



January 18, 2017

The Honorable Speaker Ryan
H – 232
The Capitol
Washington, DC 20515

RE: BLM's Final Rule on Resource Management Planning
(RIN: 1004-AE39)

Dear Speaker Ryan:

On behalf of the members of the Petroleum Association of Wyoming (PAW) and the Independent Petroleum Association of America (IPAA), we would like to express our support for use of the Congressional Review Act (CRA) to repeal the unnecessarily burdensome regulations finalized during the Obama Administration. Among those of great concern to our industry is the Bureau of Land Management's (BLM) Final Rule on Resource Management Planning which is more commonly referred to as "Planning 2.0" (RIN: 1004-AE39). We respectfully request that the House allow Floor consideration of a joint resolution of disapproval for this Rule.

Many of our member companies share a direct interest in how the BLM plans to manage public lands. Our companies hold valid existing leases and are interested in the future of oil and natural gas leasing, exploration and production activities on public lands that will be directly impacted by BLM's management decisions. Our companies are good stewards of the land, dedicated to meeting environmental requirements, while developing and supplying affordable energy to consumers. PAW and IPAA believe Planning 2.0 presents multiple challenges that will prejudice multiple use interests with a bias against oil and gas resources on public lands.

There are several references throughout Planning 2.0 that its authority is based upon recent Executive and Department of Interior Secretarial direction. In a truly democratic process, when making changes to existing planning regulations, such changes are to be based upon laws or rules that have gone through the appropriate lawmaking or rulemaking process such as the Federal Land Policy and Management Act (FLPMA) or the National Environmental Policy Act (NEPA), and not through a series of directives and memorandums. Furthermore, policy preferences expressed in executive orders, instructional memoranda and various studies and guidance are being treated in Planning 2.0 as equivalent to the

statutes underlying BLM's authority. Given the importance of this Rule, it should only require or encourage actions dictated by foundational statutes and case law. Many of the provisions reach beyond the actual authority of BLM and as such, BLM needs to remember these policy preferences are not supported by law.

Although Planning 2.0 has not yet impacted our industry, if it is not repealed the impacts will impose a significant and harmful burden on individual operators and the industry as a whole. Planning 2.0 provides no certainty for land users and instead creates ambiguity in the planning process. The final rule would allow for all planning documents to be changed at any moment, which does not allow for a set understanding of expectations and long-term planning. Industry is not able to adjust plans on a whim and relies on certainty in the planning process. This added uncertainty will likely result in reduced development on federal minerals and, therefore, lead to a loss of royalty and tax revenue for Federal, state and local governments. The following is a list of specific changes under Planning 2.0 that will negatively impact our industry:

NET CONSERVATION GAIN MITIGATION STANDARD

"The final rule adopts the proposal that objectives should identify standards to mitigate undesirable impacts to resource conditions, with minor edits. This change supports implementation of the BLM mitigation policy."¹

§1610.1-2(a)(2) Objectives

"(i) Identify standards to mitigate undesirable impacts to resource conditions;"²

Planning 2.0 requires Resource Management Plans (RMPs) and Plan Amendments to include, as part of the Objectives, mitigation guidance and standards consistent with BLM Policy. The Presidential Memorandum "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment"³ (Presidential Memo) dated November 3, 2015, directed that federal agency mitigation policies establish a mitigation standard of a net benefit goal or, at a minimum, a no net loss goal. A net benefit mitigation standard is when mitigation results in an improvement above the affected environment that existed prior to the project's implementation, or above the "baseline" environmental condition. In accordance with the Presidential Memo, BLM released its policy guidance with regard to determining and applying mitigation on December 22, 2016, ten days after publication in the Federal Register of the Planning 2.0 final rule.

The mitigation standard of a net benefit, or net conservation gain, is policymaking that has been put in place through recent Executive and Secretarial directives and memorandums, and is not based upon laws or rules that have gone through the lawmaking or rulemaking process. PAW and IPAA maintain that the net conservation gain mitigation standard is inconsistent with the idea of the balanced multiple use of Federal lands. BLM's mitigation policy represents a fundamental and substantial shift in agency direction and it would seem that mitigation has become more about assessing penalties than habitat conservation. Further, a net conservation gain standard is inconsistent with the realities of current oil

¹ BLM Resource Management Planning; Final Rule, 81 Fed. Reg. 89580 (December 12, 2016) (to be codified at 43 C.F.R. Part 1600), p. 89600.

² Id. at 89663.

³ Mitigation Impacts on Natural Resources from Development and Encouraging Related Private Investment; Presidential Documents, 80 Fed. Reg. 68743 (November 6, 2015).

and gas development which, due to technological advances such as horizontal drilling, has a vastly reduced footprint, in some cases up to 70 percent or more.⁴

PAW and IPAA believe the goal of a net conservation gain is excessive and BLM's effort to make sure this new mitigation standard is included as part of RMPs and Plan Amendments only serves to increase our concern regarding the BLM's departure from the balanced multiple use of Federal lands.

In addition, when formulating mitigation requirements to meet the goal of a net conservation gain, consideration should be provided for imposing punitive mitigation requirements on land users (such as owners of federal and non-federal oil and gas leases). This overreach that seeks to compel more mitigation than is necessary to offset the effects of development will run afoul of the requirement that mitigation have a "rough proportionality" to the impact and may result in an uncompensated taking that violates the U.S. Constitution. The United States Supreme Court has held that "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. ___, 133 S. Ct. 2586, 2591 (2013) (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). The Supreme Court has confirmed this rule applies to requirements of compensatory mitigation in the form of money as well as property. *Id.* at 2595. To condition a land use on a demand for compensatory mitigation that lacks a "nexus" and "rough proportionality" with the effects of the land use activity results in an uncompensated taking prohibited by the Fifth Amendment of the U.S. Constitution. *Id.* at 2594-95.

LANDSCAPE-SCALE PLANNING AND PLANNING AREAS THAT CROSS STATE BOUNDARIES

§1601.0-4 Responsibilities.

"(a) ...The Director determines the deciding official and the planning area for the preparation of resource management plans and plan amendments that cross State boundaries."⁵

Planning 2.0 contains scant explanation of how a planning area will be determined, other than it is part of the new landscape-scale approach as envisioned through Presidential and Secretarial policies and will be decided by the BLM Director. With little understanding of how the BLM Director will determine planning areas, PAW and IPAA believe it will cause the planning process to become unduly complicated, particularly when crossing state boundaries. It is important to note that in the past, BLM's ability to cooperate across state lines has proven to be tentative at best.

Additionally, if land use plans and/or amendments are dependent on resources, it stands to reason that one piece of land may be subject to multiple overlapping land use plans which has the potential to cause considerable confusion and permitting delays. Sage-grouse management is a good example of how complicated planning across state boundaries can become. The Sage-grouse Records of Decision (RODs) were released in September 2015, and industry experienced significant delays as the BLM Washington Office struggled to develop one-size-fits-all instruction memoranda (IMs) on several topics for use across

⁴ Applegate, D.A. and N.L. Owens. 2014. Oil and Gas Impacts on Wyoming's Sage-Grouse: Summarizing the Past and Predicting the Foreseeable Future. *Human-Wildlife Interactions* 8(2): 284-290.

⁵ BLM Resource Management Planning; Final Rule, 81 Fed. Reg. 89580 (December 12, 2016) (to be codified at 43 C.F.R. Part 1600), p. 89662.

11 states. Incidentally, it took BLM over a full year to develop the IMs. So while this practice has been allowable in the past, it has rarely been used and Planning 2.0 appears to promote it.

Planning 2.0 eliminates the provision requiring that Field Managers prepare, and State Directors approve, RMPs. The result is that RMP development will be centralized to BLM's Washington Office, creating more administrative hurdles and limiting local input and participation. Planning 2.0 further directs that when a planning area crosses state boundaries, one state director, or other designee, will be appointed by the BLM Director as the deciding official making land use planning decisions for all states involved. The Rule does not sufficiently provide a clear understanding of when and if input from the other involved states and BLM offices will take place within the process, nor does it even direct the deciding official to collaborate with the respective governors or state BLM officials when planning areas cross state lines.

SITE-SPECIFIC NEPA ANALYSIS FOR LEASING

"In most circumstances, a resource use determination indicating that a use is allowed, or allowed with restrictions in an area, will not represent a final decision allowing future use authorizations in the area, rather it will indicate that future authorizations for the activities may be considered for approval following site-specific NEPA analysis."⁶

Under Planning 2.0, mineral leasing decisions will happen at the site-specific level rather than during the planning process. PAW and IPAA believe this may require an Environmental Impact Statement (EIS) to be prepared at the leasing stage, adding to the already needless duplication and delay in the process. The fact that all new leases are required to conform with the land use plan in place renders this additional layer of analysis completely unnecessary. The requirement prior to Planning 2.0 was for an environmental assessment (EA) to be prepared for each lease sale which lengthened the time needed before new lease tracts are put up for bid by nearly a year. Changing this to require the preparation of an EIS will lengthen the time even more, resulting in significant delays to new lease issuance without any improvement to the leasing process itself. Experience has shown that BLM oftentimes takes up to seven (7) years or more to complete an EIS.

COOPERATING AGENCY INPUT

It's vitally important that cooperating agencies maintain the current elevated level of input during the planning process. Planning 2.0 appears to place less significance on input from cooperating agencies and local interests during this newly outlined RMP development process. The Rule provides national groups as much input as state and local cooperating agencies through the planning assessment and preliminary alternatives review process. Cooperating agencies, such as county commissions, provide special expertise as local stakeholders that have been elected to represent their constituents and local interests in processes such as RMP development. In public land dominated states it is essential for cooperating agencies to maintain the current elevated level of input due to the vulnerability of their local economies to the BLM planning process.

RESOURCE USE DETERMINATIONS

"A resource use determination identifies areas of public lands or mineral estate where, subject to valid existing rights, specific uses are excluded, restricted, or allowed, in order to achieve the goals and objectives of the resource management plan or applicable legal requirements or

⁶ Id. at 89601.

policies. Resource use determinations shall be consistent with or support the management priorities identified through designations.”⁷

PAW and IPAA have concern that resource use determinations will be used to designate Priority Management Areas which limit oil and gas activities only to those specific areas. While it is acceptable for BLM to identify areas where oil and gas activities may be a priority, future leasing, exploration and development must not be limited to such areas through a resource use determination which outlines what uses will be allowed. History has shown time and again that areas previously not expected to have potential for fluid mineral resources have in fact been found to hold tremendous deposits. Many of these new discoveries have stemmed from technological advances and/or new geologic interpretations which have resulted in innumerable new areas of development.

MANAGEMENT MEASURES (IMPLEMENTATION STRATEGIES)

“The final rule does not preclude development of the information described in the two types of proposed implementation strategies – management measures and monitoring procedures. Rather, it affirms that while this information is not required as planning level management direction and need not be included in a resource management plan this information is important for resource management and essential to the effective implementation of adaptive management procedures. In some situations, the BLM may choose to develop this information concurrently with resource management planning, and the final rule does not preclude this option.”⁸

It is of great concern that management measures may not be included in the draft planning documents, and will oftentimes first appear in the proposed or final planning documents as an appendix to the final, leaving no chance to comment on them. As such, management measures are subject to NEPA and should be included in the draft. For example, it is not clear in the final rule that management measures, such as Best Management Practices (BMPs) and Required Design Features (RDFs), which can have a significant effect on how activities are conducted, will be made available for comment in draft RMPs. PAW and IPAA maintain that any federal action that causes an effect must go through the NEPA process before being implemented.

Additionally, management measures can be amended any time new information becomes available and will only require public notice prior to changes being made. This provides the potential for BLM to inappropriately expand management actions and authority without creating an opportunity for and consideration of public comment and PAW and IPAA is concerned that this change in the rule can be misused to arbitrarily make changes to recently issued planning documents.

PAW and IPAA believe Planning 2.0 does not streamline or otherwise reduce the administrative burden on BLM and in fact does quite the opposite. It substantially increases the planning burden, creates more limitations, provides more litigation opportunities and stymies the BLM from making objective land use decisions in accordance with FLPMA. The final rule gives BLM and the public little guidance as to how planning will be conducted in the future.

⁷ Id. at 89663.

⁸ Id. at 89604.

We sincerely appreciate the efforts you make for regulatory relief and thank you for consideration of this request.

Sincerely,

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cc: Majority Leader McCarthy
Majority Whip Scalise
House Natural Resources Chairman Rob Bishop