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Via eRulemaking Portal

Director (630), BLM
U.S. Dep't of the Interior
1849 C Street NW, Room 2134LM
Washington, DC 20240

Re: RIN 1004-AE39, Proposed Amendments to Resource Management Planning Regulations

The Citizens' Advisory Commission on Federal Areas (Commission; CACFA) appreciates the opportunity to review and comment on the regulatory amendments being proposed by the Bureau of Land Management (Bureau; BLM) relating to the development, approval and implementation of its resource management plans (RMP). The Commission has long encouraged significant and necessary changes to the RMP planning process, among other things, to appropriately limit and adequately justify user restrictions and to make it easier for the public to meaningfully participate in the management of federal public lands in Alaska.

Unfortunately, that is not what the proposed rule is likely to accomplish and, in fact, the effect is more likely to add to the growing list of necessary changes. The Commission requests the proposed rule be withdrawn and revisited.

PROCESS ISSUES AND CONSIDERATIONS

The Commission strenuously disagrees that Categorical Exclusions are the appropriate means of compliance with the National Environmental Policy Act of 1969 (NEPA), its implementing regulations and federal guidelines. While it would present less of a quandary, the Commission even questions whether an Environmental Assessment would be adequate given the nature, intent, scale, scope and impact of the proposed rule. Under the law, an Environmental Impact Statement (EIS) would be required to ensure NEPA compliance.

The regulations governing NEPA at 40 CFR §1508.18 are clear that new or revised rules and the implementation of policies are prime examples of "*major federal actions*." An EIS is required where a major federal action will significantly affect the quality of the human environment. Under 40 CFR §§1508.3 and 1508.27, "*significantly affect*" includes establishing "*a precedent for future actions with significant effects*" and actions that may violate "*Federal, State, or local law*." Under 40 CFR §1508.14, the "*human environment*" includes "*the natural and physical environment and the relationship of people with that environment.*"

The proposed rule satisfies each of these requirements, and more, particularly in Alaska. For instance, the rule is undeniably precedent setting, viably threatening a sea-change in how Alaskans, federal agencies, state agencies and the Bureau work together to manage hundreds of millions of virtually contiguous acres. Furthermore, the proposed regulations and the plans developed under them could severely compromise Congress' intent for how public lands in

Alaska will be managed, particularly regarding how public uses and needs will be balanced and the degree of participation afforded to state, local and tribal governments. If even one of these things is something we could credibly argue about, an EIS is warranted.

Precedent Setting

According to 40 CFR §1508.27(b)(6), when evaluating the intensity of an impact, the Service needs to consider the "*degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration*." This sums up multiple aspects of the proposed amendments quite well. The rulemaking is not a mere recitation of statutory factors and considerations into a more usable form. The proposed rule significantly expands on what Congress provided in statute and, in some instances, completely revises a planning protocol that has been in effect for decades and *is based on the exact same statutes*. And, despite the rule's considerable length, the rationale for such a shift proves elusive, particularly owing to the repeated protestations that it merely clarifies administrative procedures.

One example of how the proposed rule satisfies criteria at 40 CFR §1508.27 is in its definitions of "*multiple use*" and "*sustained yield*" – which essentially redefine the entire purpose for resource management planning under the Federal Land Policy and Management Act of 1976 (FLPMA). Under 40 CFR §1508.27(b)(7), "[s]*ignificance cannot be avoided by . . . breaking* [an action] *down into small component parts*," such as reinventing a statutory mandate simply by defining a few key terms. The fact the change itself is small does not make its ultimate effects insignificant. The proposed rule also takes recent mitigation policies, developed without public involvement or a statutory basis and currently lacking the force of law, and effectively makes them regulatory requirements. These two examples would, if adopted, establish a decisive precedent to be referenced for both significant future actions and critical future considerations.

Violation of Federal, State or Local Law and Requirements

Consideration of 40 CFR §1508.27(b)(10) involves whether the proposed rule threatens violation of federal, state or local laws and requirements related to the protection of the environment. This makes sense since EISs are required to analyze conflicts between proposed actions and "*the objectives of Federal, regional, State and local . . . land use plans, policies and controls*" and how those conflicts might be reconciled. See 40 CFR §1502.16(c). Reconciliation can take the form of adopting state plan components, particularly when developed to implement federal programs (e.g., best management practices in Clean Air Act permitting), or accommodating the management of natural resources under established state programs (e.g., fish and wildlife).

The Commission notes several instances where the proposed rule could run afoul of or threaten a violation of federal law, including FLPMA and the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). More detail on this as a general concern is provided below, but there are many specific examples, as well.

For instance, FLPMA requires the Secretary to "*keep apprised of State, local, and tribal land use plans*" and "*assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands*." However, under the proposed rule, the burden on identifying plan inconsistency issues, and considering how to best address them, is completely shifted from the Secretary to the affected state, local or tribal government. See proposed 43 CFR §1610.3-2(a)(2). This may even include having to convey an interest to the BLM beforehand to ensure notification of opportunities for public involvement. See 43 CFR §1601.0-5 (definition of "Public") and proposed §1610.2-1(d). This passive and purely responsive role for the BLM bears little resemblance to the one mandated under FLPMA.

As for state or local laws and requirements, even if no direct violations could be found in the proposed rule itself, the likelihood of a violation is vastly increased under the system it would create. For example, while the Commission is aware of problems with the current Analysis of the Management Situation (AMS) process, including length, complexity and limited review, it is superior to the proposed Planning Assessment process in ensuring consistency and conformity with other laws and requirements. During AMS development under current regulations at 43 CFR §1610.4-4, the Bureau must coordinate with state and local governments to determine "*specific requirements and constraints to achieve consistency with policy, plans and programs of other Federal agencies, State and local government agencies and Indian tribes*." Under the proposed rule, not only will any marginally related plan coordination fail to include policies and programs, but state and local governments are openly treated as members of the public. See, e.g., 43 CFR §1601.0-5 (definition of "Public"); proposed §§1610.3-2(a) and 1610.4(a).

By removing the need to be consistent with approved and adopted resource-related programs and policies, and simply focusing on plans, the proposed rule inexplicably cripples the consistency determination process to the detriment of responsible landscape-level management. More importantly, this effective revision of federal, state, local and tribal government relationships, and reduced emphasis on consistency, not only warrants initiation of an EIS but also stands in stark contrast to the proposed rule's stated goals of "*landscape-scale management approaches*" and "*active coordination and collaboration with partners and stakeholders*."

The Commission requests the Bureau withdraw the proposed rulemaking in its entirety and, if the Bureau still wishes to proceed, initiate the development of an EIS to comply with NEPA. The Commission further requests the maximum amount of public process be provided *in every affected state* to ensure adequate and thorough consideration of the numerous potential impacts and consequences at an appropriate scale. While absolutely certain either withdrawal or an EIS is the only lawful and responsible path forward, the Commission offers the following comments to reinforce that determination and explore other concerns to inform that new path.

GENERAL COMMENTS ON CHANGES AND ADDITIONS

Parts of the proposed amendments hold the promise for much-needed changes, but how or if those changes will manifest is entirely unclear. Even though components of the "Planning 2.0" paradigm have already been integrated into two RMP revisions in Alaska, we have yet to see that promise materialize and are greatly burdened by new concerns and issues. Further, many parts of the proposed amendments could be counterproductive to planning process improvements or, in some cases, present an unacceptable deviation from statutory authority and intent. The following comments present only a few examples to demonstrate the basis for these concerns and hopefully promote contemplation of how best to pursue a more workable planning process.

Potential Improvements and Related Concerns

The proposed rule aims to create more opportunities for public involvement early in the process. Real-time previews of actual language and an ability to present insights and information in time to influence the plan are beneficial, useful and welcome additions to the development process. However, the proposed rule stops short of ensuring these opportunities will operate in that way.

For example, while the proposed regulations at 43 CFR §§1610.4(a) and 1610.5-1 require opportunities for the public to provide information, suggestions and viewpoints to inform the Planning Assessment and other draft plan elements, there is no indication of what form those

opportunities will take. The Commission has been told many times that the public "can always call or write" to the BLM with suggestions. While that is good to know, we hope that is not the "opportunity" being envisioned. Other proposed regulations describe certain plan elements that will be "*made available for public review*." However, there is no mention of whether comments will be solicited or, if they are, how they will be received, responded to and incorporated.

The partial roll-out of this early public involvement process in the Bering Sea-Western Interior RMP amendment provides even more grounds for skepticism regarding the effect of this change. In spring of 2015, public comments were taken on a number of preliminary planning documents. The Commission appreciatively availed itself of this review opportunity and encouraged many others to do the same. However, over a year later, we have no idea how those comments were received or what impact they had on the draft plan's development, if any.

In August 2015, an almost 700-page "Comment Summary Report" was quietly posted to the planning website. Despite its length and robust, objective analyses of submitted comments, actual responses to those comments were neither hinted at nor provided. Only those agency responses that were put on the record at a public meeting were included. The report further advised that the next step would be to develop the draft RMP/EIS, meaning the public is unlikely to see how their comprehensive and detailed comments will be addressed until the draft plan is released. No provision in the proposed rule is made for responses to any preliminary comments before or within the draft RMP/EIS. The additional opportunity for public involvement espoused by the proposed rule is basically just a series of previews and scoping with a bit more substance. While that may have some utility, it is not an "opportunity," other than for considerable amounts of time to be expended with no guarantee of thoughtful consideration, influence or results.

Moreover, under the proposed rule, the public will have significantly less time to review the draft RMP. This is true even though the public now has to search for and discover how their previous comments and others were incorporated, analyze how early release drafts were changed, read additional materials that were not previously released, consider how everything fits together and develop a whole new batch of meaningful comments. In a typical draft RMP for a planning area in Alaska – dense, lengthy and covering enormous areas – this is not remotely achievable in the current required timeframe, and would be effectively impossible in the proposed shorter one.

Potential Obstacles to Improvements

The proposed rule seems to stem from and impose an entirely new agenda for land and resource management that favors preservation over use. While never explicitly stated, nor openly refuted, echoes of this policy shift are infused throughout the rule and associated documents. For example, the proposed regulation at 43 CFR §1610.4(c), describing how conditions in the planning area will be assessed, contains a markedly disproportionate emphasis on considering resource values that are or would be impacted by use. The undertone of establishing "non-use" as the desired condition can be a bit subtle until compared with the existing regulations being replaced. The current assessment process at 43 CFR §1610.4-4 provides, as its foundational purpose, a determination of the resource area's ability to respond to identified issues and opportunities, and reinforces the need for the assessment to be "*consistent with multiple use principles*." Language along these lines is undermined or absent in the proposed amendments.

Even where this new agenda presents an opportunity for progress, implementation under the proposed rule borrows little from past practices and lessons learned. Inventing new procedures and considerations without reverence for what works is unnecessary, unjustified and will only serve to exacerbate existing problems or replace them with new problems.

More often, however, this new agenda takes things that do work and eliminates them. Compared to the proposed rule, current regulations do a much better job capturing enforceable planning requirements and outcomes, whether required by law or simply intuitive. For instance, existing regulations at 43 CFR §1610.4-4 require consideration of "*estimated sustained levels of the various goods, services and uses that may be attained . . . .*" The proposed rule eliminates "*uses*" from this consideration, explaining it is included in estimates for "*goods*" and "*services*," and focuses only on attainment within the planning area. This narrow interpretation of potential land uses is alarmingly inaccurate. Not every use of the land is related to obtaining goods and services from that land, and the proposed changes negate a warranted examination of this fact.

Deviation from Statutory Authority and Intent

The definitions, provisions and focus of the proposed regulations stray significantly from what Congress articulated in FLPMA Title II and intended in ANILCA. Existing statutory direction is either being seized and repurposed, interpreted to provide additional authorities, or given short shrift, whatever seems necessary to promote a very new, preservation-based policy objective for the planning and management of federal public lands.

In addition to the more specific examples provided elsewhere in these and other comments, the very essence of these statutes is also being compromised. Direction in FLPMA is focused on accurate, unbiased inventories of public land in order to put it to the most responsible and publically beneficial use. The BLM is directed to "*consider present and potential uses of the public lands*" and to "*weigh long-term benefits to the public against short-term benefits*." "*Scarcity*" and "*special values*" are not viewed in isolation but in context, and the "*availability of alternative means and sites for realization of those values*" must be considered to temper the preservationist impulse that would interfere with the BLM's multiple use mandate.

The effect of implementing the proposed amendments would work against this direction. The evaluations of Areas of Critical Environmental Concern and less formal conservation-based designations downplay the need to consider resource values in context. Amended planning considerations focus on present and historic uses, removing "uses" from forecasting and estimated sustainability analyses. Potential "uses" of the land predominantly focus on mitigation and preservation of the status quo.

As noted in the preamble, statutory direction in FLPMA requires "*management be on the basis of multiple use and sustained yield unless otherwise specified by law*." As noted earlier, "multiple use" is not a presumptive foundation of the proposed amendments. Granted, the term is retained in proposed modifications to regulatory "*objectives*," but it is notably diluted. The preamble describes retention as consistent with FLPMA but asserts a need to deemphasize multiple use in light of the language in FLPMA that competing considerations can be "*otherwise provided by law*." This global and indiscriminate accommodation by Congress is inherent and obvious; it did not and does not warrant a mention. The only rational purpose for the changes, especially the removal of "*multiple use*" references from the regulatory scheme, is to depreciate the concept.

This implicit policy shift away from "*multiple use and sustained yield*" and towards promoting conservation and preservation does not just deviate from statutory direction in FLPMA; it also severely undermines the great compromise of ANILCA. The multiple use mandate on general public lands managed by the BLM provided an essential counterweight to conservation-based designations when the balance was being struck. Proposed amendments destabilize some very important accommodations for the social and economic needs of Alaskans.

GENERAL COMMENTS ON EXCLUSIONS

The proposed rule fails to articulate any salient problems with the current process, certainly none that might necessitate a 200+ page assessment and a 60+ page rulemaking package to resolve. This does not mean there are no problems, or that known problems are undeserving of a remedy, it simply means the proposed rule makes little to no significant strides towards problem solving.

For example, a typical draft RMP/EIS in Alaska is enormous, complex, dense, redundant, covers millions of acres of largely undeveloped land in a complex ownership mosaic and takes multiple years to put together. Alaskans ability to access and use the land is essential to the sustainability and perpetuation of our economy and culture. We also have incredibly unique geographical, ecological and legal distinctions to accommodate. Needing a month or more, at 40 hours/week, just to read through a draft RMP/EIS is perfectly understandable, with any analysis and comment development necessitating at least another month or more. This would be the bare minimum amount of time required for a seasoned bureaucrat or other professional to develop at least some meaningful comments on the plan. Members of the public and others may need substantially more or less time depending on their level of interest and faith in the process up to that point.

Not one of these things is resolved in the proposed rule. Resulting plans are likely to be longer and take more time. Planning areas are larger and land ownership patterns even more complex. As mentioned above, there will be more things in the draft RMP/EIS that need to be reviewed since it is the only discernable follow-up to new advance public participation opportunities. The proposed amendments threaten a shifting balance in how our ability to use the land will be viewed, limited and accommodated. And the time required to review the draft plan is shorter.

If the NEPA process had been adhered to, or even if public hearings had been held in Alaska, most if not all of these concerns, and more, could have been integrated into the rulemaking.

CONCLUSION

In summary, the Commission requests the Bureau stop the rulemaking process at this point and initiate the development of an EIS to adequately explore and explain the consequences of this major process shift. In the alternative, the Commission requests either a total withdrawal of the proposed rule or that Alaska be immediately exempted and that separate efforts be initiated to ensure land use planning proceeds appropriately and with due consideration for the distinctive laws, circumstances, needs and values of the federal public lands and land users in Alaska.

Exempting Alaska at this stage is fully consistent with the Bureau's stated objectives, and is a warranted prelude to a successful regulatory scheme. Short-sighted management challenges and complications are inherent in a one-size-fits-all approach of this magnitude. Having a resource management planning process that is at least somewhat regional in nature and scope is entirely appropriate given the diversity of our nation's public lands. And in whatever form this regional approach would take, Alaska would almost certainly be its own region every time.

Almost one-third of all BLM-managed lands are in Alaska – tens of millions of acres with an indisputable uniqueness in fact and also in law. Despite the current predilection for "national" rulemakings, having Alaska as the exception is simple common sense. Trying to create or force a "consistency" with the rest of the nation evinces a denial of the very real circumstances present on the public lands being inventoried, which cannot possibly be the favored foundation of a land

use plan. Alaska has a history of statutory, administrative, judicially created exemptions from national initiatives, for these and other reasons, and the Commission strongly recommends its propriety with respect to the proposed rule.

Many elements of the proposed rule can be informally incorporated and tested to select an ideal and workable management planning scheme for BLM lands in Alaska. Other solution-based approaches can also be developed and ground-truthed, following adequate consultation and public outreach. Considering the vast majority of the land at issue is in long-term or even permanent federal ownership, there really is no hurry, and we can even save time avoiding the consequences of rushing ahead with an approach developed for other places and other problems.

Thank you for your consideration of these comments, as well as those from many other Alaskans, organizations and industries with roots in our amazing state. The Commission would welcome the opportunity to collaborate on amendments to the planning process in Alaska that could result in meaningful, much needed changes and mutual advancement of shared goals and opportunities. If you have any questions, concerns or would like more information, please do not hesitate to inquire.

Yours faithfully,

Sara Taylor
Executive Director

cc: Marty Rutherford, Acting Commissioner, Alaska Department of Natural Resources
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