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Via Regular Mail and Electronic Mail: www.regulations.gov

Director (630)
Bureau of Land Management
U.S. Department of the Interior
1849 C Street NW
Room 2134LM
Washington, DC 20240

Attn: Regulatory Affairs, 1004-AE39
Re: Resource Management Planning, Proposed Rule, 81 Fed. Reg. 9674 (Feb. 25, 2016) ID: BLM-2016-0002-0044

Dear Sir or Madam:

The Arizona Mining Association (the "AMA") hereby provides comments on the proposed rule entitled Resource Management Planning, 81 Fed. Reg. 9674 (Feb. 25, 2016) (the "Proposed Rule") issued by the Bureau of Land Management ("BLM").

The AMA is a non-profit corporation comprised of entities engaged in mining, beneficiation and mineral processing activities in Arizona. Mining activity in 2013 provided a total of 51,200 Arizona jobs and generated $4.87 billion in total income for workers, business and property owners, and governments in Arizona. Nationwide, mining contributed $225 billion to U.S. GDP in 2012 (including coal, metal and non-metallic mineral mining).[1] In addition, AMA member companies produced 65% of the nation's newly mined copper, along with significant amounts of associated valuable co-products (e.g., gold, silver, selenium, tellurium and molybdenum). This copper was used throughout the world in homes, offices, cars, communications systems and many other applications. In fact, copper has become one of the most important metals in generating and bringing renewable clean energy to our homes and businesses, and is helping to drive down auto emissions through its application in hybrid and electric vehicles.

The AMA is very concerned about the impact of the Proposed Rule on its members. AMA members have interests in exploration projects and mining operations on public and acquired lands that include mineral resources, processing facilities, utility corridors, and water rights, all which may be affected by future BLM land use management plans and/or

[1] National Mining Association, The Economic Contributions of U.S. Mining (2012), 2014.

amendments. Nationwide, BLM is responsible for 260 million acres of land in the western states, including Alaska. In Arizona, BLM manages 12.2 million surface acres and 17.5 million mineral acres. Less than .01% of the earth's crust contains economically viable mineral deposits, meaning that mineral resources are not everywhere and mining must take place where the minerals are located.[2]

BLM's Surface Use Regulations require that:

> . . . **consistent with the mining laws**, [] operations and post-mining land use must comply with the applicable BLM land-use plans and activity plans, and with coastal zone management plans under 16 U.S.C. 1451, **as appropriate**.

43 C.F.R. § 3809.420(a)(3). Consequently, the land use planning process and resulting plans and/or amendments are extremely important to the AMA and its members and the nation's consumers who depend upon the domestic extraction of minerals for stability and economic prosperity.[3]

The AMA agrees with BLM that the existing land use planning process (the "Current Rule") needs improvement. *See* 43 C.F.R. Subpt. 1600. We also share BLM's desire to streamline the planning process to facilitate timely, durable agency decision-making. A prime example of the problem is evidenced by the recent plan update BLM completed for the Lower Sonoran Planning Area in central Arizona. The update took ten years to complete and was subject to multiple protests upon finalization. Scoping was initiated in 2003, the draft environmental impact statement was not published until 2011, and the final plan and record of decision were published in 2012. Similar delays for other plan updates are being experienced throughout the western states.[4] Unfortunately, the changes to the planning regulations set forth in the Proposed Rule will not address the length of time it takes for plan amendments to be completed or facilitate increased opportunity for Federal agencies, state and local governments, tribes and the public to be meaningfully involved in the process planning.

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[2] National Research Council. *Hardrock Mining on Federal Lands*. Washington, DC: The National Academies Press, 1999. doi:10.17226/9682.

[3] The land use planning process is particularly important for members who may conduct operations on acquired lands (i.e., federal land acquired through purchase, gift or condemnation whether prior or after the passage of the FLPMA) not subject to the operation of mining laws, thus explored or developed through hard rock mineral leasing regulations. *See* 43 C.F.R. Subpt. 3501. Those members do not have the benefit of the applicable provisions of the Mining Law of 1872 and a determination of plan inconsistency can result in a rejection of preference right leases having a chilling effect on prospecting and/or exploration. *See* 43 C.F.R. § 3508.14 (b)(1).

[4] Specifics on anticipated completion dates of pending plan amendments is available at http://www.fs.usda.gov/detail/planningrule/home/?cid=stelprdb5349164 (visited April 7, 2016).

BLM has a real opportunity to effect positive change through this rulemaking. At the same time, the agency should take the time necessary to get it right. This means taking a step back, conducting further stakeholder meetings, modifying provisions of the Proposed Rule to conform with the Federal Land Policy and Management Act ("FLPMA") (43 U.S.C. § 1701 *et seq*.) requirements and then conducting requisite environmental analysis under the National Environmental Policy Act ("NEPA") (42 U.S.C. § 4321 *et seq*.) to fully evaluate the effects of the agency action. Regrettably, BLM has determined the Proposed Rule is categorically excluded from NEPA. Contrary to BLM's assertion, the Proposed Rule is not simply procedural in nature. If adopted, it will have substantive and significant environmental effects and will establish a precedent for all future land use planning and plan amendments. This fact alone warrants that NEPA analysis be conducted. BLM's failure to acknowledge these effects is remarkable and the decision to exclude the Proposed Rule from NEPA analysis is a violation of its own regulations.

The balance of these comments will provide detailed discussion on the applicable federal laws and the issues with the Proposed Rule relative to compliance with those laws.

I. Relevant Federal Laws

In 1970, Congress adopted the Mining and Minerals Policy Act (84 Stat. 1876, 30 U.S.C. § 21a) declaring**:**

> [T]hat it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial security and environmental needs . . .

In 1976, when Congress enacted FLPMA, it understood that the management of public lands would require balancing between competing policies and uses. FLPMA, among other things, requires that the Interior Secretary:

> . . . manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

43 U.S.C. § 1732(a). Within FLPMA, Congress reiterated the importance of implementing the Mining and Minerals Policy Act requiring that:

> . . . public lands be managed in a manner which recognizes the nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 as it pertains to the public lands.

43 U.S.C. § 1701(a)(12). Further, Congress recognized the importance of mining on public lands stating that with three exceptions:

> . . . no provision in this section or any other section of the Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under the Act, including, but not limited to, rights of ingress and egress.

43 U.S.C. § 1732 (b). The three exceptions are the establishment of the California Desert Conservation Area, Wilderness Study Areas, and the obligation of the Secretary to take any action necessary to prevent unnecessary or undue degradation of [public] land (the "UUD Standard" or "UUD").

In 1980, Congress adopted the National Materials and Minerals Policy, Research and Development Act which provides in part:

> For the purposes of achieving the objectives set forth in section 1602 of this title, the Congress declares that the President shall direct (1) the Secretary of the Interior to act immediately within the Department's statutory authority to attain the goals contained in section 21a of this title and (2) the Executive Office of the President to act immediately to promote the goals contained in section 21a of this title among the various departments and agencies.

30 U.S.C. § 1605. Section 1602 of Title 30 directs the President to require responsible departments and agencies to "promote and encourage private enterprise in the development of economically sound and stable domestic materials industries" and to "encourage Federal agencies to facilitate availability and development of domestic resources to meet critical materials needs." The term "materials" is defined in Section 1601(b) as including "minerals."

The requirements for the development of land use plans are set forth in FLPMA Section 202 (43 U.S.C. § 1712) (where Congress adopted the principle of multiple use grounded in the recognition of the nation's need for domestic sources of minerals). Those FLPMA planning requirements must be read in harmony with the other provisions of FLPMA, the Mining and Minerals Policy Act of 1970, the National Materials and Minerals Policy, Research and Development Act and BLM's existing Surface Management regulations (43 C.F.R. Subpt. 3809). Further, any regulations developed for land use planning must not violate those laws or otherwise conflict with existing BLM regulations governing mining. As explained below, AMA contends the Proposed Rule contains a number of provisions that inconsistent with the mandates

of FLPMA and fails to acknowledge Congress' directive to promote and encourage domestic mineral production.

II. Proposed Changes to Planning Boundaries

The Proposed Rule contemplates that future planning boundaries may "extend beyond traditional BLM administrative boundaries such as Field Offices or States" to "landscapes" and that the BLM Director in Washington would be responsible for determining the deciding official and planning area for plans/amendments that cross State boundaries.[5] This is a fundamental shift from local land management to regional/national management and will have significant implications for public land users.

The apparent justification for this shift is BLM's desire to conduct "landscape scale" planning on an "eco-regional" basis. BLM has laid the groundwork for this policy via the preparation of "rapid eco-regional assessments" ("REAs") over massive geographic regions throughout the western states.[6] REAs are defined by BLM as "rapid" evaluations of regionally important habitats for fish, wildlife and species of concern, with an assessment of the effects of environmental change agents on those resources. One example of an REA that BLM has conducted is an evaluation covering 20,552 square miles in California and Arizona known as the "Sonoran Desert Region." This REA contain portions of land administered by 14 different BLM field offices. AMA believes the eco-regions where REAs have been conducted will become the new planning areas and the data contained within the REAs will be the foundation for agency decision-making, including the designation of areas of critical environmental concern and other special management areas. As explained in greater detail below, the use of REAs in this fashion is not consistent with FLPMA's mandate that BLM maintain an inventory of public lands and that the inventory be coordinated with state and local governments. Further, the use of macro-data that was rapidly compiled and likely fails to meet the data standards set forth in the Information Quality Act or NEPA should not be used in conjunction with determining any effects of mining on public lands in conjunction with land use planning.

The expansion of planning boundaries to facilitate "landscape scale" planning will do nothing more than politicize planning decisions, further complicate the National Environmental Policy Act of 1969 ("NEPA") analysis associated with plan development/amendments, delay decision-making associated with implementation level proposals and result in the imposition of

[5] The Department of the Interior defines a "landscape" as an area encompassing an interacting mosaic of ecosystems and human systems characterized by a set of common management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context. *See* 600 DM 6 landscape-Scale Mitigation Policy.

[6] According to BLM, the ecoregions were classified by the Commission for Environmental Cooperation and the Environmental Protection Agency as fundamental geographic units for resource assessment and management. Further sub-division of the eco-regions are accomplished via use of hydrologic unit codes. Available at http://www.blm.gov/wo/st/en/prog/more/Landscape_Approach/reas.html (visited April 6, 2016).

excessive mitigation obligations. BLM is already unable to timely complete any land use plan or update within relatively compact administrative boundaries. How, then, will the agency improve its performance by expanding the planning boundaries to massive "eco-regions," which are hundreds of thousands of acres in size encompassing multiple administrative boundaries?

III. BLM's Standard for the Use of High Quality Information in Land Use Planning is Contrary to Existing Law and BLM Policy

Information is critical to sound land use management. For that reason, Congress required the Secretary of the Interior to:

> . . . prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values) giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.

43 U.S.C. § 1711(a). This inventory must be the baseline for information utilized in public land use planning, evidenced by Congress' placement of the statute at the outset of Title II (Land Use Planning, Land Acquisition and Disposition) of FLPMA. In addition to preparing and maintaining an inventory on a continuing basis, BLM has an obligation to coordinate the land use inventory with land use planning and management programs of state and local governments. *Id*. at § 1712(c)(9).

The Proposed Rule fails to reference inventory data. Instead, it simply requires that "BLM will use high quality information to inform the preparation, amendment, and maintenance of resource management plans." § 1610.1-1 (c). BLM defines "high quality information" in the Proposed Rule to mean:

> [A]ny representation of knowledge such as facts or data, including the best available scientific information, which is accurate, reliable, and unbiased, is not compromised through corruption or falsification, and is useful to its intended user.

§ 1601.0-5 (proposed). This broad definition is not consistent with FLPMA, other existing laws or BLM policy. The certain outcome will be that "citizen-science" will play an improper role in agency decision-making. Essentially, what BLM has done in crafting this definition is to borrow a perfectly sound term of art from the NEPA (i.e., "high quality information") and water it down to allow suspect representations of knowledge (also known as "junk science") to have an influence in agency decision-making. This was accomplished by selectively picking and

choosing elements of policies developed pursuant requirements of the Information Quality Act (the "IQA") (44 U.S.C. § 3516).

Existing federal laws governing data quality include the "IQA" (also known as the "Data Quality Act") and NEPA. The IQA, adopted in 1995, required the Office of Management and Budget ("OMB") to issue guidelines that "provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of the information (including statistical information) disseminated by federal agencies. . . ." 44 U.S.C. § 3516. The OMB guidelines were published in 2002. *See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information and Disseminated by Federal Agencies*, 67 Fed. Reg. 8452 (Feb. 22, 2002). Among other things, the OMB Guidelines define "information quality" as an "encompassing term" having three components:

1. "Utility" refers to the usefulness of the information "to its intended users, including the public" ensuring that "the agency take care to ensure that transparency has been addressed in its review of the information;"

2. "Integrity" meaning the "security of the information–protection of the information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification" and;

3. "Objectivity" which includes several sub-components:

    a. "whether the information is being presented in an accurate, clear, complete and unbiased manner" ensured by the agency "identifying the sources of the disseminated information . . . so that the public can assess for itself whether there may be some reason to question the objectivity of the sources."

    b. "focus on ensuring accurate, reliable, and unbiased information" and where such data and analytic results have "been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity."

    c. where information being disseminated by an agency is determined to be "influential" (i.e., will have or does have a clear and substantial impact on important public policies or important private sector decisions) the standards are heightened requiring a general requirement of "reproducibility by qualified third parties."

Consistent with the OMB Guidelines, the BLM adopted its own information quality guidelines in 2012. *See U.S. Bureau of Land Management, Information Quality Guidelines* (updated 2012) (hereafter "BLM Guidelines"). BLM's Guidelines include the concept of using

"best available" data in decision-making, which includes "considering the data available weighted against needed resources and delay to collect new information and the value of newer information" *Id*. at Section 2(c).[7] BLM's Guidelines also clarify that where information is "voluntarily submitted in hopes of influencing a decision or that BLM obtains for use in developing a policy or regulatory decision, BLM will disclose what it knows of the quality of this type of information and why it is being relied on." *Id*. at Section 2(d). It appears BLM has forgotten its own guidelines relative to the receipt of "voluntary information" in crafting the definition of "high quality information" in the Proposed Rule.

Importantly, BLM's Guidelines also define "influential information" and require a heighted standard of being capable of replication when such information is disseminated. Specifically, "influential information" is "that which is expected to have a clear and substantial impact at the national level for major public and private policy decisions as they relate to Federal public lands and resource issues." *Id*. at Section 2(b). "Clear and substantial impact" is defined as "one that has a high probability of occurring." *Id.* Examples of this include "information disseminated in support of top BLM actions (i.e., substantive notices, policy documents, studies, guidance) that demand the ongoing involvement of the Director's office" and "information used in cross-bureau issues that have the potential to result in major cross-bureau policies and highly controversial information that is used to advance the BLM's priorities." *Id*. Land use plans and amendments clearly have a substantial impact on decisions regarding the use of public lands by other federal agencies and private parties. Accordingly, land use plans contain "influential information" and should be subject to the heightened standard of replicability applicable to such information.

Data quality standards have a similar refrain under NEPA. The Council on Environmental Quality ("CEQ") regulations include specific references to the integrity of scientific information that agencies use in an environmental impact statement. Specifically, the CEQ regulations direct that:

> Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in an [environmental impact statement] EIS. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.

40 C.F.R. § 1502.24. Under NEPA, federal agencies are also required to use a "systematic, interdisciplinary approach" to ensure "the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment." 42 U.S.C. § 43332(2)(A). Information included in an EIS must "be of high quality" and allow for "[a]ccurate scientific analysis, expert agency comments, and public scrutiny." 40 C.F.R. § 1500(1)(b). BLM has fallen short in the Proposed Rule by merely

[7] Notably, FLPMA's mandate that BLM collect and maintain inventory data necessarily tilts the scale requiring agency data collection of newer information in lieu of relying on generally available data.

adopting the term "high quality" but forgetting to include the meaningful standards that define that term.

In addition to considering additional regulatory processes for peer review, AMA proposes the following revised definition of "high quality information" for Proposed Rule § 1601.0-5. The AMA's definition: (i) leads with inventory data (consistent with FLPMA), (ii) borrows a standard from the Endangered Species Act requiring the United States Fish and Wildlife Service to use the "best scientific and commercial data available" for listing decisions (16 U.S.C. § 1533(b)(1)(A); and (iii) includes all relevant concepts from the IQA. Specifically, "high quality information" should be defined as:

> [P]ublic lands inventory data comprised of the best available scientific and commercial data available, which is of high quality, accurate, reliable, complete, unbiased and is not compromised through corruption or falsification, is useful to its intended user, can be replicated by qualified third parties and which may, if warranted, also include voluntarily submitted information subject to the Deciding Official's transparent disclosure of the quality of the information and justification for reliance thereon.

Importantly, the use of a proper definition of "high quality information" would make it virtually impossible for BLM to rely on completed REAs to identify management priorities. Specifically, the preamble to the Proposed Rules explains, REAs are developed at a "landscape scale" and cover vast areas. 81 Fed. Reg. 9680. Moreover, as their title indicates, REAs are by design prepared "rapidly," with little or no ground-truthing, by agglomerations of public and private entities—some of which have their own agendas for the management of the public lands. Consequently, the use of REAs in the land planning process raises serious questions, such as whether REAs comply with FLPMA's express direction that ***the Secretary*** "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values."

In any case, if REAs and similar "landscape scale" studies, reports, and documents are used as a basis for land use planning, coordination with State local governments is clearly necessary. State and local governments, particularly rural counties and districts whose citizens and economies depend on the use of public lands, may have superior information on local resource conditions and values and, in addition, can effectively critique more general, "landscape scale" reports and information, which are likely to contain errors or produce distortions when applied on a local scale. Presumably, this is why Congress has required coordination on the BLM's inventory in FLPMA Section 202(c)(9). Under the Proposed Rules, however, there is no opportunity for coordination with State and local governments on the inventory in advance of land use plan development. This is another serious oversight that should also be recognized and addressed in the Proposed Rule.

IV. Changes to Planning Objectives, Process and Plan Content are Contrary to FLPMA, the Mining and Minerals Policy Act and BLM's Surface Mining Regulations

The Proposed Rule will result in substantial changes in planning objectives, the planning process and plan content. If adopted, a fundamental shift in the management of public lands will result. Critically important steps in the existing planning process are being eliminated, purportedly to increase opportunities for public involvement. In addition, land use plan content will be changed to separate "plan components" (including goals, objectives, designations, resource use determinations, monitoring and evaluation standards, and lands identified for disposal) from "implementation strategies." The latter will not be subject to public notice, NEPA, comment or protest. These changes will afford BLM "increased flexibility" and opportunities to engage in "adaptive management" but marginalize the role of the public and state and local governments. AMA's specific concerns are discussed below.

A. BLM's Planning Objective Excludes Key Language from FLPMA Requiring the Implementation of the Mining and Minerals Policy Act

BLM's overall objective for resource management planning must be consistent with FLPMA and its important recognition of implementation of the Mining and Minerals Policy Act. An examination of BLM's existing land use planning objective in the Current Rule as compared to the newly stated objective in the Proposed Rule evidences a fundamental shift in land use management from multiple use to preservation and conservation. Further, the new objective excludes a key provision of FLPMA that makes express reference to implementing the Mining and Minerals Policy Act of 1970 as it pertains to public lands.

The chart below is a side by side comparison of BLM's Current Rule compared to the objective in the Proposed Rule and it speaks volumes about the relative weight of conservation and preservation and future agency priorities.

Current Rule – 1601.0-2	**Proposed Rule – 1601.0-2**
The objective of resource management planning by the [BLM] is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state and local governments, Indian tribes and appropriate Federal agencies. Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.	The objective of resource management planning by the BLM is to promote the principles of multiple use and sustained yield on public lands unless otherwise provided by law, ensure participation by the public, State and local governments, Indian tribes and Federal agencies in the development of resource management plans, and ensure that the public lands will be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; that will provide for outdoor recreation and human occupancy and use, and which recognizes the Nation's need for domestic sources of

	minerals, food, timber, and fiber from the public lands.

In the preamble to the Proposed Rule, the BLM explained that it modified current § 1601.0–2 "to revise the stated objectives of resource management planning to reflect FLPMA and remove vague or inaccurate language." 81 Fed. Reg. 9683. The BLM claimed that it eliminated vague and inappropriate language from the current § 1601.0–2 and substituted language "to be consistent with FLPMA," in many cases directly quoting from FLPMA. The BLM explained:

> The BLM proposes to add an additional objective of resource management planning to the regulations, which is to "ensure that the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide for outdoor recreation and human use, *and which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands*." This proposed change would incorporate language from FLPMA (see 43 U.S.C. 1701(a)(8) and (a)(12)) to identify in the planning regulations the general management objectives that apply to the public lands and therefore apply to all resource management plans. While this is a change in the regulations, it would simply affirm statutory direction and not change existing practice or policy.

81 Fed. Reg. 9684 (emphasis added). The italicized phrase, "and which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands" comes directly from 43 U.S.C. § 1701(a)(12), as indicated by the BLM. However, this FLPMA provision actually states:

> The Congress declares that it is the policy of the United States that—
>
> . . .
>
> (12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands *including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands*; . . . . [Emphasis added.]

In short, Congress deliberately and specifically referred to the Mining and Minerals Policy Act in its declaration of policy in FLPMA and, moreover, has required the Interior

Secretary "to foster and encourage private enterprise in . . . the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries," and to promote "the orderly and economic development of domestic mineral resources [and] reserves" in the Mining and Minerals Policy Act. Importantly, the Mining and Minerals Policy Act also provides: *"It shall be the responsibility of the Secretary of the Interior to carry out this policy when exercising his authority under such programs as may be authorized by law other than this section."* *Id.* (emphasis added). By expressly referencing the Mining and Minerals Policy Act in FLPMA, Congress clearly intended that the Act be emphasized in connection with public land planning and management. Yet, the BLM has deliberately ignored it. This is a very significant omission, highlighting the BLM's shift away from traditional land and resource uses on the public lands. At a minimum, the proposed "objective" should be modified to add "*including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands"* to the end of existing sentence comprising § 1601.0–2 (proposed).

B. The Proposed Planning Assessment is Further Evidence of a Major Policy Shift Regarding the Use of Public Lands

The process for land use planning outlined in the Proposed Rule will lead to "value-based" decision-making, instead of "resource-focused" decision-making as required by FLPMA. One of BLM's duties under FLPMA's land use planning provisions is to:

> . . . prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreations and scenic values), giving priority to areas of critical environmental concern.

43 U.S.C. § 1711 (a). BLM appears to be delegating its duty to prepare and maintain the public lands inventory to the public with a "call for data and opinions" at the outset of planning process (called the "planning assessment"). Specifically, pursuant to Proposed Rule 43 C.F.R. § 1610.4, the public would be provided:

> . . . opportunities to provide existing data or information or to suggest policies, guidance, or plans for consideration in the planning assessment. The BLM would identify public views in relation to the planning area, which may include public meetings. The planning assessment would be documented in a report, which would be made available for public review. The BLM could waive the requirement to conduct a planning assessment for minor EIS-level amendments or if an existing planning assessment is determined to be adequate.

BLM claims this planning assessment step will "help the BLM better understand resource, environmental, ecological, social and economic conditions and identify public views and resource management priorities for the planning area" and this includes "the identification of

potential areas of critical environmental concern." *See* 81 Fed. Reg. at 9705, 9706. This violates BLM's responsibility under FLPMA to conduct its own inventory of the public lands and specifically adhere to the nine planning principles set forth in FLPMA (43 U.S.C. § 1712 (c)) when making its resource use determinations. Land use planning should not become a voting exercise whereby resource and land use determinations are the result of public views or opinions.

It is of even greater concern that the planning assessment will be used in lieu of BLM's existing requirements to develop planning criteria, inventory data and collect information and conduct an analysis of the management situation ("AMS"). 43 C.F.R. §§ 1610.4-2, 1610.4-3 and 1610.4-4. Under the Current Rule, the AMS is particularly important. First, it requires BLM to conduct an analysis of "the inventory data and other information available to determine the ability of the resource area to respond to identified issues and opportunities" and provides "consistent with multiple use principles, the basis for formulating reasonable alternatives, including the types of resources for development or protection." 43 C.F.R. § 1610.4-4. In conducting the AMS, BLM now considers "resource demand forecasts and analyses relevant to the resource area" and the "degree of local dependence on resources from public lands." *Id.* at § 1610.4-4 (c) and (g). In addition, the AMS now requires BLM to coordinate with state and local governments on these important matters to determine "specific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, State and local government agencies and Indian tribes." *Id*. at § 1610.4-4 (e). Under the Proposed Rule, no such considerations of "resource demand forecasts and analyses" will be undertaken, nor will the important state and local coordination occur during the early stages of the planning process. State and local governments will simply be treated as members of the public.

Further, a major policy shift is readily apparent when the elements that are addressed in conducting the AMS under current § 1610.4-4 are compared to the elements that would be addressed in the planning assessment under proposed § 1610.4(c). This proposed section requires the Responsible Official to "consider and document" seven elements (with a number of subparts), virtually all of which ignore the degree of local importance/dependence on use of resources in the planning area. Among other things, these new elements eliminate references to land and resources *uses*, substituting the term "goods and services," which includes "ecological services"—an inherently vague and undefined term.

Even worse, the Proposed Rule focuses almost exclusively on a variety of environmental and ecological elements, while ignoring traditional public lands uses identified in FLPMA, such as mineral exploration and development, grazing, rights-of-way, timber production, and outdoor recreation. *See* 43 U.S.C. § 1702(l) (defining "principal or major uses"). Detailed comments are provided in Table 1, entitled Comparison of Current § 1610.4-4 and Proposed § 1610.4(c) Planning Elements, which is attached hereto and incorporated herein by reference. As discussed in Table 1, a number of the changes in the planning elements are inappropriate and highlight the BLM's attempt to alter the focus of land use planning under FLPMA Section 202, 43 U.S.C. § 1712, from multiple use to preservation. At a minimum, BLM must expand its consideration of land uses in the planning assessment to avoid biased decision-making that elevates

conservation over traditional multiple uses.[8] A better outcome, however, would be to retain the AMS in lieu of the proposed planning assessment process in recognition that the AMS effectively implements the inventory and coordination requirements of FLPMA.

C. The Unlawful Imposition of Mitigation Standards (§ 1610.1-2(a)(ii)(2))

The Proposed Rule contemplates the inclusion of specific and measureable objectives in a plan amendment or update to improve transparency and accountability and guide progress towards identified goals. *See* 81 Fed Reg. at 9690. These objectives will include standards to mitigate undesirable effects to resource conditions. *See* § 1610.1-2(a)(2)(i) (proposed). The preamble to the Proposed Rule explains:

> To the extent practical, objectives should identify standards to mitigate undesirable effects to resource conditions and should provide integrated consideration of resource, environmental, ecological, social, and economic factors . . . [t]he proposed changes would support implementation of the BLM mitigation policy through the development of standards to be used for mitigating undesirable effects to resource conditions. For example, an objective might identify a mitigation standard for no net loss to a sensitive species [sic] would provide a standard to guide future authorizations in avoiding, minimizing, and compensating for any unavoidable remaining impacts to the sensitive species.

See 81 Fed. Reg. at 9690.

Clearly, the identification of mitigation standards within objectives is designed to provide legal justification for the implementation of various Department of Interior ("DOI") policies, which have been recently issued without public input or observance of rulemaking procedures required by the Administrative Procedures Act (the "APA").[9] These include, but are not limited to:

- DOI, Secretarial Order No. 3330, "Improving Mitigation Policies and Practices of the Department of the Interior" (Oct. 31, 2013).

[8] This value shift is further evident in Secretary Jewell's prepared remarks issued April 19, 2016 offering the Department of Interior's vision for the "next 100 years of conservation in America." That coupled with the Secretary's corresponding announcement that the Commerce Department's Bureau of Economic Analysis will soon undertake a study to analyze the impact outdoor recreation has on the nation's economy to inform decision making and management of public lands and waters evidences a continued pattern of disregard for traditional public land uses.

[9] Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4).

- Joel P. Clement et al., "A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior – A Report to the Secretary of the Interior from Energy and Climate Change Task Force" (Apr. 2014).

- DOI, Departmental Manual, Pt. 600, Chp. 6, "Implementing Mitigation at the Landscape-scale" (Oct. 23, 2015).

- Presidential Memorandum, "Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment." 80 Fed. Reg. 68743 (Nov. 3, 2015).[10]

The intent of these policy documents is to facilitate the imposition of compensatory mitigation for all activities on public land resulting in a "net resource benefit" or a "no net loss" of resources. This is evidenced by the definition of mitigation in the Proposed Rule, which is "the sequence of avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts." 81 Fed. Reg. at 9725. Mandated sequencing and the use of the two above-referenced standards are not consistent with the UUD Standard established in FLPMA or BLM's existing 3809 Surface Management regulations. Congress recognized there will be some degradation of public lands in conjunction with mining, and only UUD is prohibited.

BLM's 3809 Surface Management regulations define what constitutes UUD. *See* 43 C.F.R. § 3809.415. Those regulations also require certain performance standards for modern mine plans, including mitigation. However, under the 3809 Surface Use regulations, the definition of "mitigation" is quite flexible (consistent with the definition in NEPA) and "*may include one or more of the following*" options (emphasis added):

(1) Avoiding the impact altogether by not taking a certain action or parts of an action;

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and

[10] President Obama has directed the DOI to develop a policy to "avoid and then minimize harmful effects to land, water wildlife, and other ecological resources caused by land-or water-disturbing activities . . . and adopt a clear and consistent approach for avoidance and minimization of, and compensation for mitigation of the impacts of their activities and the projects they approve." Agency policies are also to be designed to "encourage advance compensation," establish "net benefit goals or, at a minimum no net loss goals," and avoid impacts to "irreplaceable resources." *Id*.

(5) Compensating for the impact by replacing, or providing substitute, resources or environments."

See 43 C.F.R. §§ 3809.5 (definition of mitigation) and 3809.420(a)(4) (mitigation as a performance standard). In fact, BLM's use of the word "*may*" instead of "*shall*" before the list of mitigation options, leaves the door open for the BLM and an operator to develop other creative mitigation measures that might be implemented when circumstances warrant.

The prescriptive mitigation principles BLM now seeks to implement via the Proposed Rule fail to recognize BLM's existing 3809 regulations. BLM's land use planning mitigation measures will require mandatory sequencing for implementation level proposals (including mine plans of operation): first avoid impacts, then minimize, then compensate for impacts resulting in a "net benefit" or "no net loss" to the environment. BLM has no authority to impose this sequencing structure or a "net benefit" or "no net loss" standard for mitigation of impacts, particularly in the context of locatable mining operations. FLPMA does not authorize BLM to require compensatory mitigation, offsite mitigation, or any sort of advanced mitigation as the Proposed Rule implies. BLM cannot imbue itself with the authority to prescribe mitigation in conjunction with developing land use plans and then bootstrap compliance with those measures on all future implementation level activities via the requirement for consistency with adopted land use plans.

FLPMA does not require the development of any standards to be used for mitigating undesirable effects to resource conditions nor does it authorize the BLM to impose mitigation obligations. Accordingly, the content of proposed § 1601.1-2 (a)(2) should be modified to remove "(i) identify standards to mitigate undesirable effects to resource conditions." In addition, the definition of "mitigation" at proposed § 1601.0-5 should be removed. In the alternative, BLM must clarify that the imposition of mitigation measures identified in a land use plan or plan amendment will not supersede BLM's obligation to comply with its Surface Management regulations when considering appropriate mitigation measures for mine plans of operation or modifications thereto.

D. Relegation of Existing Plan Content to Implementation Strategies (§1610.1-2)

The Current Rule lists eight elements that a land use plan establishes.[11] The Proposed Rule removes half of those elements and relegates them to "implementation strategies" including the following:

[11] The remaining four items will continue to be elements of land use plans, subject to public notice and comment and protest: (1) land areas for limited, restricted or exclusive use; designations including ACEC; and transfer from BLM administration; (2) allowable resource uses (either singly or in combination) and related levels of production or use to be maintained; (3) resource condition goals and objectives to be attained; (4) intervals and standards for monitoring and evaluating the plan to determine effectiveness of the plan and the need for amendment or revision.

- program constraints and general management practices needed to achieve [resource uses and goals and objectives];

- evaluation of [the] need for an area to be covered by more detailed and specific plans;

- support action, including such measures as resource protection, access development, realty action, cadastral survey, etc., as necessary to achieve [resource uses and goals and objectives]; and

- general implementation sequences.

81 Fed. Reg. at 9689-9694.

BLM defines "implementation strategies" in the Proposed Rule as "strategies that assist in implementing future actions consistent with the plan component of the approved resource management plan." 81 Fed. Reg. at 9725. Notwithstanding this apparently benign definition, "implementation strategies" are the heart of a resource management plan and are where the heavy lifting is accomplished. Essentially, implementation is the "how" to the "what, where, when and why" of land use plan. Consequently, implementation strategies are extremely important and should not be excluded from land use plans.

This division of plan elements into components and "implementation strategies" has significant consequences because "implementation strategies" (i) will be developed solely by the BLM following publication of the draft plan and the draft NEPA document; (ii) will not be subject to public notice and comment; (iii) will not be subject to protest; and (iv) will be subject to modification at any time in BLM's sole discretion. This change in plan content gives BLM unfettered discretion not intended by Congress.

Importantly, FLPMA requires:

> (1) "[L]and use planning and **management**" must be **coordinated** with the land use planning and management programs of state and local governments within which the lands are located.
>
> (2) **"[M]eaningful public involvement** of State and local government officials, both elected and appointed in the development of land use programs, land use regulations and **land use decisions** for public lands, including early public notice of proposed decisions which may have a significant impact on on-Federal lands."
>
> (3) [A]uthoriz[ation] [by officials in each State] "to **furnish advice** to the Secretary with respect to the development and

> revision of land use plans, land use **guidelines**, land use rules, and land use regulations for the public lands within such State . . ."
>
> (4) BLM land use plans "be **consistent with State and local land use plans** to the maximum extent he finds consistent with Federal law and the purposes of this Act."

43 U.S.C. § 1712 (c)(9) (emphasis added).

> (5) "In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and **an opportunity to comment upon** the formulation of standards and criteria for, and **to participate in, the preparation and execution of plans** and programs for, and the management of, the public lands."

43 U.S.C. § 1739 (e) (emphasis added).

The BLM cannot ignore these important FLPMA mandates. In particular, Congress provided a front row seat for state and local government officials in terms of involvement via requiring that BLM coordinate with them. Congress did so because of the importance of public lands to western states and, in particular, rural areas and their economies. Coordination is a legal term of art and is not co-equal to commenting on a proposal like a member of the public or participating in a NEPA process as a "cooperating agency" as the BLM seems to imply by virtue of their changes to the planning process in the Proposed Rule.

All aspects of land use planning and management must be coordinated.[12] This necessarily includes "implementation strategies" because they are the crux of the actual management of public lands. Similarly, BLM has a duty to provide meaningful involvement of State and local officials in the development of land use regulations and land use decisions for public lands. Under the Proposed Rule, BLM has foreclosed this opportunity for all "implementation strategies" by exempting them from public comment and protest. Further, state and local officials have a right to give the BLM advice on the development and revisions of land use plans, guidelines, rules and regulations within the affected state. This requires government-to-government consultation to ensure that the concerns and recommendation of State and local governments are recognized and addressed. Without that process, BLM is unable maintain

[12] BLM has also impermissibly narrowed the scope of its coordination obligation in the Proposed Rule. One example is requiring coordination "to the extent consistent with Federal laws and regulations applicable to public lands, and the purposes, policies and programs of such laws and regulations." 43 C.F.R. § 1610.3-1 (proposed). As quoted above, FLPMA Section 202 (c)(9) states that coordination is required "to the extent consistent with the laws governing the administration of public lands." The addition of "purposes, policies and programs of such laws and regulations" is an impermissible "out" for BLM and this phrase should be removed.

consistency with State and local government land use plans and policies, which are critical to those communities and their economy. Put simply, the role of State and local governments is substantially marginalized under the Proposed Rule in violation of FLPMA.

In addition to the rights of state and local governments, the general public has a statutory right to comment upon the "formulation of standards and criteria for . . . *the preparation and execution* of [management] plans . . . ." *Id*. Consequently, BLM has an obligation to provide a reasonable opportunity for comment on "implementation strategies." Increased frequency of public notice (without comment) does not meet this requirement. Mere public notice provide no opportunity for involvement in the formulation of standards or criteria for the execution of a plan. Notices simply provide an opportunity for BLM to declare their intent to impose objectives and standards of their own making. The division of plan components into plan content and "implementation strategies" (which are exempt from public comment, not subject to protest and changeable at any time) is not permissible and should be remedied in the final rule.

V. The Protest Standard Is Being Improperly Narrowed.

Presently, any person who participates in the preparation of the resource management plan or amendment and has an interest which may be adversely affected by the approval or amendment may protest an approved plan or amendment. *See* 43 CFR § 1610.5-2.(a). This will not change under the Proposed Rule. What will change, however, is what constitutes a valid protest.

Under the Current Rule, filed protests can include "any issue or issues that were submitted during the planning process by the protesting party" and must include "a concise statement explaining why the State Director's decision is believed to be wrong." 43 CFR § 1610.5-2 (a)(2)(v). In contrast, under the Proposed Rule, protests must "identify *the plan component(s)* believed to be inconsistent with Federal laws or regulations applicable to public lands, or the purposes, policies and programs of such laws and regulations." 81 Fed. Reg. at 9732. In the preamble to the Proposed Rule, the BLM contends this is "not a change from existing practice or policy." *Id*. at 9715. That statement is misleading in that it does not factor in the effects of other aspects of Proposed Rule.

Plans and amendments under the Proposed Rule will be comprised of plan components (including goals, objectives, designations, resource use determinations, monitoring and evaluation standards, and lands identified for disposal). The narrowing of the protest criteria to "plan components" apparently eliminates the ability of the public to protest: (i) the planning area boundary determination; (ii) factors and information deemed relevant in the planning assessment; (iii) BLM's compliance with its own procedural regulations in conjunction with carrying out the planning process; (iv) BLM's compliance with other federal requirements including NEPA, the Endangered Species Act and the National Historic Preservation Act; and (v) the "implementation strategies." Even more disconcerting is the fact that these new protest criteria will increase the likelihood of dismissal by the BLM Director who will simply be able to assert any purpose, policy or program adopted by BLM outside of a formal rulemaking process as justification for denial.

This substantive modification which the BLM denies is a change from existing practice and states its purpose is to "help the BLM to identify, understand, and respond thoughtfully to valid protest issues," and to "focus the BLM Director's attention on aspects of a proposed resource management plan that may be inconsistent with legal requirements or policies" is illegal and must be removed from the final rule. *Id*. If not removed, then BLM should clarify that the above referenced agency actions are final and that there is no attendant requirement to exhaust administrative remedies before pursuing judicial review. In the alternative, the protest procedures existing in the Current Rule should simply be restored.

VI. The Proposed Rule Cannot Be Categorically Excluded from Analysis under NEPA.

BLM has determined that the Proposed Rule is categorically excluded from further review under NEPA because the rule is "entirely procedural in nature" and "does not involve any of the extraordinary circumstances listed in [the BLM's NEPA regulations at] 43 C.F.R. § 46.215." *See* 81 Fed. Reg. 9674 and 9724.[13] At a minimum, the BLM is required to prepare an environmental assessment ("EA") to consider the potential environmental and economic effects of the Proposed Rule on the human environment. AMA strongly urges the BLM to reconsider its decision that the Proposed Rule is eligible for a categorical exclusion ("CE") and commence the NEPA review process with a proper scoping.

A. NEPA Background

The purpose of NEPA is to promote informed decision-making by ensuring "that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. §1500.1(b). NEPA obligates federal agencies to consider the significant effects of a proposed action on the human environment and inform the public that it has indeed considered significant environmental concerns in its decision-making process. *See Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc*., 462 U.S. 87, 97 (1983). "Major federal actions" subject to review under NEPA have been defined to include, among other things, "new or revised agency rules, regulations, plans, policies or procedures, and legislative proposals." 40 C.F.R. 1508.18(a). CEQ regulations define the "effects" that must be considered under NEPA to include ecological, aesthetic, historic, cultural, economic, social, and/or health effects, whether direct, indirect, or cumulative. 40 C.F.R. 1508.8. "NEPA itself does not mandate particular results." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004). However, NEPA does impose "procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 23 (2008).

[13] The BLM has prepared a document entitled "Preliminary Categorical Exclusion Documentation 2016 Proposed Rule 43 CFR Part 1600" ("PCE Document") in support of its determination.

A proposed federal agency action may only be categorically excluded from analysis under NEPA in very limited circumstances. CEQ regulations allow federal agencies to adopt procedures to categorically exclude certain actions "which have been found to have no [significant] effect" on the human environment. 40 C.F.R. § 1508.4. By definition, however, CEs are intended to be limited "to situations where there is an insignificant or minor effect on the environment." *Alaska Ctr. for the Env't v. United States Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999).

B. The BLM Should Not Have Applied a Categorical Exclusion to the Proposed Rule

The BLM relies upon the following CE to justify its decision not to conduct further NEPA analysis for the Proposed Rule:

> 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.

Preliminary Categorical Exclusion, p. 2 (quoting 43 C.F.R. § 46.210(i)). The BLM has asserted that this CE is applicable because "the proposed modifications of [the Proposed Rule] are entirely procedural" and future planning decisions will be subject to compliance with NEPA. *Id*., p. 2. For the reasons explained below, the BLM's application of a CE to the Proposed Rule is both inconsistent with the BLM's prior practice for planning rules of this magnitude and a violation its obligations under NEPA.

First, the BLM's application of a CE to the Proposed Rule is a clear departure from NEPA process followed by the BLM in prior rulemakings involving the original adoption and major changes to its land use planning rules. The BLM has engaged in three prior rulemakings relating to its land use planning rules. The BLM first adopted its planning rules in 1979. *See* Final Rulemaking: Public Lands and Resources; Planning, Programming, and Budgeting, 44 Fed. Reg. 46386 (Aug. 7, 1979). In 1983, the BLM promulgated major amendments to its planning regulations to enhance and clarify the planning process and eliminate unneeded provisions. *See* Final Rulemaking: Planning Programming, Budgeting; Amendments to the Planning Regulations; Elimination of Unneeded Provisions, 48 Fed. Reg. 20364 (May 5, 1983). In 2005, the BLM promulgated a minor amendment to its planning rules regarding cooperating agencies and cooperating agency status. *See* Final Rule: Land Use Planning, 70 Fed. Reg. 14561 (March 23, 2005).

In the case of both the 1979 original rules and the 1983 major amendment, the BLM prepared an EA to evaluate the potential environmental effects of the rules. It was only with the minor amendment to the planning rules in 2005 that the BLM applied a CE to avoid NEPA analysis. The Proposed Rule represents the most dramatic overhaul of the BLM's land planning

process since the BLM's original adoption of its planning rules in 1979. Accordingly, the BLM should have followed the approach taken for the 1979 and 1983 rules and prepared a programmatic EA to assess the potential environmental impacts of the Proposed Rule.

Second, the BLM's proposition that major programmatic regulations that set forth a process for future agency decisions may be exempted from NEPA review because they are "procedural in nature" is contrary to the requirements of NEPA. As noted above, CEQ regulations specifically define "major federal actions" under NEPA to include "new or revised agency rules, *regulations*, plans, policies, or *procedures*." 40 C.F.R. § 1508.18(a) (emphasis added). The CEQ regulations further elaborate that federal actions, subject to NEPA, may include "formal documents establishing an agency's policy which will result in or substantially alter agency programs" and "plans … which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based." *Id*. at § 1508.18(b)(1)-(2). Furthermore, the regulations provide that EISs "may be prepared, and are sometimes required, for broad federal actions such as the adoption of new agency programs or regulations." *Id*. at § 1502.4. The Proposed Rule, which substantially alters the process to be followed and issues that are to be considered by the BLM in preparing and amending land use plans clearly falls within the scope of the types of actions subject to review under NEPA.

C. Important Precedence of *Citizens for Better Forestry v. USDA*

The case of *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007) (*Citizens*), which involved facts very similar to this rulemaking proceeding, is instructive regarding the applicability of NEPA to programmatic planning rules like the Proposed Rule. In that case, notwithstanding the United States Department of Agriculture's ("USDA") completion of an EA for earlier versions of its National Forest System planning rules, the USDA utilized a CE to exempt its 2005 land use planning amendments from NEPA analysis. *Id*. at 1068. Like the CE relied on the BLM for the Proposed Rule, the CE at issue in the *Citizens* case excluded "rules regulations, or policies to establish Service-wide, administrative procedures, program processes, or instruction." *Id*. (quoting 70 Fed. Reg. 1023, 1053-54). The USDA also determined that "no extraordinary circumstances exist[ed] that would require preparation of an EA or EIS. *Id*.

Also similar to the BLM's argument in support of its use of a CE for the Proposed Rule, the Forest Service argued that its 2005 planning rule fit into its "rules, regulations, and policies" CE because "it merely identifies the procedures and standards for later development of forest plans, plan amendments, and plan revisions," and "does not change the physical environment in any way, and that there will be no direct environmental impacts." *Id*. at 1083. The plaintiffs, on the other hand, argued that the Forest Service's 2005 planning rule did much more than simply establish procedures, asserting that the rule established requirements for sustainability of social, economic and ecological systems, described the nature and scope of plans, and set forth required plan components. *Id*. at 1083-84.

Agreeing with the plaintiffs, the district court held that "NEPA requires *some* type of procedural due diligence—even in cases involving broad, programmatic changes." *Id*. at 1085

(emphasis in original). The court found that "NEPA does indeed contemplate preparation of EAs and EISs in the case of programmatic rules and changes." *Id*. The district court held that the USDA violated NEPA when it "determined that the 2005 Rule satisfied a CE never before invoked for such large scale actions, and concluded that no further NEPA analysis was required." *Id*. at 1086.

The court further held that determination of CE was inappropriate because there was a possibility that the action may have significant environmental effects. First, the district court explained that the rule could impact future site-specific plans. *Id*. at 1087. Second, applying CEQ regulations, the district court determined that the 2005 rule may have significant environmental effects because it was "highly controversial," set "precedent for future action with significant effects," and "may be related to other actions which have individually insignificant, but cumulatively significant impacts." *Id*. at 1089 (citing 40 C.F.R. § 1508.27(b)). Accordingly, the district court determined that the USDA, at a minimum, should have prepared an EA and remanded the matter to the USDA for further consideration.

As with the 2005 Forest Service planning rules at issue in *Citizens*, the Proposed Rule clearly has the potential to have a significant effect on the human environment. The Proposed Rule not only completely overhauls the process for preparing and amending land use plans, but also modifies the required plan components and standards under which public lands will be managed in the future. In consideration of the decision in *Citizens*, the potential significant impacts of the Proposed Rule, and the dramatic departure from the Current Rule, the BLM should be required to conduct NEPA analysis.

In fact, the BLM should take note of the effort the Forest Service undertook in conjunction with its 2012 National Forest System planning rules. In the development of those rules, the Forest Service engaged in one of the most collaborative rulemaking efforts in the agency's history and prepared a programmatic environmental impact statement ("EIS") to comply with its obligations under NEPA in order to take a hard look at the environmental effects of the new planning rules. *See* Final Rule and Record of Decision, National Forest System Land Management Planning, 77 Fed. Reg. 21162 (April 9, 2012); *see also* U.S. Forest Service Planning Rule Revision webpage, *available at* http://www.fs.usda.gov/planningrule.

D. Extraordinary Circumstances Prevent Application of a Categorical Exclusion to the Proposed Rule

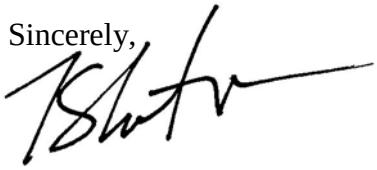
Even if a proposed action appears eligible for CE from NEPA, an agency may not use a CE when "extraordinary circumstances" exist. *California v. Norton*, 311 F.3d 1162, 1168 (9th Cir. 2002) (citing 40 C.F.R. 1508.4). "Extraordinary circumstances has been defined as those "in which a normally excluded action *may* have significant environmental effect." *Norton*, 311 F.3d at 1168 (emphasis added). CEQ and BLM regulations enumerate several factors that must be considered by the BLM in determining whether extraordinary circumstance exist that preclude application of a CE to a particular agency decision. *See* 40 C.F.R. § 1508.27(b); 43 C.F.R § 46.215.

In this instance, there are several extraordinary circumstances that preclude the BLM from categorically excluding the Proposed Rule from review under NEPA. The most obvious, however, is the precedent the Proposed Rule establishes for future plan development and the fact the Proposed Rule represents a decision in principle about future plans that will have potentially significant environmental effects. The Proposed Rule, if adopted, will control the content of plans and plan amendments on all BLM lands in the future. That being the case, it is imperative that the BLM conduct a programmatic NEPA analysis now to assess how the Proposed Rule may impact those future land use planning decisions. The BLM's conclusory statement in the PCE Document that none of the extraordinary circumstances under DOI NEPA regulations apply because the Proposed Rule is "procedural in nature" and future actions will be subject to future NEPA review is simply inadequate to explain and justify the BLM's failure to conduct NEPA review in conjunction with this significant change to the agency's planning rules.

VII. Conclusions Regarding the Proposed Rule.

The AMA appreciates the opportunity to provide comments on the Proposed Rule. If adopted in its current form, the Proposed Rule will result in changes in the management of public lands that conflict with the congressional mandates of FLPMA, the Mining and Minerals Policy Act and NEPA. Further, the sweeping changes in the Proposed Rule will exacerbate problems with timely, informed and balanced agency decision-making while simultaneously disenfranchising state and local governments from meaningful participation in the planning process. This is exactly the opposite of BLM's purported intent. In order to prevent these consequences, AMA urges serious consideration of the matters discussed herein.

Sincerely,



Kelly Shaw Norton
President, Arizona Mining Association

Table 1

Comparison of Current § 1610.4-4 and Proposed § 1610.4(c) Planning Elements

COMMENTS ON THE BUREAU OF LAND MANAGEMENT'S PROPOSED RESOURCE MANAGEMENT PLANNING RULES

Table 1—Comparison of Current § 1610.4-4 and Proposed § 1610.4(c) Planning Elements

Analysis of Management Situation Current Rules – 1610.4-4	**Planning Assessment Proposed Rules – 1610.4(c)**	**Comments**
(a) The types of resource use and protection authorized by the Federal Land Policy and Management Act and other relevant legislation.	(1) Resource management authorized by FLPMA and other relevant authorities.	The meaning of "other relevant authorities" is vague and significantly changes the meaning of the existing rule, allowing directives and guidance documents to be considered. As discussed in the comments, these directives are often of questionable validity because they have not undergone NEPA review and coordination and consistency review under FLPMA § 202(c)(9), and may constitute "rules" that were adopted without compliance with the Administrative Procedure Act. At a minimum, "other relevant authorities" should be specifically identified so that these authorities are disclosed to the public.
(b) Opportunities to meet goals and objectives defined in national and State Director guidance.	Eliminated	This change is inappropriate. As noted in the preamble, under proposed § 1610.4(a)(2), the Responsible Official must "[i]dentify relevant national, regional, or local policies, guidance, strategies or plans for consideration in the planning assessment." Given that these policies and guidance must be considered in the planning assessment, there is no reason not to address opportunities to meet their goals and objectives. This will foster full disclosure to the public and ensure transparent process.

Analysis of Management Situation Current Rules – 1610.4-4	**Planning Assessment Proposed Rules – 1610.4(c)**	**Comments**
(c) Resource demand forecasts and analyses relevant to the resource area.	Substantially eliminated—see discussion below on new element (c)(7).	See comments below on new element (c)(7).
(d) The estimated sustained levels of the various goods, services and uses that may be attained under existing biological and physical conditions and under differing management practices and degrees of management intensity which are economically viable under benefit cost or cost effectiveness standards prescribed in national or State Director guidance.	(7) The various goods and services, including ecological services, that people obtain from the planning area such as: (i) The degree of local, regional, national, or international importance of these goods and services; (ii) Available forecasts and analyses related to the supply and demand for these goods and services; and (iii) The estimated levels of these goods and services that may be produced on a sustained yield basis.	These changes are inappropriate. First, they improperly marginalize the degree of local importance/dependence on use of resources in the planning area. This change is consistent with the agency's improper de-emphasis on the "principal or major uses" of the public lands, as reflected in FLPMA. *See* 43 U.S.C. § 1702(*l*). As written, the local or regional importance of resource uses in the planning area can be ignored in favor of national or even international considerations (as evidenced by the use of "or") in the element (c)(7)(i). Second, the BLM is deliberately confusing the public by eliminating "use" and "uses" and instead using "goods and services." Throughout FLPMA, Congress referred to land uses and "land use plans," not "goods and services" or "goods and services plans." The preamble's discussion that land uses are subsumed in the phrase "goods and services" (*see* pp. 9708) is not acceptable. Very few persons would regard "goods and services" as a reference to land uses. Rather than being more precise, the BLM is making the planning process vaguer and more difficult to understand. This in turn invites agency employees to downplay traditional land and resources uses, and focus on murky concepts such as "ecosystem services," which are poorly understood and impossible to accurately quantify, inviting arbitrary decision-making.

Analysis of Management Situation Current Rules – 1610.4-4	**Planning Assessment Proposed Rules – 1610.4(c)**	**Comments**
(e) Specific requirements and constraints to achieve consistency with policies, plans and programs of other Federal agencies, State and local government agencies and Indian tribes.	Eliminated	This change is inappropriate. As discussed in the first section of the comments, it is important, through coordination, to identify the land use plans, policies and programs of Federal agencies, State and local government agencies and Indian tribes at the outset of the planning process, and to identify any constraints and limitations they may impose to comply with FLPMA § 202(c)(9). Presumably, for this reason, proposed § 1610.4(a)(1) *requires* the BLM to "*[i]dentify relevant national, regional, or local policies, guidance, strategies or plans for consideration in the planning assessment*" (emphasis added). Thus, the BLM would be required to identify "policies, guidance, strategies or plans" of State and local governments. There is no point in identifying these State and local policies, strategies and plans if they are then ignored. The preamble states that this element is not necessary because the BLM will not be developing resource management alternatives at this stage of the process (p. 9709). This assertion is illogical; it is important to be aware of other land use plans, policies, and programs that may impact the BLM's planning process so that when alternatives are developed, conflicts can be avoided or minimized to the maximum extent practical.

Analysis of Management Situation Current Rules – 1610.4-4	**Planning Assessment Proposed Rules – 1610.4(c)**	**Comments**
(f) Opportunities to resolve public issues and management concerns.	Eliminated	This change is inappropriate. Presumably, the BLM, by virtue of its continuing inventory and other management activities, is aware of certain public issues and concerns. Current §1610.4-4 states: "The Field Manager, in collaboration with any cooperating agencies, will analyze the inventory data and other information available to determine the ability of the resource area to respond to identified issues and opportunities." Thus, under the current rules, opportunities to address these issues and concerns are disclosed. By eliminating this information from the planning assessment, the BLM is making the process less open. The public should be advised of important issues and concerns at the beginning of the process. Moreover, addressing issues and concerns in the planning assessment will ensure that they are addressed during the development of alternatives.
(g) Degree of local dependence on resources from public lands.	Eliminated	This change is inappropriate. See comment above on new element (c)(7).
(h) The extent of coal lands which may be further considered under provisions of §3420.2-3(a) of this title.	Eliminated	This change is inappropriate. The planning process is the chief process by which public land is reviewed to assess whether areas are suitable or unsuitable for all or certain types of surface coal mining operations. Proper consideration of suitability at all levels of planning should be undertaken.

Analysis of Management Situation Current Rules – 1610.4-4	**Planning Assessment Proposed Rules – 1610.4(c)**	**Comments**
(i) Critical threshold levels which should be considered in the formulation of planned alternatives	(4) Known resource thresholds, constraints, or limitations.	On its face, this change does not appear to add anything. However, the preamble discussion (pp. 9707-08) suggests that the change in language is intended to restrict or limit the principal or major land uses identified in FLPMA, such as grazing, mineral exploration and development, rights-of-way, timber production, and outdoor recreation. *See* 43 U.S.C. § 1702(*l*) (defining "principal or major uses"). Similarly, FLPMA states as a policy that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands." 43 U.S.C. § 1701(a)(12). The preamble discussion is clearly one-sided and biased against traditional resources uses, evidencing a significant substantive shift in BLM land use planning and management.
Not in current rule.	(2) Land status and ownership, existing resource uses, infrastructure, and access patterns in the planning area.	This change is appropriate as this information is necessary to develop the plan.
Not in current rule.	(3) Current resource, environmental, ecological, social, and economic conditions, and any known trends related to these conditions	This change is also appropriate as this information is necessary to develop the plan.
Not in current rule.	(5) Areas of potential importance within the planning area, including: (i) Areas of tribal, traditional, or cultural importance;	These changes are one-sided and fail to acknowledge the principal or major land uses identified in FLPMA, such as grazing, mineral exploration and development, rights-of-way, timber production, and outdoor recreation. *See* 43 U.S.C. § 1702(l) (defining "principal or major uses"). FLPMA states

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
	(ii) Habitat for special status species, including State and/or federally-listed threatened and endangered species; (iii) Other areas of key fish and wildlife habitat such as big game wintering and summer areas, bird nesting and feeding areas, habitat connectivity or wildlife migration corridors, and areas of large and intact habitat; (iv) Areas of ecological importance, such as areas that increase the ability of terrestrial and aquatic ecosystems within the planning area to adapt to, resist, or recover from change; (v) Lands with wilderness characteristics, candidate wild and scenic rivers, or areas of significant scenic value; (vi) Areas of significant historical value, including paleontological sites; (vii) Existing designations located in the planning area, such as wilderness, wilderness study areas, wild and scenic rivers, national scenic or historic trails, or ACECs; (viii) Areas with potential for renewable or non-renewable energy development or energy transmission; (ix) Areas of importance for recreation	as a policy that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands." 43 U.S.C. § 1701(a)(12). While it is appropriate to identify, for example, areas of areas of tribal or cultural importance, existing designations (e.g., wilderness), areas with energy development potential, and recreational areas in the planning area, many of the elements are duplicative and serve to emphasize certain preferred land uses (e.g., wildlife) while marginalizing traditional lands uses. As such, these changes evidence a significant substantive shift in BLM land use planning and management. The following should be added: 1. Areas used or capable of being used for domestic livestock grazing, including range condition and carrying capacity, and programs that can be undertaken to increase forage production and improve range conditions. 2. Areas with active mineral exploration and production, areas with known mineral reserves, and areas with mineral development potential, and steps that can be taken to facilitate or increase mineral production. 3. Areas with active oil and gas exploration and production, and areas with known and potential reserves, and steps that can be taken to facilitate or increase oil and gas production. 4. Areas with commercial- grade timber, including areas

Analysis of Management Situation Current Rules – 1610.4-4	Planning Assessment Proposed Rules – 1610.4(c)	Comments
	activities or access; (x) Areas of importance for public health and safety, such as abandoned mine lands or natural hazards;	with current or historic timber production, and steps that can be taken to facilitate or increase timber production.
Not in current rule.	(6) Dominant ecological processes, disturbance regimes, and stressors, such as drought, wildland fire, invasive species, and climate change.	This element is vague and redundant. An evaluation of current ecological trends and conditions is required under element (c)(3), which necessarily requires consideration of ecological processes.

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