Streamlining, BLM_WO <blm_wo_streamlining@blm.gov>

Re: BLM Requests Input for Future Planning Efforts and Environmental Reviews

1 message

Dustin L. Cox (b) (6) Wed, Jul 5, 2017 at 10:07 AM
To: "Streamlining, BLM_WO" <blm_wo_streamlining@blm.gov>

The main thought I have is the NEPA process takes so long and expensive to get any project done on the land, that all parties agree on except those that don't want cattle, cars or people on the land. The best managed lands are managed local. The best managed lands are the ones people want to see. The best managed lands are the ones the ranchers and BLM have worked on the bring water and feed to the land which brings wildlife and great pastures for cattle and other livestock.
We seem to have a cut and reduce mentality instead of a growth and increase grazing possibilities mentality.
I believe we do need to look at the impact the decisions will make on the land but we need to realize of the best managed lands for grazing are the best Managed lands for everything else.

Dustin L. Cox

DHC Agriculture, Inc.
(b) (6)

Sent from my iPhone

On Jul 3, 2017, at 12:16 PM, Streamlining, BLM_WO <blm_wo_streamlining@blm.gov> wrote:

> I write to you today to ask for your ideas.
>
> The President and Secretary of the Interior Zinke have asked the Bureau of Land Management (BLM) to take a new, in-depth look into our land use planning and National Environmental Policy Act (NEPA) processes. As someone who cares about the nation's public lands, your input is vital to determining how the BLM will approach land use planning going forward.
>
> Our goal is to identify inefficiencies and redundancies that should be eliminated from our land use planning and NEPA processes, while ensuring that we fulfill our legal and resource stewardship responsibilities. By doing this, we will be able to dedicate more time and resources to completing the important on-the-ground work on our public lands.
>
> Balanced stewardship of the public lands and resources is more important to the interests of the country and its people than ever before. This mission is also more complex and challenging than at any time in our history. But with your input, we can strike that balance.
>
> We are opening a 21-day period, beginning on July 3, 2017 and ending on July 24, 2017, in which you can submit your ideas specific to how we can make the BLM's planning procedures and environmental reviews timelier and less costly, as well as responsive to local needs. This streamlining effort will help shape how we move forward. You can submit your input by going to this link: goo.gl/CYxqM5.
>
> The decisions made in land use plans and after NEPA analyses are fundamental to how BLM public lands and resources are used for the benefit of all Americans. We are committed to working cooperatively with state and local governments, communities, Indian tribes, and other stakeholders to determine the best ways to manage public lands for multiple uses and values, both now and in the future.
>
> This effort is not required under any laws or regulations. We are doing this because we strongly believe that public input, especially at the local level, is an essential component of federal land management.

We look forward to hearing from you.

Sincerely,

Michael Nedd

Acting BLM Director

National Headquarters
1130 17th Street, N.W. | Washington, D.C. 20036-4604 | tel 202.682.9400 | fax 202.682.1331
www.defenders.org

Submitted via email to mnedd@blm.gov *and* kbail@blm.gov

July 24, 2017

Mr. Mike Nedd
Acting Director
Bureau of Land Management
1849 C Street NW, Rm. 5665
Washington DC 20240

Ms. Kristin Bail
Assistant Director, Resources and Planning
Bureau of Land Management
1849 C Street NW, Rm. 5644
Washington, DC 20240

Re: Comments on the BLM Streamlining Planning and NEPA process

Dear Director Nedd and Assistant Director Bail:

Please accept this input from Defenders of Wildlife (Defenders) on "Streamlining BLM Planning and NEPA," submitted in response to the Bureau of Land Management's (BLM) announced 21-day public comment period beginning July 3. Defenders has also endorsed separate comments submitted by Nada Culver of The Wilderness Society on behalf of a number of conservation organizations. We have chosen to provide input via this letter, as opposed to the agency's online comment portal, due to the limitations of that medium. We believe our comments are more useful presented in this format.

Founded in 1947, Defenders of Wildlife is a national non-profit organization focused on conserving and restoring native species and the habitat upon which they depend. Based in Washington, DC, the organization also maintains six regional field offices. Defenders is deeply involved in public lands management and wildlife conservation, including the protection and recovery of flora and fauna on lands administered by the BLM. Defenders is supported by hundreds of thousands of members and supporters who are concerned about the proper management of our National System of Public Lands.

This current endeavor to "go back to the drawing board" to update the BLM's planning process should build upon recent reform efforts. As you are aware, the agency and stakeholder community have been deeply invested in reforming the agency's planning processes since 2014. The agency conducted extensive outreach and provided multiple opportunities for public input over the past several years. The agency already has thousands of public comments on improving BLM planning and should use that input to inform this process; it is likely that most interested parties in planning and resource management would offer the same recommendations provided in the recently

completed rulemaking. Best practices for efficient and effective land and resource management planning have not changed in the past year.

The new reform effort stems from Secretary of the Interior Zinke's March 2017 memorandum to the BLM Acting Director that includes some assertions that the agency should further explain in the interest of transparency and effectiveness in this process. For example, the memorandum states that "projects and decisions are sometimes excessively delayed and agency land and resource management actions languish in a quagmire of plans, studies and regulatory reviews." Both the public interest and the legitimacy and success of this planning reform process would be better served if the BLM could offer a full understanding of the facts regarding project delays, the factors contributing to those delays, as well as the degree and causes behind them.

The Secretary's memorandum also notes that each year the "BLM spends $48 million for the planning process and completes more than 5,000 documents to comply with" the National Environmental Policy Act (NEPA). We assume that the agency believes that funds have been spent wisely and with fair return to the taxpayers to date on resource planning, but any new information on program inefficiencies would be most useful to inform this process. We also look forward to more information on the premise that, if the agency simply invested less in planning, results would improve.

A. Focused Analysis: How can the BLM reduce duplicative and disproportionate analyses?

BLM CAN IMPROVE PLANNING AND PROJECT-LEVEL DECISION-MAKING BY ADDRESSING LAND AND RESOURCE ISSUES AT THE APPROPRIATE SCALE

Given increasing threats and demand for our public lands and resources, the BLM can no longer successfully manage on a project-by-project approach centered on land use and development. BLM must acknowledge, as the agency did in prior planning reform efforts, that a paradigm shift has occurred in land and resource management planning and begin managing for these important resources at appropriate, typically larger, scales in order to achieve management goals. Nested or tiered planning processes are also known to be more efficient than outdated project-by-project

Adopting a broader approach to planning and analysis allows agency planners, stakeholders and the public to assess resources, identify proactive strategies to avoid land use and development in essential wildlife habitats and corridors and other sensitive areas, and direct those activities to areas with the least possible conflicts. This approach avoids the redundancies and expense of project-by-project analyses and provides greater certainty of achieving both conservation and development objectives.

Employing a contemporary approach to planning, analysis and decision-making means BLM must:

- Define the planning/project area at the appropriate ecological scale and use an assessment to inform goals and objectives for conservation, development and mitigation. Often the appropriate scale for planning will cross administrative boundaries such as state lines, and/or BLM district and field office administrative boundaries. As the BLM has acknowledged, comprehensive up-front assessments allow for more efficient, effective agency planning. In contrast, the failure to conduct these evaluations can lead to increased expense and delay.

- Develop a shared vision for the planning area that addresses impacts to a full range of stakeholder values, e.g., special status species, habitat connectivity, wilderness characteristics, renewable and other energy opportunities, and recreational uses.
- Identify goals and objectives to guide broad and nested project-level planning and decision-making. This is particularly important for conservation. Conservation-based goals and objectives will enable the agency to define and identify "high-priority resources" or "high-value habitats," and prioritize them for avoidance.

Monitoring and Adaptive Management

The agency should also develop a detailed framework for long-term monitoring and adaptive management.[1] For adaptive management to be effective for land use planning and decision-making, a land use plan must include an evaluation and decision-making framework that identifies objective thresholds to trigger adaptive management interventions and adjustments to plan components and implementation strategies based on monitoring data and project objectives. These clear thresholds (often referred to as "triggers") are increasingly being used by agencies as a way to provide an adaptive – yet structured decision-making framework – by identifying at the outset how, when and why land management plans will be altered based on monitoring information. A trigger represents a commitment by the agency specifying what actions will be taken based on monitoring. BLM should also establish a process to ensure that information is made available to the public when such thresholds are reached.

Landscape Mitigation Strategies

The agency should also apply the mitigation hierarchy (i.e., prioritizing avoidance first, then minimization) at a landscape level, incorporating these priorities into land management plans and permitting decisions, and ensuring that mitigation for public lands provides enduring designation, management, and funding.

BLM's planning direction should ensure that regional mitigation strategies are appropriately integrated and assessed through the development of land use plans. Defenders has been heavily engaged in the development of regional mitigation strategies, particularly in the context of BLM's Solar Energy Program. While the agency has made significant progress in refining the methodologies of these strategies, we are concerned that they have often been developed outside of the land use planning context.

When BLM develops regional mitigation strategies outside of the land use planning process, it loses a key opportunity to ensure that the mitigation objectives in those strategies appropriately link with

[1] The BLM is increasingly developing experience and expertise on the use of rigorous models to measure condition of wildlife and habitat through the use of indicators. Two useful resources for developing relevant indicators are the BLM's Long-Term Monitoring Program (LTMP) and Assessment, Inventory, and Monitoring (AIM) Program. The AIM program makes use of Ecological Site Descriptions (ESDs) and rangeland health indicators to measure changes in particular habitats over time. ESDs and the body of research and data they represent through the Ecological Site Inventory are powerful tools that should be utilized and leveraged to the fullest extent possible for developing plan objectives, mitigation objectives, measuring impacts, and selecting indicators to measure and monitor the conservation benefits achieved through compensatory mitigation.

and contribute to broader plan resource goals and objectives. Unless plan-level goals and objectives are broadly described, BLM will lack the context necessary to decide how to best mitigate development impacts and sustain ecological systems, functions, and values in a given planning area.

Integrating regional mitigation strategies with plan development will also enhance BLM's ability to pursue and secure durable compensatory mitigation on public lands. "Durable mitigation" includes measures that are effective for as long as the impacts being mitigated last, plus the time needed to restore the affected site.

There are three important tenants of durability:

1. Durability as to designation – i.e., executive branch action cannot readily undo the designation;
2. Durability as to management – i.e., the land management agency has both the authority and the responsibility to remove threats to and improve the status quo for covered resources; and
3. Durability as to funding – i.e., ongoing funding for conservation management is assured.

Given the essential role of public lands in the conservation of wildlife and other resources, planning provides BLM an important opportunity to clarify what tools the agency will use to further durable and effective mitigation in order to meet plan goals and objectives.

Directed Development Approach

Planning reform is an opportunity for BLM to codify and advance progress to date in facilitating responsible energy development on public lands. BLM lands are home to some of the most unique and sensitive resources in the United States, including some of the best remaining habitat and corridors for at-risk species. These lands also offer substantial solar and wind resources to generate clean, renewable energy. The Department and BLM should continue to advance policies that embrace a landscape-scale approach to effectively direct development to locations on the public lands that reduce the likelihood of conflict between renewable energy development and conservation objectives.

Critical to a successful landscape approach is ensuring that renewable energy project planning and implementation is informed by energy development and conservation goals and objectives for the planning area. Adopting a directed development approach allows public land agencies, energy developers, and other stakeholders to identify upfront strategies to: (1) avoid development in priority areas, including essential wildlife habitats and corridors; (2) direct development to, and incentivize development in, areas with excellent renewable energy resources and the lowest possible conflicts with conservation values; (3) minimize impacts on-site through project-specific best management practices; and (4) when remaining unavoidable impacts warrant mitigation, off-set impacts with effective and durable off-site, compensatory mitigation that advances specific and measurable conservation goals for the identified landscape by protecting, restoring and improving management of priority areas.

For a directed development approach to be successful for renewable energy, we need up-front comprehensive resource assessments to identify important ecological resources, renewable energy resource areas, transmission opportunities (current or future), and potential demand for development in the planning area. Comprehensive up-front assessments allow for more efficient, effective agency planning. In contrast, the failure to conduct these evaluations can lead to increased

expense and delay. The BLM can avoid these situations by ensuring that planning assessments include information necessary to implement an effective directed development framework for renewable energy development. BLM must also ensure that adequate tools and methodologies exist to improve the way the agency and partners evaluate potential conflict from renewable energy development and make smart from the start decisions for siting and operation.

BLM CAN IMPROVE PLANNING AND PROJECT-LEVEL DECISION-MAKING BY BETTER INCORPORATING THE CONSERVATION NEEDS OF WILDLIFE INTO DECISION-MAKING PROCESSES

The BLM manages over 253 million acres of federal public lands in 23 states, primarily in the West. These lands support a vast diversity of habitats for terrestrial and aquatic wildlife and plants, including more than 420 species listed under the Endangered Species Act (ESA). The agency has also identified hundreds of additional sensitive species on BLM lands in accordance with its special status species policy (BLM Manual 6840). The BLM estimates that approximately 450 listed and other species of conservation concern occur only on BLM lands, where BLM management is critical to their persistence.

As part of the current planning reform process, the BLM should commit to affirmatively plan and manage for wildlife conservation, ecosystem function, and other resources and values on public lands, consistent with Federal Land Policy and Management Act's (FLMPA) direction 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" (43 U.S.C. § 1701(a)(8)). Proactive planning should especially provide for special status species, given the agency's obligation to "protect" ecological and environmental values and "provide food and habitat for fish and wildlife" (43 U.S.C. § 1701(a)(8)).

Special Status Species

Efficient, effective project planning and implementation depends on clear, informative land use plans. These plans should "identify appropriate outcomes, strategies, restoration opportunities, use restrictions, and management actions necessary to conserve and/or recover listed species, as well as provisions for the conservation of Bureau sensitive species" (BLM Manual 6840.04D5). Moreover, "land use plans [must] be sufficiently detailed to identify and resolve significant land use conflicts with Bureau sensitive species *without deferring conflict resolution to implementation-level planning*" (BLM Manual 6840.2B, emphasis added).

To accomplish this policy requirement, potential conflicts should be addressed within the land use planning process. Land use plans should document the significance of BLM-administered lands to conserve wildlife resources, as well as the actions available to the agency in conserving those species. Plans should also document the conditions needed to "improve the condition of the species habitat on BLM-administered lands" (*see* BLM 6840 Manual Glossary: 43) and indicate where the planning area contains "ecological refugia" (BLM Manual 6840.2A2) necessary for the conservation of wildlife on BLM lands.

The Endangered Species Act

The BLM has a statutory mandate to contribute to the conservation and recovery of endangered and threatened species listed under the ESA. This includes compliance with Section 7(a)(1) of the Act, which requires federal agencies, in consultation with the Secretaries of the Interior (via the U.S. Fish

and Wildlife Service (FWS)) and Commerce (via National Marine Fisheries Service (NMFS)) to "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered … and threatened species" (16 U.S.C. § 1536(a)(1)) (Section 7(a)(1)). In fact, FLPMA specifically accommodates application of the ESA in BLM decision-making and resource management ("[n]othing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species," 43 U.S.C. § 1732(b)).

In addition, "[p]lanning efforts must reflect those actions necessary for the recovery of species to the extent that BLM management can influence recovery" (BLM Manual 6840.1H2c). Actions necessary for species recovery and the extent that BLM can influence recovery must be addressed at the land use plan level; doing so at the plan level will facilitate more efficient and less controversial project-level actions.

Incorporating ESA Section 7(a)(1) conservation reviews in land use planning would support more effective and efficient species conservation programs and reduce future legal conflicts over resource management.

The BLM has acknowledged its responsibility to conserve listed species under Section 7(a)(1), including

1. Developing and implementing activities that provide for the conservation and recovery of species listed pursuant to the ESA. (BLM Manual 6840.1E1)
2. Developing and implementing agency land use plans, implementation plans, and actions in a manner consistent with conservation and/or recovery of listed species. (BLM Manual 6840.1E5)
3. Monitoring and evaluating ongoing management activities to ensure conservation objectives for listed species are being met. (BLM Manual 6840.1E6)
4. Cooperating with the FWS and/or NMFS and other interested parties in species recovery and conservation as provided in species recovery plans. … (BLM Manual 6840.1E7)

In addition to providing a mechanism to assure compliance with Section 7(a)(1), conservation reviews on programmatic efforts could improve (e.g., provide for more effective and efficient) consultation on subsequent, tiered planning processes (i.e., future resource management planning under the proposed rule). The Consultation Handbook (USFWS/NMFS 1998, Consultation Handbook: 5-1) suggests that

> By identifying potential program effects and developing guidelines to minimize these effects to listed species and designated critical habitats, subsequent "stepped-down" consultations, where more specific effects on species can be determined within the context of a local geographical area, can be done more expediently …

There is precedent for the BLM to engage in Section 7(a)(1) conservation review in the development of individual resource management plans. The BLM consultation with FWS on the Draft Resource Management Plan/Draft Environmental Impact Statement for Western Oregon included a Conservation Assessment and Conservation Review as a step toward satisfying Section 7(a)(1) obligations under the ESA (*see* State Supervisor/Oregon Fish and Wildlife Office/USFWS, letter, 08-20-2015: 1). In addition the BLM, in consultation with FWS, completed a Section 7(a)(1)

Conservation Review on the agency's Solar Energy Program in 2012. FWS determined that the program constituted a conservation program under the ESA.[2]

B. User-friendly Planning: How can the BLM help state and local governments, tribal partners, and other stakeholders understand and participate in the planning process?

Please refer to the letter submitted by The Wilderness Society endorsed by Defenders and other organizations.

C. Transparency: How can the BLM foster greater transparency in the NEPA process?

Given the centrality of NEPA to the BLM's planning and decision-making processes, the agency should strive for exemplary adherence to not only the letter of the law, but also the Council on Environmental Quality's (CEQ) additional frameworks for conducting thorough and informative analysis under NEPA.

We recommend that the agency refer to CEQ Final Guidance for Effective Use of Programmatic NEPA Reviews (issued December 2014), which is particularly relevant to broader resource planning efforts. Programmatic analyses can be used to achieve greater transparency by establishing understanding of broad level impacts and benefits of proposed activities. They also support more efficient and effective decision-making processes by enabling tiering in planning.

We also recommend that the agency refer to CEQ Final Guidance on NEPA Efficiencies (issued March 2012). Some of the key points in that guidance are important to transparency in planning and include the use of early and well-defined scoping to not only focus reviews, but also to encourage public engagement in planning, and the development of meaningful planning timelines, which can increase public understanding of the decision-making process.

CEQ has issued numerous memoranda and related information to guide agency treatment of complex NEPA topics. The following are especially relevant to managing public lands and resources:

- CEQ, "Incorporating Biodiversity Considerations into Environmental Impact Analysis under the National Environmental Policy Act" (January 1993)
- CEQ/ACHP, "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106" (March 2013)
- CEQ, "Environmental Justice Guidance Under the National Environmental Policy Act" (December 1997)
- CEQ, "Guidance Regarding Cumulative Effects" (January 1997)
- Several documents on issues related to wetlands and waterways, including CEQ/Memorandum for Heads of Agencies, "Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in Nationwide Inventory" (August 1980).

[2] *See* "Endangered Species Act – Section 7 Compliance (http://blmsolar.anl.gov/program/laws/esa/) (viewed May 25, 2016).

D. Being Good Neighbors: How can the BLM build trust and better integrate the needs of state and local governments, tribal partners, and other stakeholders?

Please refer to the letter submitted by The Wilderness Society endorsed by Defenders and other organizations.

Administrative protests are a key element of public participation in BLM planning and can help resolve outstanding planning issues and improve records of decision. Unfortunately, the current system has proven unsatisfactory for both protesters and the BLM, and leads to administrative appeals and litigation over issues that might have been resolved under a more communicative process.

The BLM should adopt a more collaborative approach to address outstanding planning issues, as the Forest Service has done. The objection process used in the national forest land management planning rule encourages the agency to meet with objectors to discuss planning issues. A reviewing officer or objector may request a meeting to discuss issues raised in an objection and explore potential resolutions (36 C.F.R. § 219.57(a)). Other interested persons may participate in those meetings, which are otherwise open to observation by the public (36 C.F.R. § 219.57(a)). A reviewing officer also has discretion to extend the deadline for providing written response to objections or participate in discussions with parties related to their objections (36 C.F.R. § 219.56(g)).

Defenders has found the Forest Service's objection process more efficient and effective for understanding the agency's preferred management for a particular issue and arriving at a consensus alternative (often with other stakeholders) that better serves the public, federal lands and resources. The Forest Service has probably also saved agency resources under its new rule by batching similar protests by multiple parties and using group meetings to resolve them all at once (Defenders has participated in such a process).

E. Reducing Litigation: How can the BLM create legally defensible documents and avoid the delays associated with legal challenges?

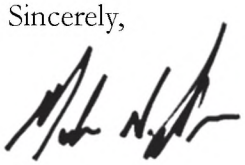
Our response above to question 'A' is relevant to this question. Also, please refer to the letter submitted by The Wilderness Society endorsed by Defenders and other organizations.

F. "Right-sized" Environmental Analysis: How can the BLM more closely match the level of NEPA analysis to the scale of the action being analyzed?

Our response above to question 'A' is relevant to this question. Also, please refer to the letter submitted by The Wilderness Society endorsed by Defenders and other organizations.

Thank you for your consideration of these comments.

Sincerely,



Mark N. Salvo
Vice President, Landscape Conservation

Streamlining, BLM_WO <blm_wo_streamlining@blm.gov>

COMMENTS: Fwd: BLM Streamlining Planning and NEPA

1 message

Molly Cobbs <mcobbs@blm.gov> Thu, Jul 13, 2017 at 11:58 AM
To: blm_wo_streamlining@blm.gov

Sent from my iPad

Begin forwarded message:

From: Fred Storer <fred.storer@hydrationengineering.com>
Date: July 13, 2017 at 8:34:07 AM MDT
To: Molly Cobbs <mcobbs@blm.gov>
Cc: Melinda Carter (b) (6) 'Shane Matson' <shane@bluejacketenergy.com>, <jd@sickinglaw.com>, 'Travis Keener' <travis.keener@hydrationengineering.com>
Subject: FW: BLM Streamlining Planning and NEPA

Resending – address correction.

From: Fred Storer [mailto:fred.storer@hydrationengineering.com]
Sent: Thursday, July 13, 2017 9:28 AM
To: Molly Cobbs <mcobbs@blm.com>
Cc: Melinda Carter (b) (6) ; 'Shane Matson' <shane@bluejacketenergy.com>; jd@sickinglaw.com; 'Travis Keener' <travis.keener@hydrationengineering.com>
Subject: BLM Streamlining Planning and NEPA

Molly, I tried to submit this via the Google Form. It does not appear to have worked, perhaps it is too long.

Please submit this for consideration.

……

The sad Osage NEPA story

In 1979 the BIA responded to a court order and published an Environmental Assessment addressing oil and gas leasing in Osage County, Oklahoma. The EA described in 165 pages the consequences of continuing the Osage leasing program which began in 1906. The BIA did nothing further, insofar as NEPA was concerned, until July 2014 when a surface owner lawsuit alleged the BIA had failed to comply with the requirements of NEPA.

The BIA's response was to effectively shut down oil and gas activities in Osage County and launch an Environmental Impact Statement process. (Although significantly impeded, oil and gas is now limping along

under flawed make-do EAs'.) The resulting Draft EIS was made available for public comment on November 9, 2015. The 322-page Draft EIS, was unprofessional, full of errors, exhibited an underlying incorrect assumption that an EIS was a forum for writing regulations, demonstrated a lack of knowledge of Osage County, and most importantly, was entirely disproportionate to the NEPA requirement that the responsible official make a statement of the consequences of the proposed action. The proposed action should have been, obey the law and continue to operate the Osage leasing program.

> *A sample from the Draft EIS, page, 4-73 "Construction lighting would reduce nighttime darkness which would affect nighttime activities, such as stargazing."*

After receiving public comments, the Draft EIS was effectively withdrawn in April 2016 and a EIS process restarted.

That the BIA needed to repair 37 years of NEPA neglect is accepted. However, other than disgruntled surface owners pointing out the BIA's neglect of NEPA, nothing had changed. A simple Environmental Assessment would have been sufficient. After all, the hay day of Osage oil and gas had long passed and the environmental impact of oil and gas is diminishing as old wells and facilities are abandoned faster than the few new wells are drilled.

We are waiting with trepidation on the next Draft EIS, forecast for October 2017. It is understood that the BIA has retained the same consultant to write the next Draft. Is it too late to prepare a simple EA and get back to work?

In our example a "Right-sized" Environmental Analysis would have been based on an answer to the question: <u>What is the proposed action and who is the responsible official that will describe the consequences?</u>

-

Fred Storer, P.E.

Hydration Engineering, PLLC

Hydration Engineering is a Bartlesville, Oklahoma based Professional Engineering firm which has commented extensively on the Osage regulatory situation pro bona and on behalf of the Osage Producers Association. The Osage Mineral Estate is a stripper well resource where significant oil remains to be recovered if reasonable business practices are allowed.

July 27, 2017

Mike Nedd
Bureau of Land Management
Department of the Interior
1849 C Street NW
Washington, DC 20240

Re: BLM Streamlining Planning & NEPA

Dear Acting Director Nedd:

The National Mining Association (NMA) welcomes the opportunity to present its views on ways to improve the National Environmental Policy Act (NEPA) and planning processes. NMA is encouraged by the Bureau of Land Management's (BLM) proactive effort to reduce duplicative and disproportionate analyses; help state and local governments tribal partners, and other stakeholders understand and participate in the planning process; foster greater transparency in the NEPA process; build trust and better integrate the needs of state and local governments, tribal partners, and other stakeholders; reduce litigation and associated project delays; and right size environmental analysis to more closely match the level of NEPA analysis to the scale of the action being analyzed.

NMA is the national trade association representing the producers of most of America's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. Since many NMA members conduct coal and mineral operations which require federal decisions or authorizations, they have extensive experience with the NEPA process, especially the protracted delays and escalating costs associated with NEPA compliance. Similarly, since many NMA members conduct operations on federal lands, they are subject to complex and often cumbersome land management plans which take years to develop and far too frequently stray from adherence to the multiple use mandate under the Federal Lands Management Policy Act (FLPMA).

I. Improving the Land Use Planning Process

A. Single-purpose Policy Initiatives Unnecessarily Burden Land-Use Planning Contrary to FLPMA's Multiple-use Mandate

The previous administration proposed sweeping changes to existing planning regulations in the now void "Planning 2.0" Rule. While NMA agrees with the general proposition that the existing planning process is not being properly used to meet its objective, NMA believes that many of the current inefficiencies can be resolved under the existing framework without the need for changes to the program. To help state and local governments tribal partners, and other stakeholders understand and participate in the planning process, BLM must first and foremost focus on adhering to the planning objective at the center of which is multiple-use management:

> "The objective of resource management planning by the Bureau of Land Management 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." 43 CFR § 1601.0-2.

Unfortunately, this objective has become something of an afterthought in recent years as BLM has focused more on pursuing distracting agendas and overcomplicating the process than adhering to this core objective. In addition to other resource values, FLPMA specifically directs BLM to manage public lands "in a manner that recognizes the Nation's need for domestic sources of minerals…" FLMPA Sec. 102(a)(12). BLM should return to its core planning objective by encouraging greater public participation throughout the planning process and facilitate multi-jurisdictional planning. This Includes planning in conjunction with local communities and in partnership with other planning jurisdictions. As an example, in the past BLM and the Forest Service have coordinated on approaches to land use planning. BLM should strive to work with the Forest Service to clarify and improve the joint planning process and strengthen collaborative relationships with the public.

BLM should focus on providing minimum procedural requirements for planning while offering increased flexibility in the planning process. BLM should also clarify the relationship between land use plans and implementation plans as well as the relationship between land use plans and NEPA requirements, taking care to maximize efficiencies and avoid duplication in the process. In addition, BLM should specify a minimum shelf

life for each management plan, with a strong presumption against amendment during its designated lifetime.

BLM should also maximize the durability of its resource management plans by insulating them from single purpose, policy-driven initiatives. The plans are of value to NMA's members and the public at large to the extent that they identify the many resources that are available, and the limits or restrictions on their use. Placing these multiple-use, foundation-level plans at the mercy of a single- policy agenda destroys their utility. Single purpose initiatives, such as sage-grouse conservation or landscape-scale planning, should be pursued, if at all, within the framework of existing resource management plans, rather than becoming the reason for their constant revision. In other words, the policy initiatives should be subordinate to multiple-use management plans, rather than the plans existing at the mercy of each new policy initiative.

B. Current Process Fails to Recognize State and Local Priorities

DOI's current NEPA and planning processes disregard input from state and local government, prioritizing national agendas largely set by special interest groups to the detriment of state conservation programs rural communities. Section 202(c)(9) of the FLMPA requires the Secretary to coordinate land use planning and management programs with local governments. This assures that consideration is given to local plans and provides meaningful public involvement of state and local government officials in the development of land use programs. 43. U.S.C. §1712(c)(9). This provision of the FLMPA exists to "protect local governments from over encroachment by the federal government and aims to balance conservation with communities sustained use of the environment." *Western Exploration, LLC et. al., v. U.S. Department of the Interior.* Case No. 3:15-cv-00491-MMD-VPC, Order at 22 (9th Cir. March 31, 2017).

DOI has routinely disregarded this mandate in its NEPA and planning processes. For example, when developing the FEIS for the Regional Management Plan for the Greater Sage Grouse, BLM blatantly misconstrued and ignored data, information, and mapping submitted by state agencies. Over the protests of western states and local communities, BLM's RMP designated non-habitat as "priority habitat" for the Greater Sage-Grouse.

DOI's planning processes should be inclusive and must consider the efficacy of successful state conservation efforts. Moreover, where BLM conducts programmatic NEPA analysis, BLM must not defer to future site-specific NEPA analysis as the vehicle to correct blatant errors contained in the broader, region-wide analysis. DOI's programmatic determinations made during NEPA and planning processes must be based on accurate data and meaningful input from the states at every stage.

Finally, in pursuing multiple-use management of public lands BLM should keep the proper limitations on mitigation requirements, bearing in mind that mitigation exists to

serve the multiple-use mandate, not to overtake it. This will be discussed in further detail below.

C. Avoid Duplication between Land-Use Plans and Other DOI Mandates

To the extent that DOI's specific statutory mandates require planning-level decisions, that planning (and its NEPA analysis) should not be duplicated in the resource management plans. An example is the duplicative treatment of lands designated as unsuitable for surface coal mining pursuant to Section 522 of the Surface Mining Control and Reclamation Act (SMCRA) but implemented through the land-use-planning process. NMA's members have found that BLM may use the planning process as a pretense for designating lands unsuitable for coal leasing in excess of statutory authority. SMCRA authorizes a review of federal lands for suitability pursuant to five criteria. 30 U.S.C. § 1272(b), referencing criteria at 1272(a)(3). BLM's land-use planning procedures expand Congress's five criteria into twenty, in a process that minimizes the role of state government. *See* 43 C.F.R. 3461.5.

Much like the NEPA process, the planning process has been beleaguered by serial litigation which upends the multiple-use objective and delays the process years beyond feasible deadlines. While adhering to statutory and regulatory requirements and moving forward in a scheduled manner would greatly help reduce the "paralysis by analysis" seen in recent years, litigation reform discussed in greater detail below, would ultimately serve the greatest benefit to getting the planning process back on track. The importance of litigation reform cannot be overstated as avoidance of litigation seems to have become the primary driver of BLM actions (or inactions) with regard to mining projects, and it cannot be avoided.

II. NEPA Process

A. Lengthy NEPA Process Hinders Mineral Development

An inefficient NEPA process contributes to the lengthy and unpredictable permitting process that discourages the capital investments required for mineral exploration and mine development. This is not a new problem. As the National Academy of Sciences (NAS) found almost 20 years ago:

> "Th[e] process has become much slower and more costly than was originally intended or than it needs to be. It commonly imposes data collection and analysis requirements on the applicant and the regulatory agency that are poorly coordinated, excessively expensive, and of uneven value in protecting the environment. Mining operators are entitled to a permitting process that is as timely and cost effective as possible while still achieving compliance with all statutes and regulations."

NAS, *Hardrock Mining on Federal Lands*, p. 54 (1999). Specifically, the NAS indicated the "most serious matter [in obtaining approvals of mining operations] is the excessive time required to complete a NEPA review." NAS Report at 86.

An outdated, inefficient permitting system presents a major barrier to the domestic mining sector's ability to perform to its full potential and supply more of our infrastructure needs. The U.S. has one of the longest permitting processes in the world for mining projects. In the U.S., necessary government authorizations now take approximately seven to 10 years to secure, placing the U.S. at a competitive disadvantage in attracting investment for mineral development. By comparison, permitting in Australia and Canada, which have similar environmental standards and practices as the U.S., take between two and three years. Moreover, it is not clear that such delays yield any environmental benefits versus the significant additional costs to project proponents.

Authorities ranging from the National Academy of Sciences to the Departments of Energy and Defense to international mining consulting firms have identified permitting delays as among the most significant risks and impediments to mining projects in the United States.[1] Most recently, the U.S Government Accountability Office linked the need to streamline the mine permitting process to mitigate supply risks.[2]

The impacts of these delays can be significant, not just for the mining industry but for US economic and national security. Permitting delays have contributed to the US' growing import reliance on minerals necessary for manufacturing technology and innovation. The most recent USGS *Mineral Commodity Summaries* published earlier this year indicates that the United States is now import-dependent for 50 different metals and minerals – and 100 percent import-dependent for 20.[3] That's half of the naturally-occurring elements on the Periodic Table, most of which can be mined in the U.S. The trend line is troubling: U.S. mineral dependency is at a record-high, now double what it was 20 years ago. Another troubling trend line: the decrease in U.S. exploration activities that are a prerequisite to expanded or new operations necessary to increase domestic mineral supplies. Last year marked the fourth consecutive year of globally declining exploration expenditure, with the U.S. showing the sharpest pullback in exploration last year, with its budgets falling more than 30%.[4]

Clearly, change is needed to make the permit process for mining projects, including the NEPA component, more efficient and timely. Attempts to make the NEPA process more

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[1] *See* National Resources Council, *Hardrock Mining on Federal Lands,* National Academy Press (1999); U.S. Department of Energy, *Critical Materials Strategy* (Dec. 2010); U.S. Geological Survey USGS, *the Principal Rare Earth Elements Deposits of the United States—A Summary of Domestic Deposits and a Global Perspective*, 2010; Behre Dolbear, *Where Not to Invest* (2015).
[2] GAO Report 16-699, *Advanced Technologies: Strengthened Federal Approach Needed to Help Identify and Mitigate Supply Risks for Critical Raw Materials,* Dec. 2016
[3] USGS, *Mineral Commodity Summaries 2017*, available at https://minerals.usgs.gov/minerals/pubs/mcs/2017/mcs2017.pdf
[4] S&P Global Market Intelligence, *Worldwide Mining Exploration Trends*, March 2017

timely and efficient are not new. The Council on Environmental Quality (CEQ) has previously engaged in numerous efforts and reviews since NEPA was enacted. Congress has held a variety of hearings and even convened a task force to look at NEPA reforms. Furthermore, federal agencies have undergone review efforts, and amended regulations in the hopes of achieving improvements. The fact remains, however, that the NEPA process appears to only be getting more cumbersome. As the NAS noted, for mining projects, "NEPA comment and review requirements under the Council on Environmental Quality's regulations could in theory allow a project to proceed from notice of intent to prepare an EIS to a record of decision in approximately six months, the committee found that large-scale mines on federal lands require between 18 months and 8 years to complete both the EIS review and all the permitting and other approvals by state and federal agencies with jurisdiction over the mining operations." NAS Report at p. 54.

BLM needs to make more efficient use of key staff resources for large mining projects; including drawing upon the most qualified staff regardless of location. There should also be specific management accountability for quality, schedule, and cost performance. At the national level BLM could do a better job of providing high level guidance on key elements of NEPA analyses (e.g., alternatives, mitigation, level of detail/data needs, cumulative effects, etc.) that often come up in litigation.

BLM's outreach seeking input on how to make the process work more efficiently and effectively is an important first step. Regulatory and guidance changes could go a long way towards making the necessary improvements, while support for certain legislative changes could help address some of the underlying systemic problems with the process.

B. Mandatory Timelines Are Needed

As previously mentioned, the delays associated with the NEPA processes can expand a review intended to last months into a decade. CEQ's implementing regulations for NEPA encourage agencies to set time limits appropriate to individual actions. 40 CFR § 1501.8 The DOI regulations for NEPA implementation state:

> (a) For each proposed action, on a case-by-case basis, bureaus shall:
>
> (1) Set time limits from the start to the finish of the NEPA analysis and documentation, consistent with the requirements of 40 CFR 1501.8 and other legal obligations, including statutory and regulatory timeframes;
>
> (2) Consult with cooperating agencies in setting time limits; and
>
> (3) Encourage cooperating agencies to meet established time frames.

(b) Time limits should reflect the availability of Department and bureau personnel and funds. Efficiency of the NEPA process is dependent on the management capabilities of the lead bureau, which must assemble an interdisciplinary team and/or qualified staff appropriate to the type of project to be analyzed to ensure timely completion of NEPA documents. 43 CFR § 46.240.

Despite this directive, timelines are seldom adhered to and there is little accountability for delaying necessary agency approvals years past stated deadlines. While more robust pre-application dialogues are of great assistance, strict time limits are an important consideration and can contribute significantly to a more efficient NEPA process. NMA does not believe that such time limits foreclose public participation and/or consideration of relevant issues. Many environmental statutes provide deadlines for final agency decisions without undermining public participation or precluding a full airing of the underlying environmental issues.

A recent Government Accountability (GAO) report, Renewable Energy: Agencies Have Taken Steps Aimed at Improving the Permitting Process for Development on Federal Lands found that wind and solar permitting times at the BLM were reduced from four years for applications filed in 2006 to 1.5 years for applications filed in 2009. The GAO report is evidence that we know how to make a cumbersome permitting process more efficient if sufficient focus is devoted to the problem. It is ironic that the same agency that permits these renewable projects cannot use similar means to streamline the permitting process for the mines that provide the necessary mineral components to produce such energy.

DOI should consider adopting the timeframes advocated by CEQ in its "Forty Most Asked Questions Concerning CEQ's [NEPA] Regulations." According to CEQ, the completion of an EIS for "large complex energy projects would require only about 12 months," while the completion of an EA should take "no more than 3 months, and in many cases substantially less." *See* 46 Fed. Reg. 18026 (Mar. 16, 1981). Further, the department should limit any extensions of set timeframes to circumstances involving unanticipated and material evidence bearing on the environmental impacts of the project.

BLM needs to fully recognize that mine planning and development are inherently dynamic processes and that changes in applicants' mine plans or Plan of Operations will likely occur, frequently in response to feedback from stakeholder involvement in the NEPA or Section106 consultation process. Such changes should not be used by agencies to delay the review process or trigger demands for additional analysis when the changes do not result in substantially greater or new environmental or socioeconomic impacts. Indeed, when such changes mitigate legitimate concerns raised during the review process, they should expedite, not delay, the completion of the process.

C. Reform the Federal Register Clearance Process

DOI has established an overly-complex review policy for routine Federal Register notices announcing different stages in the NEPA processes for specific projects. This "clearance process" requires such notices sent from Bureau of Land Management (BLM) state offices to DOI undergo 14 separate levels of review within DOI. The impact of these delays is significant as most mining operations require at least three of these notices per project. As the clearance process routinely takes 4 months or longer per notice, this policy adds approximately a year of review time for project approvals. However, these added layers of review rarely result in a final product that differs substantively from what was submitted by the state BLM offices rather than requiring approval from Washington D.C.

DOI has never adequately explained the need for this review process given the extensive environmental reviews already required for mining operations. The review process should be limited to 45 days and allow sign off by the state BLM offices.

D. Ensuring the Proper Size and Scope of NEPA Review

BLM's goal to address duplicative and disproportionate analyses and right size environmental analysis to more closely match the level of NEPA analysis to the scale of the action being analyzed is commendable. Our member companies report that far too often a determination is made that an EIS should be prepared for a project when in many cases an Environmental Assessment (EA) is a more appropriate tool for analysis, particularly as regards expansion of an existing mining operation. Further, once a Finding of No Significant Impact (FONSI) has been made for a project, an EA should be completed within months, not years, of that determination. EA's that drag on for years and become de facto EIS's, in the futile hopes of avoiding protest or appeal, waste time and limited resources for both the applicant and the BLM. Key areas on which to focus to better achieve BLM's "right-size" objectives are NEPA agency coordination and appropriately tiering project specific analyses from prior NEPA reviews.

1. Tiering NEPA Analysis

NMA supports using existing analyses to avoid duplication of effort, to control costs and to reduce delays. The most important element in using the NEPA tiering process and programmatic analyses is exercising careful discretion to ensure that these tools are used to make the process more efficient and not to reinvent the wheel with each subsequent review. When appropriate, "A programmatic environmental assessment (PEA) or a programmatic environment impact statement (PEIS) addresses the general environmental issues and concerns at a broad policy level, and can effectively frame the scope of subsequent site and project proposed Federal actions." *Council on Environmental Quality, Draft Guidance on Effective Use of Programmatic NEPA Reviews* at 6, (August 25, 2014). The purpose of such reviews is to develop initial programmatic

documents that can be efficiently and reliably used in subsequent "tiered documents" that build off of the analysis in the broader programmatic review.

The function and goal of programmatic reviews has been previously explained by CEQ as follows:

> "The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.
>
> Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in [above], this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act*, 46 Fed. Reg. 18,026, 18,033 (Mar. 23, 1981).

The scope of impacts to be analyzed by the programmatic review and its tiered reviews is set forth at 40 C.F.R. § 1502.20:

> Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) *the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action* (emphasis

> added). The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

When appropriate, programmatic NEPA reviews should result in clearer and more transparent decision-making, as well as provide a better defined and more expeditious path towards decisions on proposed actions. As previously explained by CEQ, "one advantage of preparing a programmatic NEPA review for repetitive agency activities is that the programmatic NEPA review can effectively provide a starting point for the analysis of cumulative and indirect impacts. Using such an approach allows an agency to subsequently tier to this analysis, and address more narrow, site-specific, details. *This avoids repetitive broad level analyses in subsequent tiered NEPA reviews* and provides a more comprehensive picture of the consequences of possible actions (emphasis added). *Council on Environmental Quality, Draft Guidance on Effective Use of Programmatic NEPA Reviews* at 6, (August 25, 2014). The Eleventh Circuit Court of Appeals has clarified that, tiering "is accomplished by incorporating earlier statements into the new analyses, and focusing only on what has not previously been considered. Tiering is also appropriate where a broad EIS has already been prepared and the agency is now considering specific aspects of a proposal. Agencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project. NEPA regulations encourage agencies to coordinate on such efforts." *Sierra Club et. al. v. U.S. Army Corps of Engineers*, 295 F.3d 1209, ¶ 11(2002).

While the tiering process can offer considerable benefits, programmatic NEPA reviews have historically suffered from improper tiering to subsequent actions which can make the programmatic process more, rather than less, time and resource consuming, without any additional substantive analysis of environmental impacts. As characterized by one land management agency official, "conducting the multileveled analysis required [under the programmatic NEPA process] to reach project level decisions often requires extraordinary amounts of time, money, and manpower. Also, once decisions are made, their finality is suspect." Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making, 20 ENvTL. L. 703, 717-18 (1990) See also, The NEPA Task Force Report to the Council on Environmental Quality; Modernizing NEPA Implementation*, at 38 stating that "When agencies fail to resolve issues of scope, content, and purpose at the start of a programmatic NEPA analysis, citizens, stakeholders, and cooperators are usually dissatisfied, which results in higher costs, inefficiencies, and unmet expectations. Some agencies and respondents have abandoned the concept of tiering concluding that it is ineffective and inefficient."

The challenge in framing a successful programmatic NEPA review is developing a document that is specific enough to provide value moving forward for tiered site-specific reviews, without being overly prescriptive such that the impacts of subsequent site-specific actions do not receive adequate review. CEQ has previously noted that "there

are times when analysis at one level is sufficient. For example, when the programmatic review has taken the required "hard look" at the potential environmental impacts, an agency can rely upon the analysis provided in the PEA or PEIS." *CEQ Programmatic NEPA Guidance at 35.* With respect to the general misunderstanding regarding the purpose and scope of programmatic reviews relative to subsequent tiered reviews, the appropriate question is not if there is a significant impact from the proposed action, but if there is a new significant impact that was not already considered and addressed in the programmatic review. If there are no new significant impacts, an EA may be appropriate instead of an EIS so long as the aspects of the proposed action that involve significant effects have not changed since the PEIS, and the agency presents its reasons for determining that the effects and potential mitigation measures were adequately considered in the PEIS. *Id.*

To meet this objective, tiered reviews should focus narrowly on the difference between impacts analyzed at the programmatic level and impacts resulting from site-specific action that were not considered in detail in the programmatic review. To do otherwise invites agencies to reinvent the wheel at each stage making programmatic reviews less, rather than more efficient. Case studies of where this has been successfully conducted would be helpful in better understanding the utility of programmatic reviews as well as when and if they should be used by implementing agencies.

Fortunately, agencies are afforded considerable deference in whether or not to prepare a programmatic review and courts will defer to their judgment on such a decision, absent a finding that the agency acted arbitrarily and capriciously in failing to conduct a programmatic review. 42 U.S.C. § 4332(C)(v); *Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 24 L.Ed.2d 576 (1976). As such, in the vast majority of cases the decision to prepare a programmatic review under NEPA is not a compulsory one, and BLM should determine when and how to use programmatic and tiered reviews in terms of doing what is pragmatic to save time and resources while fulfilling statutory obligations.

In addition to the principle that a programmatic NEPA review should only be considered when it saves time and resources, site-specific analyses should only be considered subsequent to a programmatic document if an additional level of analysis is needed. "Although a programmatic EIS may often be inadequate relative to an individual action, there is no reason to require a site-specific statement that would merely duplicate the programmatic EIS. The guidelines set down by the Council on Environmental Quality require subsequent statements on individual actions only when significant environmental impacts were not adequately evaluated in the programmatic statement. 40 C.F.R. section 1500.6(d)(1) (1978). NEPA's "rule of reason does not require rethinking of everything all the time." *Sierra Club v. Andrus*, 189 U.S.App.D.C. 117, 128, 581 F.2d 895, 906 (D.C.Cir. 1978). In MPIRG I, supra, 498 F.2d 1314 (8th Cir. 1974), the Eighth Circuit noted that a programmatic EIS could, if properly prepared, obviate the need for a site-specific EIS." *Ventling v. Bergland*, 479 F.Supp 174(1974).

When site specific analysis is appropriate, the programmatic review from which subsequent reviews are tiered need not be exhaustive. An EIS assessing environmental consequences at the programmatic stage of a multi-step project can properly discuss mitigation measures in general terms when the specifics remain uncertain, leaving for later a more complete analysis of environmental consequences associated with a particular site-specific project. *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038 (10th Cir. 2011). The Supreme Court has held that "it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989). Agencies are not required to nor are they capable of developing and analyzing the litany of mitigation strategies possible for a broad range of yet to be determined site specific projects. This ruling also acknowledges the dynamic nature of mine planning and anticipates that some minor modifications of a mine plan or Plan of Operations is permissible during the NEPA review process.

2. Avoiding Duplication and Incorporating by Reference

As the 2012 CEQ guidance, "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act," points out, agencies have a significant opportunity to avoid duplication and promote a more timely NEPA process by adopting, in whole or part, another agency's EIS or incorporating material by reference. Specifically, the guidance states that 'NEPA reviews should coordinate and take appropriate advantage of existing documents and studies, including through adoption and incorporation by reference." DOI should utilize this practice whenever possible to ensure a more timely and less resource-intense NEPA process.

3. Functional Equivalence Provides an Opportunity to Improve Efficiencies

Taking the avoiding duplication concept discussed above one step further, DOI should consider adoption of the "functional equivalence" concept. To the extent that adoption of the functional equivalence doctrine requires legislative amendments to NEPA, BLM should work with CEQ to make the appropriate recommendations to Congress.

When NEPA was enacted in 1969, the United States had very few laws in place to protect the environment. NEPA's goal was to ensure that information on the environmental impacts of any Federal, or federally funded, action is available to public officials and citizens before decisions are made and before actions are taken. Since NEPA's enactment, numerous environmental laws have been enacted that prescribe substantive goals, standards and procedures to prevent or minimize adverse impacts to environmental resources, including the Clean Air Act (CAA), Clean Water Act (CWA), the Safe Drinking Water Act (SDWA) and the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), and the Resource Conservation and Recovery Act

(RCRA). These statutes apply to all industries, including mining. Other laws, such as the Federal Land Management and Policy Act (FLPMA), the Surface Mining Control and Reclamation Act (SMCRA), and the Forest Service Organic Act, have produced comprehensive environmental programs requiring planning, analysis and performance for mining operations in order to protect a wide range of environmental resources. These laws and their corresponding regulations require a thorough analysis of the possible environmental effects of proposed projects and appropriate mitigation measures.

BLM as well as CEQ should fully recognize the comprehensive environmental analyses required by the body of law that post-dates NEPA. Today, NEPA duplicates and distracts from many of the specific statutes that provide for plans and analyses of environmental effects for projects that require permits or authorizations. NEPA was intended to require that federal agencies take a "hard look" at the environmental consequences before taking major actions. These other specific statutes and their permitting requirements now supply the hard look and allow development only when it meets established environmental standards.

Federal mining plan approval of a coal mining permit following a leasing decision under the Mineral Leasing Act (30 U.S.C. Section 1201-1328) and issuance of a state mine permit is an example where the substantive requirements of SMCRA fulfill, or even exceed, the data collection and analysis requirements of NEPA. Under SMCRA's system of cooperative federalism, Congress has permitted state government to administer a comprehensive program of environmental analysis and protection as a condition of permit issuance. Where federal lands are involved, the Assistant Secretary must issue a further mine plan approval. Under this circumstance, the leasing-level NEPA analysis may be tiered to the federal mine plan site specific analysis to allow an EA rather than an EIS. Further, the state permit review may serve as a "functional equivalent" of the federal mine plan review, where both the state and federal authority follow essentially the same requirements of SMCRA.

NMA therefore recommends that BLM work with CEQ in adopting the functional equivalence doctrine. The federal courts developed the "functional equivalence doctrine" to exempt federal agencies from conducting separate NEPA analyses when other "substantive and procedural standards ensure full and adequate consideration of environmental issues." The functional equivalence standard is met when: (1) the substantive standard of the enabling legislation emphasizes the protection of the environment; (2) the procedural standards of the enabling legislation provide for full and thorough consideration of the environmental issues involved in the agency's action, including opportunity for agency and public comment; and (3) the agency's responsibilities are judicially reviewable. Under the functional equivalence doctrine, as long as an agency's environmental assessment satisfies the primary goals of NEPA, duplicative NEPA regulatory hurdles can be avoided. The functional equivalence doctrine could be incorporated as a categorical exclusion along with those currently set forth by the Department of Interior at 43 C.F.R. Part 46.

Federal permits required for mining operations under other laws administered by BLM, the Office of Surface Mining (OSM), the United States Forest Service (USFS), and other agencies cover the same environmental concerns as the NEPA review, leading to duplicative environmental analyses. The regulatory programs established under FLPMA, SMCRA, and the Forest Service's Organic Act all provide environmental performance and reclamation standards that minimize and mitigate environmental impacts from mining operations. The breadth of environmental standards embedded in these permitting schemes assures that the responsible federal agencies consider the environmental impacts of granting permits for mining operations. Moreover, this permitting process is further supplemented by additional permit requirements under the major environmental laws, including the Clean Air Act, Clean Water Act and Safe Drinking Water Act. Indeed, these permitting processes for mining operations include the integration of these resource specific environmental laws into the mine planning and operations. Altogether, these laws and regulations provide a rigorous framework for supplying even a "harder look" than NEPA, both substantively and procedurally, at the potential environmental effects of federal decisions to grant permits or authorizations for mining projects. They also provide an opportunity for public participation and judicial review.

4. Consolidation of NEPA and Other Processes

NMA strongly supports consolidation of processes whenever possible to reduce delays and eliminate duplication of effort. Such consolidation is consistent with key executive orders and CEQ regulations many of which are currently incorporated in the DOI rules at 43 CFR Part 46. For example, Executive Orders 12291 and 12866 counsel agencies to minimize duplication, overlap, and conflict with other agencies when developing policies or promulgating rules. In addition, the CEQ regulations generally advise integration of analyses and processes to avoid duplication. *See* 40 C.F.R. § 1502.25 (requiring integration of NEPA with environmental analyses required by other federal statutes). *See also* 40 C.F.R. § 1506.4 (encourages combination of NEPA environmental documents and with any other agency document to reduce duplication).

The Council on Environmental Quality (CEQ) and the Advisory Council on Historic Preservation (ACHP) released a handbook on coordination of environmental reviews under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA): "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106". Both agencies have regulations and policies promoting coordination of these reviews but the handbook is the first joint effort to compile best practices for achieving more efficient reviews.

Specifically, the handbook provides advice on implementing provisions added to NHPA section 106 regulations in 1999 that address both coordination of the NEPA and NHPA section 106 reviews and the substitution of NEPA reviews for the section 106 process.

The key concepts for integration of the NEPA and section 106 procedures are outlined in the handbook:

- Integrate the NEPA and section 106 processes as early as practicable;
- Educate stakeholders on the benefits of integrating the NEPA processes;
- Develop comprehensive planning schedules and tracking mechanisms to keep the NEPA and section 106 processes synchronized.
- Develop comprehensive communication plans that specify whether the agency will use coordination or substitution to maximize opportunities for public and consulting party involvement and minimize duplication of effort by agency staff.
- Use NEPA documents to facilitate section 106 consultation and use section 106 to inform the development and selection of alternatives in NEPA documents.
- Develop an integrated strategy to accomplish specialized studies to provide information and analysis needed under NEPA and section 106.
- Complete section 106 and the appropriate NEPA review (categorical exclusion, environmental assessment or environmental impact statement) before issuing a final agency decision.

As detailed in the handbook, substitution of NEPA reviews for section 106 purposes is specifically contemplated under the ACHP regulations. As long as certain standards are met, 36 CFR 800.8(c) allows agencies to use the NEPA review to comply with section 106 as an alternative to the process set out in 36 CFR 800.3-800.6. The agency must first notify ACHP and the State or Tribal Historic Preservation Officer (SHPO/THPO) of its decision and provide appropriate documentation regarding potential effects to historic properties and how adverse effects are resolved.

CEQ recommendations for coordination of processes is not limited to the NHPA section 106 consultation process. The aforementioned 2012 CEQ guidance indicates:

> Agencies must integrate, to the fullest extent possible, their draft EIS with environmental impact analyses and related surveys and studies required by other statutes or Executive Orders. Coordinated and concurrent environmental reviews are appropriate whenever other analyses, surveys, and studies will consider the same issues and information as a NEPA analysis. . . A coordinated or concurrent process may provide a better basis for informed decision making, or at least achieve the same result as separate or consecutive processes more quickly and with less potential for unnecessary duplication of effort.

5. Agency Coordination

Coordination with eligible cooperating agencies should be early, thorough, and reliable. Invitations to eligible cooperating agencies should be sent as early as possible in the process. This includes not only other federal agencies with subject matter expertise and

those likely to become involved otherwise at a later point, but states and tribes as well. Doing so avoids a situation in which federal agencies with a regulatory interest in the matter later insert themselves into and delay a process that is well under way. Similarly, states and tribes often have significant interest in the outcome of BLM planning and NEPA analyses within their borders and should be invited to participate early to avoid subsequent delays. BLM can also benefit from the insight and information offered by states which may not be otherwise available to BLM.

Future proposals to strengthen adherence to existing cooperating agency requirements should include safeguards to prevent delays that could be caused by lack of timeframes for responding to an invitation to participate. BLM should consider policies that bar governmental entities that decline an opportunity to participate from later changing their mind in the final hour and thereby delaying the process. Fair and adequate timeframes for governmental entities to provide input on the substance of the NEPA analysis itself are necessary. The importance of an orderly cooperating agency process was underscored by the NAS Report which recommended that DOI secure high-level commitment from other agencies to participate fully in the NEPA process when they are cooperating agencies. BLM should enter into agreements with cooperating agencies involved in the NEPA process establishing firm schedules, staff commitments, and degree of involvement. To avoid delays that may occur due to timeframes for developing such agreements, BLM should establish model agreements to facilitate cooperation, coordination and timely interaction between permitting agency and other federal, state, tribal or applicant stakeholders. In addition, invitations and responses to participate should be made part of the public record.

III. Mitigation Should Be Consistent with Existing Law and Guidance

During the previous administration we saw a disturbing shift away from balanced, multiple-use land management and towards mandatory compensatory mitigation. These requirements, triggered by a presidential memorandum and echoed in a host of departmental and agency directives, were driven by the new requirement to seek a "net resource benefit" or "no net loss" of resources. Understanding the flaws in this previous policy and how it was implemented in practice can help guide BLM towards planning framework that it more efficient and consistent with the law.

Mandated sequencing and the use of the two above-referenced standards are not consistent with the Unnecessary or Undue Degradation (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 which is why 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 reclamation and 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
(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 BLM and operators to develop other creative mitigation measures that might be implemented when circumstances warrant.

Given the flexibility afforded by FLPMA and the existing 3809 regulations, unnecessary compensatory mitigation tools such as Habitat Equivalency Analysis (HEA) should be avoided. HEA intends full compensatory mitigation which is not compelled by NEPA and is inconsistent with FLPMA which clearly contemplates some impacts from mining. Furthermore, HEA is not scientifically based. FLMPA recognizes that mining and other multiple uses on public lands have certain acceptable impacts but that BLM is required to prevent unnecessary or undue degradation of the lands, not any impact at all.

IV. Reform is Necessary to Curtail Frivolous Litigation

Although there is much BLM can do to refocus the NEPA and planning process to be more efficient, effective, and transparent there are limitations on what can be achieved absent litigation reform to curtail frivolous lawsuits lodged to deliberately delay the process. Litigation and the fear of litigation is a primary driver in multi-year NEPA delays. Although a host of reasons have been given for ubiquitous NEPA delays, perhaps one of the most prevalent is the persistent fear of litigation and the ongoing effort to hit the moving and often unattainable target of litigation avoidance. Federal agencies often stray from the existing CEQ recommendations to stay within a 150- page limit for a normal EIS and 300 pages for a complex EIS. There seems to be so much focus on the NEPA process and endless analyses of any conceivable impacts and alternatives that federal agencies often forget that at the end of the day a decision is required. BLM also needs to remind decision-makers within the agency that NEPA is intended to be a disclosure process, not a decision-making process in itself.

The drift away from concise NEPA documents may be due to the agencies' attempts to "bullet proof" the environmental analyses in the mistaken belief that exhaustive analyses will prevent litigation. In this era, no level of thoroughness will avert litigation in the face of a determined plaintiff. For example, the over-1000 page supplemental EIS prepared in conjunction with the Marigold Mine Millennium Project in Nevada did not deter a challenge to the EIS. Furthermore, this NEPA "analysis by paralysis" has obscured NEPA's original purpose. Certain tools can and should be used to decrease the risk of litigation. However, BLM officials' focus should be on following statutory obligations, adhering to established timelines and moving forward with the process.

Perhaps no single reform effort would better streamline and expedite the NEPA process than litigation reform to disincentivize frivolous or purely obstructionist lawsuits filed to stall otherwise viable projects. While this effort will likely require a legislative solution, BLM should advocate common sense reforms to limit the payment of attorneys' fees, more timely filing of challenges, and appeals reform. These changes and others could help limit the litigation and refocus the NEPA and planning process on evaluating impacts and moving forward with projects that are NEPA compliant and consistent with the multiple use objectives of FLPMA.

V. Conclusion

NMA appreciates the opportunity to submit these comments and looks forward to working with BLM to reduce duplicative and disproportionate analyses; help state and local governments tribal partners, and other stakeholders understand and participate in the planning process; foster greater transparency in the NEPA process; build trust and better integrate the needs of state and local governments, tribal partners, and other stakeholders; reduce litigation and associated project delays; and right size environmental analysis to more closely match the level of NEPA analysis to the scale of the action being analyzed.

If you have any questions regarding these comments, please contact me at ksweeney@nma.org or (202)463-2627.

Sincerely,

Katie Sweeney