



May 25, 2016

Director Neil Kornze
Bureau of Land Management (BLM)
U.S. Department of the Interior
1849 C Street N.W., Room 2134LM
Washington, DC 20240

Attention: 1004-AE39

RE: Comments of API and the Independent Petroleum Association of America to Proposed Rule – Resource Management Planning (81 Fed. Reg. 9674, February 25, 2016)

Dear Director Kornze:

The American Petroleum Institute (API) and Independent Petroleum Association of America (IPAA) appreciate the opportunity to comment on BLM’s proposed Resource Management Planning Rule appearing at 81 Fed. Reg. 9674, February 25, 2016 (hereafter, the “Proposed Planning Rule”).

BACKGROUND

API is a national trade association representing over 650 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.

IPAA is the national association representing the thousands of independent crude oil and natural gas explorer/producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies which provide services and supplies to the domestic industry.

Many of API’s and IPAA’s member companies have a direct interest in how the Bureau of Land Management (BLM) plans to manage public lands. These companies hold valid existing leases and are interested in future oil and natural gas leasing, exploration, and production activities in areas that will be directly affected by BLM’s management decisions. These companies are also dedicated to meeting environmental requirements, while economically developing and supplying affordable energy to consumers. Issues raised by the Proposed Planning Rule will have a direct impact on the future viability of oil and natural gas development on public lands throughout the United States.

BLM stated in the preamble to the Proposed Planning Rule that the agency “initiated this rulemaking as part of a broader effort known as ‘Planning 2.0’ to improve the land use planning

procedures required by FLPMA [the Federal Land Policy and Management Act].” 81 Fed. Reg. 9674. Under this Planning 2.0 initiative, “the BLM aims to improve the land use planning process in order to apply this policy and strategic direction and to complement related efforts within the BLM.” *Id.* BLM has described the goals of its Planning 2.0 initiative as:

- (1) Improve the BLM’s ability to respond to social and environmental change in a timely manner;
- (2) provide meaningful opportunities for other Federal agencies, State and local governments, Indian tribes, and the public to be involved in the development of BLM resource management plans;
- and (3) improve the BLM’s ability to address landscape-scale resource issues and to apply landscape scale management approaches.

Id. The agency indicates that the Proposed Planning Rule is being issued as part of an overall Planning 2.0 strategy, yet it is not clear what other measures will be established under this strategy and how such measures will act to control the interpretation or implementation of the Proposed Planning Rule, or its outcomes. For example, during the breakout sessions at the March 25, 2016 public meeting to discuss the Proposed Planning Rule,¹ BLM staff referred to various strategies and programs that have been or are being developed to improve planning including the “Advancing Science Strategy” and new socioeconomic models. In addition, BLM is updating its Planning Handbook and intends to release it later in 2016.

As an initial matter, API and IPAA feel that BLM needs to identify what else comprises Planning 2.0 and its interrelation with the Proposed Rule. API and IPAA object to a piecemeal approach to Planning 2.0 that precludes our member companies from being able to review, analyze, and comment on all the various components of the agency’s new planning approach that will modify or replace BLM’s current land use planning practices. BLM must explain how Planning 2.0—as a whole—changes the agency’s resource management planning process and must allow the public to review, understand, and comment on all elements of BLM’s new planning approach together at one time. The Proposed Planning Rule should be reissued only when BLM has completed its work on the supporting policies, guidance documents, and other tools that will describe for the regulated community and the public how the key concepts introduced and the approaches being developed will be integrated and consistent with the overarching revised resource management process.

COMMENTS

As explained more fully below, API and IPAA believe that the Proposed Planning Rule departs from BLM’s statutory charge to manage the public lands “on the basis of multiple use and sustained yield,” and “in a manner which recognizes the Nation’s need for domestic sources of minerals . . . from the public lands.”² The Proposed Planning Rule introduces significant uncertainty into the resource management planning process by proposing numerous provisions that create ambiguous standards or otherwise expand agency discretion.

These provisions risk and, in some cases, seem to encourage agency decision making that is contrary to the congressional mandates in BLM’s organic statute—the Federal Land Policy and Management Act (FLPMA). The Proposed Planning Rule will most likely cause delay and increased costs in the resource management planning process by expanding public participation opportunities

¹ Video of the March 25 public meeting can be accessed at http://www.blm.gov/wo/st/en/prog/planning/planning_overview/planning_2_0.html. A summary is available at http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/planning_images/planning_image_folder.Par.18308.File.dat/BLM%20Planning%20Proposed%20Rule%20Public%20Meeting%20Summary%20-%20Denver%20March%2025%202016.pdf.

² 43 U.S.C. § 1701(7), (12).

without due consideration for how those opportunities should be managed to avoid inefficiencies in the planning process. API and IPAA are concerned that a process redesigned by the Proposed Planning Rule would disfavor multiple use interests, including the development of oil and natural gas resources on public lands, by potentially subjecting each step in the process to a new round of objections by parties committed to opposition of resource development. Finally, the Proposed Planning Rule violates other federal requirements because BLM has put it forward without engaging in NEPA analysis or completing a Statement of Energy Effects, both of which are required.

BLM has proposed a rule that would arbitrarily, capriciously, and unlawfully throw out BLM's long-standing policy expressed in FLPMA to maximize resource values for the public in favor of a structure that would discourage investment in public land use, facilitate large-scale withdrawal of public lands from consideration for multiple use, and give BLM unfettered authority to impose planning decisions and, through the use of adaptive management, *changes* to those decisions without regard for the Administrative Procedure Act, or other laws designed to limit that type of regulatory overreach.

I. The Proposed Planning Rule Would Increase Regulatory and Legal Uncertainty.

The Proposed Planning Rule includes many provisions that would alter the resource management planning process in ways that would introduce significant uncertainty for stakeholders, and for BLM itself, both during the planning phase and once resource management plans (RMPs) are made final.

A. Public Data Call

The Proposed Planning Rule's new "planning assessment" phase includes a public data call as part of its strategy to provide an early opportunity for more robust public involvement. API and IPAA support public involvement in resource management planning but are concerned that the public data call and subsequent use of the data received would significantly change BLM practices that have evolved under existing law and may exceed BLM's legal authority for resource management planning. Executive Order 13563 provides that regulations "must be based on the best available science." Exec. Order 13563, at 1 (Jan. 18, 2011). The Proposed Planning Rule, however, "would require that the BLM use high quality information (*including* the best available scientific information) to inform the planning process." 81 Fed. Reg. 9675-76 (emphasis added). This language would allow data to be treated as "high quality information" under the Proposed Planning Rule to inform the planning process, that would not meet the standards of "best available scientific information" (BASI).³ At the March 25, 2016 public meeting to discuss the Proposed Planning Rule, BLM representatives confirmed that BLM would decide what data, from all the data submitted in response to the public call, should be used.

API and IPAA are concerned that opening the data collection process up to a public data call would result in tasking the BLM to review data of highly variable quality, reliability and scientific validity. The possibility that the agency could pick and choose from these data would create uncertainty and would fail to ensure objectivity and appropriate decision making. It is likely that much if not all of the data submitted by the general public would be in furtherance of positions that would conflict with the positions of other stakeholders or which would conflict with the goals of resource management planning—including the goal of responsibly developing the mineral estate as prescribed by Congress.⁴ This would introduce additional uncertainty as parties with conflicting positions would be afforded the opportunity to submit data that are in conflict with each other's. The public data call would give undue leverage to public stakeholders that have little actually at stake. While BLM frames increased public participation as positive collaboration, in this context, there is considerable experience to suggest that a

³ Pub. L. 106-554, § 515.

⁴ Pub. L. 106-554, § 515.

public data call as described in the Proposed Planning Rule could well lead to tension, conflict, and grid-lock.

Applying the “high quality information” standard to whether data may be used, as opposed to the “best available science” standard imposed by Executive Order 13563, increases uncertainty about how BLM will proceed. The “high quality information” standard creates *legal* uncertainty as well, as any RMP that rests on “high quality information” that is not BASI may be inconsistent with the Data Quality Act⁵ and with the Department of the Interior’s (DOI’s) “Information Quality Guidelines.”⁶ Relying on such data also risks rendering BLM’s decision making arbitrary and capricious in contravention of the Administrative Procedure Act. Both concerns make an RMP that relies on “high quality information” more susceptible to legal challenge after finalization.

Before issuing any general request for data to assist with land use planning, BLM must first address the need to collect specific data, and identify the type and quality of data needed in order to fulfill its obligation to manage natural resources on federal lands. BLM must focus any data call to address a specific claim or to address a specific data gap that it has identified and set criteria within the data request as a basis for clear standards.

API and IPAA recommend that in making any public request for data under the Proposed Planning Rule, if implemented, BLM should also incorporate by reference the key concepts and criteria related to establishing data quality objectives and standards for data collection, validation, and analysis established by the Environmental Protection Agency (EPA) in its various guidance documents.⁷ These existing guidance documents can help BLM staff determine what information is considered high quality. Collection of data is usually evaluated in terms of how the data will be used to address a stated purpose. The degree of quality in the collection and analysis of data and its validation criteria can vary depending on the significance of its use in making a decision. For example, data quality assurance and control can be tiered to different functional purposes ranging from lowest for screening purposes to highest for legal defensibility. In order to fulfill its obligation to practice sound resource management planning, BLM must adopt the use of recognized quality assurance and quality control protocols for the collection and analysis of scientific data used as the basis for its decision making. BLM needs to communicate to the public the standards it will use to collect and analyze data in determining what constitutes “high quality” or “best available,” so the resources utilized by the public and other agencies are applied to provide data that satisfy established standards for quality and usability.⁸

B. Inappropriate Sources of Authority

In an attempt to rationalize the Proposed Planning Rule, BLM cross-refers to a number of other government directives and notes that “the proposed rule would respond to and advance direction set forth” in those directives. 81 Fed. Reg. 9678. The issues addressed by the directives do not include protecting valid existing mineral rights and operations, but do include, among other things:

- collaboration;
- climate change;

⁵ Pub. L. 106-554, § 515.

⁶ U.S. Dep’t of the Interior, *Information Quality Guidelines Pursuant to Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001*, <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/515Guides.pdf>.

⁷ See, for example, “Guidance on Systematic Planning Using the Data Quality Objectives Process”, EPA QA/G-4, at https://www.epa.gov/sites/production/files/documents/guidance_systematic_planning_dqo_process.pdf;

⁸ For related discussion on baseline data, please see discussion of the subject of “planning assessment” at Section II.A, below.

- mitigation practices; and
- a “landscape-scale” approach to planning.

BLM must not rely on these sources of authority to the extent that they are inconsistent with FLPMA. FLPMA specifically incorporates the Mining and Minerals Policy Act of 1970 and its mandate “to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries.” 30 U.S.C. § 21a. The Proposed Planning Rule’s favorable citation to alternative sources of guidance—sources that were passed unilaterally within the executive branch—raises concerns that future resource management planning would be guided by practices that cannot be identified at this time, based on guidance documents that have yet to be developed. Doing so would be arbitrary and capricious. As a substantive matter, the superficially appealing goals articulated in these agency directives raise numerous significant adverse consequences.

1. Climate Change

The Proposed Planning Rule’s many references to “climate change,” *see, e.g.*, 81 Fed. Reg. 9708, raises concerns as to what importance this issue will bear with respect to consideration of the many other factors that BLM must, by law, take into account in the course of resource management planning.⁹ Some stakeholders routinely make appeals to climate change as a means of advocating for restrictions on development of crude oil and natural gas resources altogether. By giving primacy to considerations of climate change in the Proposed Planning Rule, BLM signals that these types of arguments may carry great weight. BLM decision making risks being arbitrary and capricious if it indeed bases resource management decisions on these types of arguments without considering the other factors for which BLM must account, by law. Moreover, to the extent BLM does consider climate change in the course of its resource management planning, it must recognize the positive impact that natural gas had had on the level of greenhouse gas emissions from the energy generation sector, among others. There seems to be no recognition of these benefits in the Proposed Planning Rule.

2. Mitigation

Mitigation provisions in the Proposed Planning Rule raise further concerns. For example, the Proposed Planning Rule seeks to establish the following definition for the term *mitigation*: “*Mitigation* means the sequence of avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.” 43 C.F.R. § 1601.0-5 (proposed); 81 Fed. Reg. 9725. This definition does not align with BLM’s statutory charge under FLPMA to take “action necessary to prevent unnecessary or undue degradation of the [public] lands.” 43 U.S.C. § 1732(b). In other words, by allowing legitimate and conforming uses of public lands, FLPMA does not proscribe impacts altogether, but seeks to prevent “unnecessary and undue degradation.” Because they would not be grounded in FLPMA, decisions imposing mitigation requirements under the proposed definition risk being arbitrary and capricious.

The Proposed Planning Rule also would change the mechanism for developing mitigation requirements. Existing regulations provide:

The proposed plan shall establish intervals and standards, as appropriate, for monitoring and evaluation of the plan. Such intervals and standards shall . . . provide for evaluation to determine whether mitigation measures are satisfactory

⁹ *See* 43 U.S.C. § 1701(a).

43 C.F.R § 1610.4-9. In other words, the existing regulations require an RMP to establish standards for *evaluating* mitigation in the course of implementation. Under the Proposed Planning Rule, however, the RMP would impose the mitigation standards up front. That is, BLM proposes to require RMPs to “[i]dentify standards to mitigate undesirable effects to resource conditions” at the outset. 43 C.F.R § 1610.1-2(a)(2)(i) (proposed). By forcing the agency to identify the standards of mitigation at the outset, rather than evaluating in the course of implementing the plan whether mitigation measures are satisfactory, the Proposed Planning Rule threatens to impose unwarranted mitigation requirements. Imposing mitigation requirements in advance as BLM proposes here introduces additional risk for project proponents seeking to make capital investments and achieve a return on investment. To protect against this risk, BLM should not revise the existing regulations.

The preamble to the proposed rule contains a passage that BLM must clarify: “For example, an objective might identify a mitigation standard for no net loss to a sensitive species would provide a standard to guide future authorizations in avoiding, minimizing, and compensating for any unavoidable remaining impacts to the sensitive species.” 81 Fed. Reg. 9690. In addition to an apparent grammatical issue that makes this sentence difficult to follow, the “example” provided is too general to illustrate how BLM intends mitigation to be treated within RMP “objectives.” BLM needs to clearly describe whether its revisions to the resource management planning process will introduce new criteria or provide more weight to existing criteria that will unreasonably emphasize impacts over benefits to the disadvantage of the development or utilization of natural resources that FLPMA recognizes as legitimate activity on multiple use federal lands.

Finally, the proposed emphasis on landscape-scale planning presents a risk of excessive mitigation requirements. Planning at a larger, broader scale makes it more difficult to precisely assess impacts. This imprecision, in turn, makes it more difficult to tailor mitigation requirements to the specific effects of land uses, increasing the risk of excessive requirements. Imposing coordination requirements across programs adds further uncertainty, creating additional risk. Without certainty as to the effects of an RMP, planning efforts would be subject to challenges as arbitrary and capricious because they would not comport with FLPMA’s mandate that mitigation requirements be “necessary to prevent unnecessary or undue degradation of the [public] lands.” 43 U.S.C. § 1732(b).

3. Landscape-Scale Planning

In addition to the prospect of excessive mitigation, BLM’s proposal to take a “landscape-scale” approach to planning presents a number of serious concerns. First, BLM is proposing to revise its planning principles “to state that the BLM will consider the impacts of resource management plans on resource, environmental, ecological, social and economic conditions at appropriate scales, rather than just on ‘local economies.’” 81 Fed. Reg. 9688. This creates significant uncertainty, as it neither defines “appropriate scales” nor identifies a clear and transparent process for how the scale of impacts would be determined. BLM also should clarify whether it intends to replace a local-economy-scale approach with a landscape-scale approach with regard to economic conditions only, or with regard to all of the impacts listed (resource, environmental, ecological, social, and economic). In addition, use of the term “appropriate scales” would promote arbitrary and capricious decision making; it is too open-ended. BLM has a strong tradition of decentralized decision making, built upon a unique system of state offices, rather than regional offices. Upending that system, especially in this context alone, would create uncertainty and discourage investment in projects on public lands. It would be inappropriate to devalue input from local agencies, or to remove the consideration of impacts on local economies, in BLM’s planning process. *See Backcountry Against Dumps v. Abbott*, 2011 U.S. Dist. LEXIS 90163 (S.D. Cal. 2011) (underscoring the importance of BLM decisions in furthering “the public’s interest in aiding the struggling local economy and preventing job loss”); *see also Or. Natural Desert Ass’n v. BLM*, 625 F.3d 1092, 1096 (9th

Cir. 2010) (“[BLM’s] land use planning choices influence both the unique and irreplaceable natural resources of the planning area and the local economy.”).

Based upon the discussion at the public meeting in Denver on “Planning 2.0”¹⁰, there is not a common understanding of what “landscape level” or “landscape scale” means or when this type of approach should be taken based on the resource value being considered. Not all proposed projects or uses of public lands warrant a landscape-level consideration. The development and application of a landscape-level approach for resource management planning must be more thoroughly vetted, clarified, and described in supporting guidance that provides useful insight and direction to BLM staff, the regulated community, and the public. Landscape-level planning reflects an increased scope and broader level of analysis that extends beyond the site-specific analysis promoted by NEPA in evaluating project level actions. Although extensive NEPA guidance already exists, insufficient guidance has been provided to support the effective implementation of landscape-level analysis and planning. Without greater clarification and direction, the proposed rule appears to advocate a one-size-fits-all approach for landscape-level planning that will be applied for all resources. BLM should not finalize its revisions to the resource management planning process without offering for public review and comment its definitions for key concepts and their limitations, such as “landscape-level” or “landscape-scale” planning. The agency should not use subsequent guidance to define these key concepts and to determine how best to apply them.

C. Ambiguous Standards for Decision Making

The Proposed Planning Rule would establish a number of ambiguous standards that would introduce uncertainty into the planning process. For example, the Proposed Planning Rule calls for RMPs to “[i]dentify standards to mitigate undesirable effects to resource conditions” “[t]o the extent practical.” 43 C.F.R. § 1610.1-2(a)(2) (proposed); 81 Fed. Reg. 9727. Applying that provision would lead to disputes among stakeholders and between stakeholders and BLM over what is “practical.” API and IPAA are concerned that these disputes would play out through public participation during the planning process, causing uncertainty that would persist even after an RMP is finalized. Our organizations support the inclusion of a criteria concept that requirements must be “practical”, but seek definitive language around considerations of technical and economically feasibility, as well as cost effectiveness. Such RMPs would be susceptible to legal challenge, as any decision forced to meet an ambiguous standard risks being arbitrary and capricious.

Similarly, the Proposed Planning Rule calls for collaboration with cooperating agencies “as feasible and appropriate.” 43 C.F.R. § 1610.3-1(b)(2) (proposed); 81 Fed. Reg. 9728. API and IPAA agree that encouraging collaboration with other agencies is a legitimate aspiration for the Proposed Planning Rule. However, API and IPAA cannot ascertain the level of collaboration that would be required—or could be demanded or enforced—because what is “feasible and appropriate” is inherently ambiguous. This provision would lead to disputes during the development of RMPs and would result in RMPs more susceptible to legal challenge once finalized.

D. Multiple “Preferred” Alternatives

The Proposed Planning Rule also introduces uncertainty to the planning process by allowing for multiple “preferred alternatives.” 81 Fed. Reg. 9712-13. This departure from longstanding practice would render the planning process far too open ended and uncertain. If BLM were to identify two (or more) preferred alternatives, stakeholders would have no real sense of the direction the agency was leaning in developing an RMP. The ability to identify multiple alternatives would mask BLM’s

¹⁰ See note 1, *supra*.

intentions (or lack thereof) in the early planning stages and make it more likely that a final RMP would diverge from stakeholders' expectations. All of this would impinge upon stakeholders' ability to provide meaningful comments or to plan in advance of the final RMP, and would discourage investment in the use of public lands. Creating multiple "preferred alternatives" also is inconsistent with the requirements of NEPA, as discussed in Section VI.B. below.

E. Adaptive Management

The Proposed Planning Rule's adaptive management approach would introduce additional uncertainty as, by definition, it would allow for changes to otherwise final RMPs. In particular, it is unrealistic to consider "implementation strategies" as adaptive management tools distinct from settled "plan components," 81 Fed. Reg. 9675, across time and across the planning area. This approach does not reflect the reality of the land management process, which occurs along a continuum toward a decision by BLM. Land management requires monitoring and reevaluation, but it is not appropriate to suggest that the tools of land management can be neatly categorized and divided, especially when those divisions are made at the outset of the planning process. By breaking up the process this way, the Proposed Planning Rule would undercut valid existing rights and reasonable expectations, and would create the risk of arbitrary and capricious delineations between "plan components" and "implementation strategies."

API and IPAA believe that decoupling consideration of implementation as a component of a plan prevents the planning process from developing a comprehensive and solution-oriented approach to achieve a desired state in making resource decisions. The planning development process and its components need not be prescriptive in specifying implementation means, yet it should recognize that subsequent implementation may be limited in its ability to achieve the desired goal and objectives. As an example of an alternative approach for BLM to employ, EPA utilizes a feasibility analysis in developing plans and implementing remediation at Superfund sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). API and IPAA recommend that BLM include in its planning process a similar feasibility analysis that can be used to shape and evaluate potential implementation strategies. The feasibility analysis should consider applicable factors that could limit or promote an implementation strategy including legal or regulatory, technical, and economic considerations.

The Proposed Planning Rule allows implementation strategies to be updated at any time to incorporate new information without the ability for affected parties to review and comment before a final decision is made. 81 Fed. Reg. 9675. BLM needs to clarify the parameters of this allowance. Does this extend to wholly eliminating or creating an implementation strategy, or just imply corrections within previous identified limits? API and IPAA are concerned that this proposed provision gives BLM broad latitude to unilaterally decide to pursue a different strategy, action, or measure without having to collaborate with the project proponent, cooperating agencies, or other key stakeholders. BLM must allow affected parties the opportunity to comment on implementation strategies at the point that comments can influence the decision to change, and not defer to latter process steps where the decision is no longer open to question. API and IPAA seek clarification as to whether BLM believes a plan amendment would be necessary in the event that goals or objectives established in the resource management plan are subsequently altered due to new information, even if the implementation strategy remains the same.

Of particular concern to API and IPAA, the Proposed Planning Rule identifies best management practices (BMPs) as an implementation strategy. 81 Fed. Reg. 9693. This suggests that BLM would consider BMPs—including BMPs for oil and gas development and production—subject to change without the well-established, rigorous process that applies to an RMP amendment. Investments require predictability, and the prospect of imposing on everyday operations without a system of checks and balances is too unpredictable.

API and IPAA are not opposed to principles of adaptive management. A procedural mechanism like “adaptive management” is neutral on its face. But API and IPAA *are* concerned that, in practice, adaptive management can be used to increase restrictions on development or the stringency of mandatory BMPs in ways that were not explicitly addressed at the appropriate planning decision level. Adaptive management measures must contain specific limitations for discretionary change. Adaptive management measures must also provide for both adjustment that is more and less prescriptive, e.g., BLM cannot increase oil and gas restrictions in the face of new information unless it reciprocally allows, both in theory and in practice, the adaptive management process to decrease oil and gas restrictions.

F. Redefined “Cooperating Agency”

The Proposed Planning Rule would revise the definition of “cooperating agency” to provide that “[c]ooperating agencies will participate in the various steps of BLM’s planning process as feasible and *appropriate, given the scope of their expertise* and constraints on their resources.” 43 C.F.R. § 1601.0-5 (proposed) (emphasis added); 81 Fed. Reg. 9725.¹¹ The new language proposed by BLM would condition the participation of cooperating agencies on what is “appropriate” in light of such agencies’ “scope of . . . expertise.” These new qualifiers are not defined and would provide BLM wide latitude to arbitrarily ignore agencies which it determines lack sufficient expertise. Giving BLM this kind of discretion in the planning process creates unpredictability and risks creating RMPs based on arbitrary and capricious delineations between cooperating agencies with expertise and those without it.

In particular, the new definition of “cooperating agency” has the potential to undermine BLM’s traditional working relationships with State Directors, county commissioners, and other representatives of state and local interests if they are seen as lacking in “expertise.” State and local agencies and officials have traditionally played a central role in resource management planning by setting the basic practices and regulations for development, including of the mineral estate, and by educating BLM about local land use and other interests of local communities that rely on healthy industries. Changing from this approach will introduce uncertainty, both in the federal-level planning itself and with respect to the consistency between that planning and state and local land use regulation.

G. New “Deciding Official” and “Responsible Official”

BLM proposes to generalize the assignment of the two key decision and oversight roles for RMPs to address concerns about assuring flexibility in assigning resources and responsibilities for development of the scope of an RMP. In fact what the change does is separate these critical roles from the BLM organization structure and concentrate decision and oversight at the headquarters level. The strength of the current management framework is that it assures the public of a significant degree of decentralization of authorities and decision-making within BLM to the state and field levels, where knowledge of the local management situation is best understood.

API and IPAA agree that the Director should have discretion to allocate resources to effect the development of RMPs. However, to address these concerns, API and IPAA believe that the current responsibilities of the State Director and Field Manager can be retained as defined and that specific concerns arising from particular regional planning contexts can be addressed through specific direction to be provided by the Director. We would urge BLM to avoid the result of establishing a HQ planning team to manage all RMPs outside the BLM State management structure.

By redefining the “deciding official” responsible for identifying a planning area, the Proposed Planning Rule would create uncertainty both with respect to the geographic scope of future RMPs and

¹² See note 1, *supra*.

with respect to the relationships that API, IPAA, and their members have with State Directors and existing field offices. The existing regulations provide consistency and allow stakeholders to maintain relationships with State Directors and field offices with an expectation that decisions about land use planning in that area will come from that office. State Directors are also close to the specific issues that are important in a given planning area. The Proposed Planning Rule would offer no assurance that a deciding official, who would be selected by the BLM Director at BLM headquarters, would have any local understanding and expertise. The Proposed Planning Rule includes no checks and balances on the Director's appointment of a deciding official, further compounding concerns that the Proposed Planning Rule would diminish the role of state officials who are close to and knowledgeable of the specific issues facing a planning area. At BLM's March 25, 2016 public meeting to discuss the Proposed Planning Rule, BLM representatives asserted that State Directors would, by and large, retain the responsibility of the newly conceived "deciding official."¹² But, as written, the Proposed Planning Rule includes no provision suggesting that would be the case.

Moreover, the Proposed Planning Rule would not set field office areas as the default planning area. Staying within state boundaries breeds consistency with state and local land use planning in accordance with FLPMA. Under FLPMA, "[I]and use plans . . . shall be consistent with State and local plans to the maximum extent [the Secretary] finds consistent with Federal law and the purposes of this Act." 43 U.S.C. § 1712(c)(9). Planning for areas not constrained by state boundaries would undermine the authority of existing state plans by making each state's existing plan one of several. Planning for areas that cross state boundaries, therefore, would artificially introduce reasons for BLM to depart from existing state and local plans in a way that would be inconsistent with the mandate of FLPMA.

To be sure, there are times when BLM departs from this approach even under the existing regulations, but if BLM removes the default rule that the planning area is coextensive with the field office boundaries, it would encourage more frequent departures from this rule of thumb. Planning rules should protect against such unpredictability.

H. New "Responsible Official"

The Proposed Planning Rule redefines who would be "responsible for preparing and amending" RMPs by introducing the term "responsible official" to replace current references to "Field Manager" in the planning regulations. 81 Fed. Reg. 9675. BLM purportedly intends no change to the responsibilities of this official, but does intend that the change "would provide the BLM with more flexibility to prepare or amend resource management plans at levels other than a field office." 81 Fed. Reg. 9685. API and IPAA believe that BLM field offices are best positioned to prepare and amend RMPs. Allowing officials from outside the field office to lead the planning effort would lead to less predictable decision making that would be less rooted in local experience and expertise, and would fail to protect reasonable expectations.

The Proposed Planning Rule further provides that the newly conceived "responsible official may use any necessary combination of BLM staff, consultants, contractors, other governmental personnel, and advisors to achieve an interdisciplinary approach." 43 C.F.R. § 1610.1-1(b) (proposed). It is not clear from the text of the Proposed Planning Rule who BLM envisions would be working with the "responsible official" and whether there would be any constraints on who qualifies as, for example, an "advisor[]." Nor is it clear whether non-BLM stakeholders would be involved in this "interdisciplinary approach." The planning process should not be designed to incorporate the advice of unnamed government personnel without visibility for non-governmental stakeholders or the ability for those stakeholders to participate.

¹² See note 1, *supra*.

I. Consideration of Impacts “At Appropriate Scales”

The Proposed Planning Rule would revise Section 1601.0-8 of the existing regulations, which articulates the “principles” of the planning rule. The proposed revision would replace the call to consider “local economies” with a statement that BLM will consider “the impacts of resource management plans on resource, environmental, ecological, social and economic conditions *at appropriate scales*.” 81 Fed. Reg. 9688.¹³ This revision incorporates substantive considerations beyond “economies” and anticipates that those considerations would be made at a scale beyond “local.” BLM says as much: “This broader range of conditions would include the consideration of impacts to local economies, in addition to the impacts on other conditions.” 81 Fed. Reg. 9688. Expanding the considerations at the planning stage this broadly exposes the planning process to pressures to address impacts in a context for which it is not the appropriate forum. While it is appropriate to assess the larger context (scale) of RMP resource considerations to identify any controlling requirements, it is not appropriate at the RMP level to judge resource value at scales beyond the physical domain of the RMP. As example, resource development may carry national policy constraints set by congress, but the RMP should not be the forum to decide if development of a specific resource is of national value. The Proposed Planning Rule creates regulatory uncertainty by giving BLM wide discretion to choose what considerations it will favor in the course of developing an RMP, potentially leading to biased rather than objective decisions, and increasing the risk that a decision based on that discretion will be arbitrary and capricious.

In addition, the term “social conditions” is not defined, which would lead to disputes over which such conditions should influence outcomes of the planning process. Moreover, BLM has not demonstrated that it has the requisite expertise to assess whatever is meant by “social” conditions. Decisions based on “social” factors would risk being arbitrary and capricious if they are made without that expertise. The Proposed Planning Rule also provides no assurance, as it should, that consideration of social and economic factors would account for the positive social and economic impact of oil and gas development.

II. The Proposed Planning Rule Risks Further Delays in Land Use Planning.

The Proposed Planning Rule creates several potential sources of delay in the planning process. Changes to public participation opportunities, interstate planning efforts, and the protest process would all add time to the process for developing an RMP. BLM seems to recognize that the Proposed Planning Rule would increase the time spent on planning, though it asserts a hope that early delays would be made up for by back-end efficiencies resulting from the new processes. But BLM puts forward no support for this proposition. Further delays to an already belabored planning process will have significant adverse consequences for entities that have valid existing rights to use public lands, or that are seeking to invest in the use of public lands, including discouraging those entities from pursuing valid uses and exercises of those rights on public lands.

A. Concerns about the Design of the “Planning Assessment” Phase

1. Planning Assessment

BLM’s stated purpose of the proposed new “planning assessment” phase is to provide additional opportunities for early public participation. While public participation is an important part of resource management planning, the process as described in the Proposed Planning Rule would likely result in

¹³ The proposed new “planning assessment” phase is, similarly, “intended to assist the public in understanding the current baseline in regards to resource, environmental, ecological, social, and economic conditions.” 43 C.F.R. § 1610.4(c) (proposed); 81 Fed. Reg. 9730.

significant delays. The Proposed Planning Rule would “add a new regulatory requirement that the responsible official ‘[p]rovide opportunities for other Federal agencies, State and local governments, Indian tribes and the public to provide existing data and information or suggest other policies, guidance, strategies, or plans’ for the BLM to consider in the planning assessment.” 81 Fed. Reg. at 9706. In addition, the Proposed Planning Rule “would require that the BLM identify relevant public views concerning resource, environmental, ecological, social, or economic conditions of the planning area.” *Id.* To solicit this type of information, BLM “anticipates . . . hosting public meetings, although the BLM may also use other techniques, such as a collaborative Web site, for example.” *Id.* Data collection and processing, agency collaboration, and public meetings to solicit views on “resource, environmental, ecological, social, or economic conditions of the planning area” all require time. This new planning assessment phase would add time-consuming steps to the planning process and necessitate additional time to synthesize information received in the planning assessment. BLM must articulate clear internal schedule and process controls for how such changes will not delay developing a draft RMP, or hinder BLM from improving its planning turn-around times.

The BLM states that one of the objectives of a planning assessment is to obtain more public input early in the planning process in order to identify public views on the resources in the planning area and evaluate their importance or value to the public. BLM’s premise rests on the expectation that the public is well informed about the various resources with the planning area, and the significance of those resources for each of the multi-purpose land uses. In reality, the public is generally represented by a small set of stakeholders with clear factual understanding of resources and a larger set that hold opinion and beliefs focused on advocacy of one or two land uses in the planning area without consideration of the merits of other uses. To effect the efficiencies in the early planning process that BLM seeks, consideration must be made to providing materials to educate the public about the type and significance of the various resources in the planning area, their current use, and their value to BLM, the local community, and the broader public. BLM should encourage other parties to do the same in the scoping process for the planning assessment. This educational effort will lead to more informed public participation better able to appreciate the value of the various resources at issue. For example, designation of Areas of Critical Environmental Concern (ACEC) in the planning assessment should be done only if BLM can substantiate the value of the resource receiving this designation.

Another concern with the proposed planning assessment is the challenge of providing a document that assesses baseline conditions in the planning area related to resource, environmental, ecological, social, and economic criteria. This proposed baseline condition report would replace the Analysis of Management Situation that is part of BLM’s current planning process. API and IPAA believe the ability to establish baseline conditions will be challenging and time and resource demanding if extensive data need to be collected, compiled, and analyzed to reflect baseline conditions. The creation of baseline conditions needs to be streamlined in a manner that simply highlights resource conditions. The intensive data collection, compilation, and analysis required for the resource management plan and the supporting NEPA documentation should not be duplicated or taken on as part of a planning assessment. The baseline conditions assessment should simply describe the past and current use of BLM resources in the planning area and utilize data or recent analysis of that data that is readily available and should identify existing data or evaluation gaps.

2. Preliminary Alternatives

In addition to the “planning assessment,” the Proposed Planning Rule introduces the potential for other sources of delay to the resource management process. For example, under the Proposed Planning Rule, BLM would publish information about the preliminary alternatives under consideration for the draft RMP still under development. While BLM already identifies preliminary alternatives under the existing regulations, the Proposed Planning Rule “would establish a new requirement that the BLM describe the

rationale for the differences between alternatives,” 81 Fed. Reg. at 9711. and “would establish a new requirement that the responsible official identify the procedures, assumptions, and indicators that will be used to estimate the environmental, ecological, social, and economic effects of the alternatives considered in detail,” 81 Fed. Reg. 9712. All of this information—the preliminary alternatives; the rationale for those alternatives; and the procedures, assumptions, and indicators that will be used to estimate the effects of those alternatives—would be packaged together in yet another report that BLM staff would be tasked to prepare. The preamble to the Proposed Planning Rule states that the public would then be “welcome to contact the BLM with any appropriate concerns.” *Id.* To provide this opportunity, “the BLM would build time for th[e] public review of preliminary alternatives.” 81 Fed. Reg. at 9711. Beyond the time for public review, if the public provided feedback to BLM, additional time would be required for BLM’s internal process to account for this feedback. BLM needs to establish clear limitations in order that this potentially open process will not create unbounded delays in the development schedule for an RMP.

3. Impact of New Opportunities

BLM acknowledges that these new opportunities for public participation will add time to the planning process, at least at the early stages where the new opportunities arise. BLM expresses hope that increased public participation early in the process would create efficiencies and reduce planning time later in the process.¹⁴ But commenters would remain free to also identify issues at the formal comment stage, when more detailed draft documents are available for review, including issues that commenters may take with respect to BLM’s treatment of previous input from the new opportunities for public participation.

BLM proposes to control the length of the planning process by reducing the length of the public comment period. API and IPAA do not support this proposal. BLM suggests that “it is appropriate to reduce the length of public comment periods on draft EIS [environmental impact statement]-level amendments and draft resource management plans because the public would be provided an opportunity to review the preliminary resource management alternatives, rationale for alternatives, and the basis for analysis prior to the publication of the draft EIS-level amendment or draft resource management plan.” 81 Fed. Reg. 9699. What is not acknowledged in this logic is that engagement on preliminary content does not afford the public knowledge of a BLM decision that would ultimately take shape, which is reflected in the draft, proposed and final content.

Formal public commenting is the most important of the public’s participation rights in resource management planning. Formal comments not only allow stakeholders to shape the final content of an RMP, as do many other forms of public participation, but also provide the only avenue for protecting those stakeholders’ legal rights under BLM’s protest regulations, the Administrative Procedure Act, and any other applicable laws and regulations. Furthermore, draft RMPs and their supporting environmental impact statements (EISs) are becoming more broad in their scope and complex in their analysis of air quality, including ozone and climate change; landscape-level impacts; mitigation hierarchy; and socioeconomics. Given the size of these documents, including their often voluminous appendices, it is not appropriate to reduce the length of time stakeholders have to engage in the comment process, even if it is in exchange for other modes of public participation. In fact, given the importance of public comments to the administrative record, API and IPAA believe that a minimum 90 day public comment period is appropriate and necessary for RMPs and EIS-level amendments to RMPs. Furthermore, to ensure that the stakeholders most likely to experience the direct effects of the proposed RMP or RMP

¹⁴ For example, BLM notes in the preamble to the Proposed Planning Rule, “The BLM anticipates that this review [of the preliminary alternatives] would increase efficiency by avoiding the need to re-do or supplement NEPA analyses if alternatives are identified during the public comment period on the draft resource management plan and draft EIS.” 81 Fed. Reg. at 9711.

amendment have an adequate opportunity to become informed and to offer comment, to the extent possible, public meetings should be held in the communities near where the proposed action would occur.

The use of web-based technology allows BLM to be more efficient and effective in communicating with the public. Although the use of this technology is valuable in providing greater access, BLM should not marginalize the significance of local input on a proposed action. Submittal of electronic form letters that provide general, but unsubstantiated, comments generally provide little value to the debate over the relative value of resource conservation versus development in a specific instance. Yet the volume of these comments may be given more consideration than the handwritten comments from a local resident who better understands the landscape and the precarious balance between conservation and development. BLM should give more weight to the interests of the local public and its supporting agencies given their familiarity with the local landscape and their greater potential to understand both the direct and indirect effects of the proposed action.

B. Planning Across State Lines

As noted above, establishing planning areas that cross state lines would be a significant procedural and administrative change to BLM's planning process. This approach would cause delays while BLM sought to elicit and respond to commentary from multiple states. The interests of certain stakeholders would not be constrained by state boundaries, but those of state and local agencies would be.

For resource access and development, state boundaries already create divisional lines that govern authorization and conditions with which resource developers trying to harmonize requirements among the BLM and multiple states must comply.

BLM has already shown, through past forays, that coordinating planning efforts across state lines is difficult and inefficient. For example, BLM's recent land use plan amendments related to sage grouse management illustrate the difficulty of a planning effort that crosses state lines. As soon the amendments were finalized, the governors of Idaho and Utah sued.¹⁵ In this, Idaho and Utah broke from other states affected by the amendments, states which not only supported the federal action but stood with the Secretary in announcing it.¹⁶ With disagreement among even seemingly similarly situated states likely, increased interstate resource management planning would lead to grid-lock and delays.

C. Protest Process

The Proposed Planning Rule includes changes to the protest process that would increase the number of protests and threaten to burden the agency with repetitive and frivolous protests. BLM acknowledges that the proposed changes would lead to more protests, which would take more time to process: “[P]roviding an electronic option for protest submission could also lead to an increased burden on the agency by increasing the number of protest submissions, such as form letters. In this situation, it would take additional time to process protests.” 81 Fed. Reg. 9714-15. BLM asserts that because the agency responds to each unique issue only once in its protest summary, “a possible increase in form letters would not lead to an increase in the number of responses or the complexity of the final protest resolution report.” 81 Fed. Reg. 9715. This assertion ignores the likelihood that opponents of agency decisions would use the revised rule to flood BLM with not just redundant protests but also distinct but mundane protests on every conceivable issue raised in an RMP.

¹⁵ *Otter et al. v. Jewell et al.*, Complaint for Declaratory and Injunctive Relief, 1:15-cv-01566 (D.D.C. Sept. 25, 2015); *Herbert et al. v. Jewell et al.*, Complaint for Declaratory and Injunctive Relief, 2:16-cv-0010 (Feb. 4, 2016).

¹⁶ See Eric M. Johnson and Steve Gorman, *Idaho sues U.S. over sage-grouse habitat restrictions*, REUTERS (Sept. 26, 2015).

The oil and gas industry has specific concerns that lease stipulations subject to the protest process could be delayed by unwarranted and repetitive protests. BLM, of course, must consider mineral development as one of the values to further as part of its multiple use mission.¹⁷ But repeated protests would nevertheless bog down the agency's process, which could in turn cause delays for API's and IPAA's members.

III. The Proposed Planning Rule Would Increase Costs.

The procedures in the Proposed Planning Rule would increase costs associated with resource management planning. While increased procedural costs would be borne by BLM, the Proposed Planning Rule also threatens to increase costs for stakeholders, including API's and IPAA's members, by enabling excessive assessment and mitigation, beyond what is called for under FLPMA and BLM's guiding principles, to be imposed.

A. Procedural Costs

For many of the same reasons discussed in more detail in the previous section, the Proposed Planning Rule would create several sources of increased costs. The demanding requirements of the "planning assessment," which BLM assumes would include activities such as public meetings, and the preparation of reports describing baseline conditions and proposed alternatives, would require financial resources. In its *Preliminary Determination: Economic and Threshold Analysis for Planning 2.0 Proposed Rule*, BLM concedes as much: "Under the proposed rule, the number of opportunities for public involvement in a given planning effort would likely increase. This could increase the total cost of the planning process to the BLM."¹⁸ The revised protest provisions would likewise increase the costs of the planning process because, as BLM concedes, "providing an electronic option for protest submission could also lead to an increased burden on the agency by increasing the number of protest submissions, such as form letters." 81 Fed. Reg. 9714-15.

B. Excessive Mitigation.

As discussed in detail above, the Proposed Planning Rule raises the prospect of excessive mitigation requirements in RMPs which would, in turn, lead to unnecessary costs borne by stakeholders to comply with those requirements.¹⁹ Project proponents need to be given full credit for conducting thoughtful siting and design analysis, and for applying protective measures during construction and operation, including best management practices, to avoid or otherwise minimize potential impacts.

C. Monitoring and Evaluation Standards

BLM establishes monitoring and evaluation standards to gauge progress or performance against key attributes and indicators. BLM defines a *key attribute* as "an aspect of the resource that clearly defines or characterizes the resource" and an *indicator* as "how the key attribute will be measured."²⁰ The potential cost implications of BLM's proposed approach to applying monitoring and evaluation standards could be significant. API and IPAA agree with BLM that the agency need only consider "key" attributes and indicators for monitoring and evaluation. Furthermore, monitoring and evaluation standards should

¹⁹ See Section I.B.3.

¹⁹ See Section I.B.3.

¹⁹ See Section I.B.3.

²⁰ U.S. Dep't of the Interior, *Planning 2.0: Public Webinar on the Proposed Planning Rule*, http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/planning_images/planning_image_folder.Par.10173.File.dat/2016%2003%2021%20-%20Public%20Webinar%20FINAL.pdf.

focus on specific resources that have unique or special value or status. It is unreasonable to expect BLM to monitor and evaluate the key attributes for each and every resource.

BLM needs to recognize where opportunities already exist to utilize existing monitoring or evaluation data provided to or collected by BLM, in addition to similar monitoring or evaluation data collected by other federal, state, and local agencies. For example, BLM should utilize the surface disturbance data provided in permit applications as a parameter to monitor the effectiveness of reclamation. Project proponents are required by BLM and other agencies to monitor reclamation as part of various regulatory programs, including stormwater management, noxious weed control, and habitat restoration, to name a few. BLM must allow its monitoring and evaluation standards to endorse the use of existing data to fulfill BLM's data requirements even if that data collection is not specific to BLM's programs. BLM should also recognize that under certain statutes, other federal and state agencies have primary jurisdiction and authority in establishing monitoring and evaluation standards. Examples include EPA and state programs for monitoring and evaluating air quality and water quality. BLM must avoid creating monitoring and evaluation standards that create duplication or inconsistency with other federal, state, or local regulatory programs that measure key attributes for various resources. Where appropriate, BLM must acknowledge the primacy of these programs, and accept an operator's compliance with them as compliance for BLM's purposes. BLM must take a synergistic approach in creating a monitoring and evaluation framework by incorporating standards and measurement programs established by other agencies. Unnecessary and inappropriate costs, conflicts, or delays can be avoided if BLM's framework for resource monitoring and evaluation utilizes standards, data systems, and methods that have already been established and are managed by other federal, state, and local agencies.

IV. The Proposed Planning Rule Shows a Bias Against Oil and Gas Interests.

API and IPAA are concerned that the proposed revisions to BLM regulations signal an alarming trend against oil and gas and other resource development interests. For example, the Proposed Planning Rule would remove the phrase "maximize resource values for the public" from the objectives of resource management planning. 81 Fed. Reg. 9683. While BLM claims that "[t]he term 'maximize resource values' is vague and therefore inappropriate in regulations," the proposed removal of this language appears to be a thinly-veiled effort to bias the planning process against resource extraction. BLM's proposed objective "recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands," 81 Fed. Reg. 9684, but fails to provide any commitment to protecting valid existing mineral rights and interests. The Proposed Planning Rule must clearly state that BLM will honor these rights and interests in carrying forward resource management planning

Additionally, BLM has requested comments on "the distinction between planning designations, which identify areas where specific resources or uses would be prioritized, and resource use determinations, which identify areas where specific uses would be excluded, restricted, or allowed, and whether these two components should be combined into a single plan component." 81 Fed. Reg. 9692. While this request seems to suggest that designations would be less absolute than determinations, BLM is proposing that designations "would identify areas of public land where management is directed toward one or more priority resource values or uses." 81 Fed. Reg. 9691. While addressing the same topic – resource use – the two concepts are distinct in both the consideration and development. Determinations create a logical set of three mutually exclusive categories of use, mapping all options – use, use with restrictions, no use. A designation is a preference of use, but does not carry the information about restrictions. As such a designation could still carry any determination for a specific resource. BLM would have to provide more information on how it would judge a designation to modify a determination in order to judge it proposal. BLM fails to explain how management would be "directed" toward certain uses, or what the consequences would be if such uses did not occur. The proposal creates a blurry line between the prioritized or prohibited uses identified in a designation and allowed uses identified in a resource

determination. Similarly, the proposal does not offer sufficient guidance on how excluded or restricted uses would be treated in comparison to uses that are not determined to be priority uses. We agree with the commenters referred to in the preamble to the rule, who noted that “it would be shortsighted for the BLM to limit development only to . . . priority areas . . . , as future technological advances could make new unforeseeable areas appropriate for development.” 81 Fed. Reg. 9681. BLM should maintain a distinction between designations and determinations, and should avoid closing or restricting the use of public lands to the principal or major uses defined in FLPMA.

While we understand that FLPMA directs BLM to “use and observe the principles of multiple use and sustained yield” in the development and revision of land use plans, 43 U.S.C. § 1712(c)(1), “it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries.” 30 U.S.C. § 21a. While BLM concedes that “mineral exploration and production” are “principal or major uses” under FLPMA, 81 Fed. Reg. 9708, the Proposed Planning Rule would dilute the value of such congressionally designated uses by placing them into a newly concocted basket of goods and services including such vague terms as “ecosystem services,” *id.* Specific programs like oil and gas development, which are facilitated by FLPMA, must not be excluded, delayed, or obstructed in favor of vague objectives.²¹

Moreover, the full extent of the Proposed Planning Rule does not promote multiple use, as FLPMA requires. For example, the proposed revisions to ACEC provisions demonstrate that BLM is seeking to place a stronger emphasis on environmentally protective and preservation-oriented principles. In addition, BLM is requesting comments on whether its planning process should account for additional “types of information,” 81 Fed. Reg. 9707, promoting a shift away from traditional considerations.

V. BLM Must Comply with the National Environmental Policy Act (NEPA) Before Finalizing the Proposed Planning Rule.

A. BLM Improperly Invoked a Categorical Exclusion.

BLM must comply with NEPA before finalizing the Proposed Planning Rule. As BLM is aware, NEPA is a procedural statute intended to produce informed decision making by federal agencies. *United States Dep’t of Trans. v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *Lee v. United States Air Force*, 354 F.3d 1229, 1237 (10th Cir. 2004). The development of broad agency programs, such as the Proposed Planning Rule, are “major federal actions” requiring federal agencies such as BLM to prepare an EIS. 40 C.F.R. § 1508.18(a) (defining “major federal action” to include, among other things, “new or revised agency rules, regulations, plans, policies, or procedures”).

Rather than prepare an EIS, however, BLM declared that its overhaul of a longstanding process for resource management planning on public lands was exempt from environmental analysis under a categorical exclusion (CE). The Council on Environmental Quality (CEQ) regulations define a CE as:

a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§

²¹ “Indeed, FLPMA actually seems to disfavor large-scale protective uses such as wilderness preservation. The statute requires the BLM to report any management decision that excludes one or more of the principal or major uses for two or more years on a tract of 100,000 acres or more to both Houses of Congress, which then have an opportunity to adopt a concurrent resolution of disapproval terminating the management decision.” Robert L. Glicksman, *Wilderness Management by the Multiple Use Agencies: What Makes the Forest Service and the Bureau of Land Management Different?*, 44(2) ENVIRONMENTAL LAW 447, 483 (2014) (citing 43 U.S.C. § 1712(e)(2)).

1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

40 C.F.R. § 1508.4. Here, BLM invoked the CE listed at 43 C.F.R. 46.210(i), which reads as follows:

Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

BLM claimed that its reliance on this CE was appropriate because “[a]ny decisions that might be reached through the planning process, as proposed for revision through this rulemaking, would be subject to compliance with NEPA.”²² BLM further claimed that the Proposed Planning Rule is “entirely procedural in character” and denied that extraordinary circumstances exist that would prohibit the use of a CE.²³

The CE does not apply to the Proposed Planning Rule. NEPA applies at two distinct administrative levels of decision making: the programmatic level and the implementation stage. For BLM, approval of an RMP automatically requires an EIS. 43 CFR 1601.0-6. NEPA analysis generally also is required for site-specific (or “ground-disturbing”²⁴) projects, which must be consistent with an approved RMP. 43 CFR 1610.5-3. Yet the Proposed Planning Rule provides for “implementation strategies” (e.g., management measures and monitoring procedures) that can be updated at any time to incorporate new information without an RMP amendment. The Proposed Planning Rule therefore would create an opportunity for decision making that would skirt NEPA compliance requirements. In other words, the Proposed Planning Rule does not fit the CE invoked.

Even assuming that the CE applies to this momentous rule change, BLM arbitrarily and capriciously ignored the extraordinary circumstances preventing BLM from invoking a CE to avoid its NEPA obligations. Reliance on a CE is inappropriate where any of the criteria listed in 43 C.F.R. 46.215 (“extraordinary circumstances”) apply. For example, those criteria prohibit the use of a CE for BLM actions that:

- have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources;
- have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks; or
- establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

²² BLM, Preliminary Categorical Exclusion Documentation, 2016 Proposed Rule, 43 CFR Part 1600 [hereafter Preliminary Categorical Exclusion Documentation], at 2
http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/planning_images.Par.77988.File.d/Planning_Rule_Preliminary_CX_Final.pdf.

²³ *Id.* at 2-6.

²⁴ See also *Cal. Wilderness Coalition v. United States DOE*, 631 F.3d 1072, 1099 (9th Cir. 2011) (“[B]road agency programs may constitute ‘major Federal actions,’ even though the programs do not direct any immediate ground-disturbing activity.”).

43 C.F.R. 46.215(c), (d), (e). Those criteria apply here. Rather than showing that they do not, BLM dismisses them with the contention that the Proposed Planning Rule is “procedural in nature.”²⁵

1. Highly Controversial Environmental Effects or Unresolved Conflicts

The Proposed Planning Rule is highly controversial and involves unresolved conflicts. BLM itself cites “increasing conflicts between resource uses and conservation objectives” as a basis for the Proposed Planning Rule. 81 Fed. Reg. 9674. The controversial nature of the rule also is evidenced by numerous comments requesting additional time to analyze it, and the fact that over 6,000 individuals and organizations commented on “Planning 2.0”—the initiative that comprises the Proposed Planning Rule and forthcoming revisions to the BLM Land Use Planning Handbook. As discussed in BLM’s *Public Input Summary Report* for Planning 2.0,²⁶ there are sharp disputes concerning the use of BLM land for oil and gas leasing, among other things. BLM must acknowledge the volume of comments demonstrating the highly controversial nature of the Proposed Planning Rule, and, therefore, it is arbitrary and capricious to presume that the Proposed Planning Rule does not involve extraordinary circumstances.

2. Highly Uncertain and Potentially Significant Environmental Effects

In its *Preliminary Categorical Exclusion Documentation*, BLM stated that the “proposed rule would not have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.”²⁷ But in its *Preliminary Determination: Economic and Threshold Analysis*, BLM stated that “impacts cannot be quantified as they depend on the specific context of individual plans, and, more importantly, the specific character of any action proposed for implementation after a plan is approved.”²⁸ BLM cannot have it both ways. The use of a CE for the Proposed Planning Rule is inappropriate in light of this contradiction. Furthermore, BLM has proposed including climate change and landscape-scale resource issues and landscape-level management approaches in the Proposed Planning Rule. These requirements inherently will result in highly uncertain and potentially significant environmental effects, thereby precluding the use of a CE.

3. Precedent for Future Action with Potentially Significant Environmental Effects

The Proposed Planning Rule would establish a precedent for future action with potentially significant environmental effects. For example, the Proposed Planning Rule would establish “plan components” that would guide future management actions on all public lands. 81 Fed. Reg. 9726. The Proposed Planning Rule also would establish a definition for “sustained yield” that would apply “in perpetuity.” *Id.* The possibility that the Proposed Planning Rule “may have” a significant environmental effect is all that is required to make the application of a CE inappropriate. 40 C.F.R. § 1508.4; *Citizens for Better Forestry v. United States Dep’t of Agric.*, 481 F. Supp. 2d 1059, 1087-88 (N.D. Cal. 2007). BLM has not created a record showing that a CE is appropriate. To the contrary, BLM expressly stated that “[t]he proposed rule would improve the BLM’s ability to address landscape-scale resource issues and to respond more effectively to environmental and social changes.”²⁹ BLM has referred to a number of potential significant effects that may result from implementation of the Proposed Planning Rule. These include, among others, the effects on invasive species, 81 Fed. Reg. 9692, vegetation and habitat, *id.* at 9693, 9720, and site-specific plans, *id.* at 9715. BLM’s lack of serious consideration of the numerous potential significant impacts from the Proposed Planning Rule is arbitrary and capricious.

²⁵ Preliminary Categorical Exclusion Documentation at 2.

²⁷ Preliminary Categorical Exclusion Documentation at 3-4.

²⁷ Preliminary Categorical Exclusion Documentation at 3-4.

²⁸ Preliminary Determination at 13.

²⁹ Preliminary Categorical Exclusion Documentation at 1.

Because BLM did not properly demonstrate the absence of extraordinary circumstances, BLM's reliance on the CE is inappropriate. To comply with NEPA, BLM must prepare a programmatic EIS for public review and comment. BLM's NEPA analysis must adequately assess the impacts of the Proposed Planning Rule on oil and gas development. And BLM must analyze the cumulative impacts of the Proposed Planning Rule in combination with other BLM actions, strategies, and directives.

B. Breaking Up "Planning 2.0" into Smaller Components Violates NEPA.

BLM cannot circumvent the application of NEPA by segmenting or sequencing its proposed actions. *See, e.g., Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) ("An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."). In the Proposed Planning Rule, BLM refers to a litany of other BLM directives (under the heading "Related Executive and Secretarial Direction") as justification for the proposed changes. 81 Fed. Reg. 9678. The impacts of the Proposed Planning Rule must be evaluated in the context of those directives; it cannot be isolated from them to escape NEPA requirements. *See* 40 C.F.R. § 1508.7 (requiring agencies to analyze the "incremental impact of the action" together with "other past, present, and reasonably foreseeable future actions").

In addition, BLM states that its "Planning 2.0" initiative will include proposed regulatory revisions that are the subject of the Proposed Planning Rule, and revisions to BLM's Land Use Planning Handbook. 81 Fed. Reg. 9680. By separating the revisions, BLM is improperly segmenting the implementation of Planning 2.0. All of the revisions proposed under Planning 2.0 should be analyzed together to capture the significance of their impacts within the meaning of NEPA.

VI. BLM Must Comply With NEPA As It Implements The Rule.

A. BLM Must Clarify What Actions It Considers to Require NEPA Analysis.

As discussed above, detailed NEPA analysis is required at distinct levels of administrative decision making. BLM has improperly determined that the Proposed Planning Rule does not rise to one of those levels. But BLM also has left uncertain whether it considers mineral leasing decisions to require site-specific NEPA analysis.

The Energy Policy Act of 2005 requires BLM to approve applications for permits to drill if the requirements of NEPA have been completed. 30 U.S.C. § 226(p)(2). Existing approvals, therefore, already should have been subject to NEPA analysis. BLM cannot impose measures on existing leases that are inconsistent with valid existing rights. Therefore, BLM should clarify that oil and gas activities on leases that have been issued cannot be deferred or denied based on forthcoming site-specific requirements or NEPA analysis conducted in connection with the Proposed Planning Rule.

B. BLM Must Identify a Single Preferred Alternative in Its NEPA Analyses.

The Proposed Planning Rule proposes to replace the requirement that BLM identify a single preferred alternative in a draft resource management plan and draft EIS with a new requirement that BLM identify "one or more" preferred alternatives. That is inconsistent with NEPA and, as discussed above, would create an unacceptable amount of uncertainty.³⁰

³⁰ *See* Section I.D.

Although BLM cites 43 C.F.R. § 46.425(a) for the proposition that “one or more” preferred alternatives may be appropriate, BLM ignores other regulatory language and guidance to the contrary, as well as the adverse practical implications of identifying multiple preferred alternatives. Both DOI’s NEPA regulations and CEQ’s NEPA guidance define “preferred alternative” in a way that contemplates a single alternative. *See* 43 C.F.R. § 46.420(d) (“Preferred alternative . . . refers to *the* alternative which the bureau believes would best accomplish the purpose and need of the proposed action while fulfilling its statutory mission and responsibilities, giving consideration to economic, environmental, technical, and other factors” (emphasis added)); CEQ, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations (hereafter, “Forty Most Asked Questions”) (“The ‘agency’s preferred alternative’ is *the* alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors.” (emphasis added)).³¹ CEQ’s NEPA guidance provides the reason for that construction, stating that an agency’s preferred alternative “is identified so that agencies and the public can understand the lead agency’s orientation.”³² Including more than one preferred alternative would misguide the public as to BLM’s orientation.

Failing to identify a single preferred alternative would hinder the public’s ability to make informed comments and to submit protests, and would make the planning effort too difficult for public input. Rather than revising the existing requirement, BLM should continue to identify a single preferred alternative, and then be in a position to explain and defend the alternative selected.

VII. BLM Must Complete a Statement of Energy Effects Under Executive Order 13211.

In 2001, President George W. Bush signed Executive Order 13211, requiring federal agencies to prepare a Statement of Energy Effects when undertaking certain agency actions, in order to appropriately weigh and consider the effects of such actions on the supply, distribution, and use of energy. Executive Order 13211 applies to “significant energy actions,” which are defined as rules or regulations that are likely to have a significant adverse effect on the supply, distribution, or use of energy. A Statement of Energy Effects must include a detailed statement relating to:

- any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies) should the proposal be implemented, and
- reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.

For the reasons set forth in this comment letter, the Proposed Planning Rule is likely to have a significant adverse effect on the supply, distribution, or use of energy. Indeed, in its *Preliminary Determination: Economic and Threshold Analysis*,³³ BLM acknowledged the prospect of effects on the mineral and energy industries. Yet BLM asserts that the Proposed Planning Rule will have “no impact on the development of energy on public lands.” 81 Fed. Reg. 9724. There is no support for that assertion. It is insufficient to make general statements about “possible” effects without justifying why more definitive

³¹ CEQ’s Forty Most Asked Questions is available at <http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf>. Courts have interpreted this language in the same way. *See, e.g., Forest Guardians v. United States Fish & Wildlife Serv.*, 611 F.3d 692, 712 (2010) (“An agency can have a preferred alternative in mind when it conducts a NEPA analysis.” (emphasis added)); *Ass’n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1185 (9th Cir. 1997) (noting that “an agency can formulate a proposal or even identify a preferred course of action before completing an EIS” (emphasis added)).

³² Forty Most Asked Questions.

³³ Preliminary Determination at 4-5, 12-13.

information could not be provided. *See, e.g., Neighbors of Cuddy Mt. v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). BLM must complete a Statement of Energy Effects before finalizing the rule.

CONCLUSION

The overhauled resource management planning process that the Proposed Planning Rule envisions would lead to regulatory and legal uncertainty, delays, and costs. Several concepts introduced in the Proposed Planning Rule are insufficiently defined and need to be better described to demonstrate their intended application. The Proposed Planning Rule and its preamble mark a shift from BLM's historic orientation and support for balanced multi-use resource development and acknowledgement of the benefit from such development for local and regional economies where BLM administers lands and minerals for which it is responsible. Finally, BLM has advanced the Proposed Planning Rule without regard for other legal requirements to engage in NEPA analysis and to complete a Statement of Energy Effects.

API and IPAA appreciate the time taken to consider these concerns, as expressed in this letter, regarding the Proposed Planning Rule.

Very truly yours,



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