OIRA MEETING ON BLM LEASING RULE

DISCLAIMER: This document and the content included is meant for the purpose of facilitating discussion for this meeting between the American Petroleum Institute (API) and The Office of Information and Regulatory Affairs, and is not an exhaustive list of the concerns, feedback, and information API has provided on the Bureau of Land Management Proposed Rule on Fluid Mineral Leases and the Leasing Process (RIN 1004-AE80). API's full comments are available at https://www.api.org/~/media/files/news/2023/09/22/trade-comments-on-blm-proposed-leasing-rule.

ISSUE	CONSIDERATIONS
General	• Onshore federal fluid minerals should remain a viable and attractive investment option with a balanced, predictable, and equitable leasing and lease management process. Federal lands leasing is important to provide affordable, abundant, domestic energy that helps lower prices at the pump and expands US foreign policy options (API, p. 5) • API supports BLM implementing the applicable leasing changes required by the Inflation Reduction Act ("IRA"), as well as those that streamline filing and recordkeeping (API, p.5). • BLM cannot adopt new leasing procedures that sidestep or dilute its statutory obligation to conduct quarterly lease sales in each state where available lands are eligible (API, p.5). • BLM cannot adopt regulatory changes that unduly constrain opportunities for development and operations on already-issued leases, or that breach or otherwise unduly impair rights conferred under those leases (API, p.5). • BLM cannot confer undue authority on other Department of the Interior ("DOI") bureaus, and other surface managing agencies, to constrain leasing and development of oil and natural gas leases on federally-managed lands (API, p. 5). • BLM makes a counterfactual, and nonsensical, assumption that the Proposed Rule will have no substantial effects on energy supply. Moreover, BLM offers no evidence for its presumption that lessees can freely rededicate resources from federal to non-federal lands. BLM's conclusion also ignores significant cumulative cost impacts on oil and natural gas operators stemming from BLM's full suite of proposed rulemakings, such as the proposed Waste Prevention Rule and forthcoming Site Security and Measurement rules (API, p. 43). • BLM appears to significantly understate costs. Based on the last five years of National Fluids Lease Sale System data, annual EOI fees increases appear to be about 145 percent higher (approximately $9.3 million) than BLM estimates (approximately $3.8 million). The Proposed Rule does not examine aggregate economic effects with other BLM and Administration initiatives increasing costs (API, p.12).
Additional Fees and the IRA	• BLM should not impose new fees beyond the IRA (e.g., proposing to increase a range of processing and filing fees by several hundred percent, including raising the fee for an Application for Permit to Drill to $11,805, a large increase over the current fee) (API, pp. 11-12). • BLM should not institute inflationary adjustments, as it lacks the authority to do so without rulemaking (API, pp. 16-18).

Bonding and Financial Assurance	• Although Congress declined to do so, BLM is proposing to reform bonding in ways that will considerably raise costs on operators. BLM also is proposing to eliminate nationwide bonds entirely, depriving lessees and operators of a financial tool currently available to mitigate bonding costs by spreading them over a larger universe of leases. BLM is also proposing to increase the lease bond that an operator must provide to BLM from $10,000 to $150,000 (1,500 percent increase), and the state-wide bond from $25,000 to $500,000 (2,000 percent increase). These increases are excessive, will likely result in premature termination of operations and corresponding waste of federal resources, and will add additional administrative burden onto BLM staff (API, pp. 11-12 and pp. 30-33). • With respect to BLM's proposed new bonding costs, BLM's RFA analysis states that "the annual cost to secure a bond would not be material," suggesting the increased bonding might have some limited impact on small businesses. *Id.* at 47,609. That is because BLM claims that buying a bond is only 1 to 3.5 percent of the bond value on an annual basis. That simplistic metric provides an incomplete picture. For example, even premiums comprising a small percentage of the Proposed Rule's sharply increased bonding requirements may impose a significant burden on the bottom line of a small business, particularly if those premiums must be paid each year of the lease (API, p. 12) • BLM should retain Certificates of Deposit ("CDs") and Letters of Credit ("LOCs") as security for personal bonds (API, pp. 31). • BLM should modify § 3104.20 of the Proposed Rule because it is inconsistent with other sections of the Proposed Rule and is confusing. For example, under proposed § 3104.10, before any surface disturbing activities, the lessee, operating rights owner *or* operator would have to submit a surety bond or personal bond for the amounts required in subpart 3104. However, proposed § 3104.20 then inconsistently limits what is permitted under proposed § 3104.10 by providing that "[t]he operator must be covered by a bond in its own name as principal or obligor in an amount of not less than $150,000 for each lease . . . ." BLM claims in the preamble that this change is intended to simplify bonding requirements among the operator, lessee, and operating rights holder. However, BLM fails to appreciate that as a result of the substantial minimum bond amount increases that now would be incorporated into this section, this new operator bonding requirement would put a large financial burden on operators of multiple leases, particularly if they are operating on federal leases in several different states. BLM's primary concern should be that at least one person must post the required financial assurance for a lease, and should leave it to the operator, lessee, and operating rights owner to determine among themselves who will provide bonding for a particular lease (API, p. 32).
Frequency of Lease Sales	• §3120.11 is problematic because it changes regulatory language to provide more flexibility to BLM than the statute allows,[1] including making quarterly leasing in each state appear voluntary, by changing "shall" to "may," contrary to recent court decisions in the wake of EO 14008 Section 208.[2] At a minimum, any change to the existing regulation should mirror the precise language of the statute (API, p. 37). • Similarly, in §3120.12, BLM proposes to amend subsection (a) to provide that "[e]ach BLM State Office will hold sales at least quarterly if eligible lands are available for competitive leasing." This is a significant change from existing § 3120.1-1 which provides that "[a]ll lands available for leasing shall be offered for competitive bidding under this subpart . . . . ", with the latter providing less discretion to remove acreage otherwise available for lease (API, p.37).

[1] 30 U.S. Code § 226(a).

[2] *State of North Dakota v. DOI*, No, 21-148, ECF No. 98 (D.N.D. Mar. 27, 2023) (slip. op.); *Louisiana v. Biden*, 622 F. Supp. 3d 267, 293-94 (W.D. La. Aug. 18, 2022); see also *W. Energy All. v. Jewell*, No. 16-912, 2017 WL 3600740, at *8 (D.N.M. Jan. 13, 2017).

Selecting Lands for Leasing & the Leasing Process	• BLM's Proposed Rule "aims to enhance the administration of oil and gas related activities on America's public lands." Proposed Rule at 47562. Many changes in the Proposed Rule provide greater flexibility for BLM to remove lands and implement additional qualification requirements. These changes will increase uncertainty for operators. • BLM should not limit areas available for leasing by directing leasing to what BLM subjectively considers "appropriate" locations, either under its informal expression of interest ("EOI") process or its proposed formal nomination process. Regional planning, National Environmental Policy Act ("NEPA") reviews, and other processes already conduct the requisite balancing in identifying suitable areas for leasing (API, p. 5). • Other problematic provisions include: (1) novel and undefined "preference criteria"; (2) broad disqualification of persons from bidding on and receiving leases; (3) unnecessarily added steps and opportunities for BLM to further restrict lease terms or otherwise deter leasing; (4) open-ended operational restrictions announced within and even after lease sales; (5) needless tying up of capital via substantially greater bonding requirements; and (6) impermissible creation of veto authority in agencies without statutory foundation (API, pp. 9-10). • BLM is amending existing § 3120.3-5 to no longer mandate that BLM include nominated parcels in a competitive lease sale. Instead, BLM would provide that it "may" include such parcels. That is subjective and also duplicative. Proposed § 3120.32 provides that nominations are filed in response to a "List of Lands Available for Competitive Nominations." Thus, BLM has already determined that the lands are available to include in a competitive lease sale. BLM should not get another opportunity to exclude parcels on that list from a competitive sale once nominated (API, p. 38). • Proposed new §3101.13 subsection (a) would give BLM broad authority to "consider the sensitivity and importance of potentially affected resources," and any "uncertainty concerning the present or future condition of those resources," and then based on this highly subjective and amorphous standard, consider "whether a resource is adequately protected by stipulation *without regard for the restrictiveness of the stipulation on operations*" (emphasis added). This would allow BLM to offer for lease lands that are eligible and available, but then subject the offered leases to additional stipulations that could restrict operations to the point that they are uneconomic or infeasible to undertake. Providing BLM with unfettered discretion to impose lease stipulations that constrain or effectively prevent operations would severely undermine the value of those leases and discourage entities from bidding on those leases due to the resulting uncertainty (API, pp. 24- 25). • The checkerboard nature of federal tracts in some states means that state and private mineral interests adjacent to BLM lands could be adversely impacted by the Proposed Rule, yet BLM does not address this in the Proposed Rule (API, p. 11).
Specific Issues relating to compliance with Section 50265 of the IRA	• Section 50265(b)(1) of the IRA provides that during the 10-year period following enactment, BLM may not issue a right-of-way for wind or solar energy development on public domain or acquired lands unless BLM has held an onshore oil and gas lease sale in the 120 days preceding the ROW issuance, and during the 1-year period preceding the right-of-way issuance BLM has held oil and gas lease sales the acres of which exceed the lesser of 2,000,000 acres and 50 percent of acreage for which EOIs submitted during that 1-year period (API, pp. 40-41). • § 3101.13 would allow BLM to meet its obligations under §50256 of the Inflation Reduction Act by offering land for lease, regardless whether the underlying acreage received EOIs or has underlying geologic value. We disagree with that approach (API, pp. 24-25). • Similarly, proposed § 3120.42 provides that BLM will periodically calculate the "acreage for which expressions of interest have been

	submitted" and total "acres offered for lease," both of which are newly defined terms in proposed § 3000.5. Yet proposed § 3120.42 provides no calculation method. This problem is compounded by proposed § 3000.5's exclusion of expressions of interest acreage that previously was "proposed for leasing" in "any pending sale" or in any "other expression of interest pending BLM disposition." BLM should not rely upon IM 2023-006 or other aspects of the Proposed Rule that are inconsistent with the requirements of the IRA by improperly inflating acreage totals nominated or offered for federal onshore oil and gas leasing, or by improperly decreasing the number of acres included in the determination of acreage for which EOIs were submitted. BLM has not explained why it finds it necessary to itself nominate lands if prospective operators have not expressed interest in those lands and they thus are unlikely to be successfully bid or produced (API, pp. 40-41).
Award of Lease	• §3120.63 should be revised. Under the last sentence of subsection (e) of this proposed section, "[i]f the BLM cannot issue the lease within 60 days, the BLM may reject the offer." BLM should not adopt this proposed sentence, which sets up possibly routine rejection by BLM of winning lease offers after a competitive sale is held. It nowhere justifies BLM unilaterally rejecting a lease offer (API, p. 41).
Access to the Site	• The proposed changes improperly broaden BLM's authority to impose limits on lease rights by allowing BLM to require relocation of a well by up to 800 meters (4x the existing provision) and restrict access to the site by 90 days (30 days longer than the current 60, or ¼ of the year). No technical justification was given for these changes. (§3101.2 Surface Use Rights) (API, pp. 18-21). • The Proposed Rule subjects use of leasehold lands for oil and gas operations to "applicable requirements" that would include "such reasonable measures as may be required by the authorized officer to avoid, minimize, or mitigate adverse impacts to other resource values, land uses or users, federally recognized Tribes, and underserved communities." The terms "avoid" and "mitigate" are newly-added and undefined limitations. These rights reserved to BLM are so broad, vague, and subjective that they could empower BLM to significantly constrain or entirely prevent operations on the leasehold. If the lessee objects, its only recourse under the rules would be to challenge the BLM decision through an administrative appeal—with no certainty that its lease term would be suspended in the interim. And unless BLM amends the appeal regulation as the Associations suggest to first allow for State Director review, that appeal process would inexorably last several years. (§3101.2 Surface Use Rights) (API, pp. 22-24). • BLM asks for comment on whether it should adopt a 5-year diligent development requirement, and a rental increase if diligent development requirements are not met. BLM should not, especially as it notes that approximately half of operators would not currently be able to meet that obligation. The Proposed Rule also ignores the obstacles often placed by regulatory agencies and others that have the consequence of delaying development for reasons beyond the lessee's control after a lease is issued (API, p. 30).
APDs	• As the Proposed Rule's preamble points out, nearly all wells were spud within four years of approved APDs. Accordingly, the most efficient and equitable method to achieve BLM's goal is to establish a uniform four-year term for an APD, rather than two or three years as BLM proposed in §3171.14. A four-year APD term also more closely correlates with NEPA review accompanying an APD approval, given that NEPA review typically remains valid for at least a five-year period (absent changed circumstances) (API, p. 42).