays within the production system, is ultimately returned to the tank and then metered prior to sale. Because this information is not generally documented, operators would again have to revise and re-program their automated system software to keep track of this data, in spite of the fact that this information would have no practical utility to BLM.

[28] 43 C.F.R. §§ 3162.7-2 (oil) 3162.7-3 (gas).
[29] 80 *Fed. Reg.* 40797.

V. *The Proposed Rule Greatly Expands the Number of Businesses that Must Provide Records*

Under current rules, information collection and retention requirements apply only to operators; however, under the proposed rule, these requirements would apply to purchasers and transporters of oil and natural gas through the point of first sale. While the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. § 1713(a), requires that persons involved in transporting and purchasing oil or natural gas "maintain any records, make any reports, and provide any information that the Secretary may, by rule, reasonably require," the information the proposed regulations require transporters and purchasers to create and retain is an unreasonable expansion of recordkeeping burdens and not consistent with the requirements of FOGRMA.

Under the proposed regulations, transporters and purchasers would be required to "retain all records, including source records, that are relevant to determining the quality, quantity, disposition, and verification of production attributable to Federal or Indian leases" for a period of seven years for federal leases and six years for Indian leases. Specifically, transporters and purchasers, in addition to operators, would be required to produce and retain records containing the FMP number used to calculate the royalty on the oil or gas transported or purchased, as well as the name of the company that created the record. For existing facilities, in the interim period before the BLM assigns an FMP number, transporters and purchasers would be required to produce and maintain records for all oil and gas transported or purchased that identify the name of the operator, the lease, unit participating area, or communitization agreement number, and the well or facility name and number.

Compliance with these new record retention requirements would be unduly burdensome for transporters and purchasers, many of whom are small businesses, *see infra*. Because current rules do not require purchasers and transporters to retain *any* of the information required by the proposed rule, purchasers and transporters would be required to completely revise their recordkeeping systems to include mechanisms to identify and track this information. Many transporters and purchasers track data electronically, so, in many cases, revision of the recordkeeping policies would require substantial revisions to data management systems and processes. Further, and more troublingly, the proposed rule imposes immediate penalties on transporters and purchasers who do not comply with the recordkeeping requirement.[30]

In spite of the fact that the proposed regulations would specifically apply to two new categories of businesses that were not previously regulated by Onshore Order Nos. 3, 4, or 5, BLM conducted no direct outreach with these industries concerning the proposed regulations. In fact, the preamble to the proposed rule, which contains the PRA analysis evaluating the effect of the proposed rule, contains *no* discussion of the impact the regulations would have on purchasers and transporters and contains no estimate of the burden the regulations would have on these industries.[31] BLM was unable to even identify the number of purchasers and transporters that

[30] 80 *Fed. Reg.* 40787.
[31] 80 *Fed. Reg.* 40793-40797.

would be affected by the proposed regulations,[32] and has accordingly compiled no estimate of the time burden to these industries as required under the Act.

BLM must perform an evaluation of the rule's paperwork impacts to transporters and purchasers of oil and gas. Only then can we fully evaluate and comment on the full impacts the proposed rule will have on these industries.

VI. *The Burdens Associated with the Rule Will Harm Small Businesses*

As discussed in the Federal Register preamble, of the 6,628 domestic firms involved nationwide in oil and gas extraction, 99 percent are defined as "small businesses" by the Small Business Administration ("SBA").[33] Similarly, although no national data is identified, BLM presumes that the vast majority of transporters and purchasers of oil and natural gas from federal and Indian leases similarly qualify as SBA "small businesses."

In spite of the fact that virtually all of the firms that will be affected by the proposed rule are small businesses and that the proposed rule substantially increases the number of documents that must be submitted by these businesses, BLM estimates that the cost to comply with the new regulations would only reduce the annual net income of these small businesses by 0.001 percent. Nonetheless, BLM estimates that there would be an initial, one-time cost to businesses to implement the regulations of approximately $121.5 million, spread over three years, and continuing annual costs of $13.5 million, representing a staggering sum for businesses with limited resources that are already under financial strains given current low oil and gas prices.

Further, as discussed above, this estimate is based on the assumption that operators already maintain the data that must be submitted under the new rule. Given that in most cases operators will have to collect and compile large volumes of *new* information in order to comply with the rule, the economic impact to business will be much larger than estimated by BLM and will fall largely on the shoulders of small business.

The burdens to small business that would result from the proposed rule are the precise regulatory burdens the Act was enacted to prevent. *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 32, (1990) (in response to "outcries" from "small business," "the Paperwork Reduction Act was enacted in response to one of the less auspicious aspects of the enormous growth of our federal bureaucracy: its seemingly insatiable appetite for data").

VII. *Conclusion*

As set forth in this letter, the Associations believe that the proposed rule would result in massive information collection and submission burdens to operators, transporters, and purchasers of oil and gas from federal and Indian leases in violation of the intent of the Paperwork Reduction Act. We ask that OMB direct BLM to revise its proposed rule to reduce the paperwork burden. We

[32] 80 *Fed. Reg*. 40792 ("national data, including number of firms, number of employees by firm, and annual receipts by firm, is not discretely identified for purchasers and transporters of petroleum or natural gas").
[33] 80 *Fed. Reg.* 40792.

would welcome the opportunity to meet to more fully explain the ramifications of the proposed rule.

Sincerely,

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cc: Bureau of Land Management