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March 11, 2014

The Honorable Sally Jewell
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RE: DRAFT – REGIONAL MITIGATION MANUAL SECTION 1794 AND BLM INSTRUCTION
MEMORANDUM 2013-142

Dear Secretary and Director:

This letter outlines concerns held by Public Lands Advocacy (PLA), International Association of Geophysical Contractors (IAGC), Petroleum Association of Wyoming (PAW), Colorado Petroleum Association (CPA), Montana Petroleum Association (MPA), North Dakota Petroleum Council (NDPC), Western Energy Alliance and the Independent Petroleum Association of America (IPAA) regarding Bureau of Land Management (BLM) Instruction Memorandum No. 2013-142 (IM) and preparation of Draft Regional Mitigation Manual Section 1794 (Draft MS).

- ❖ PLA is a non-profit trade association whose members include major and independent petroleum companies as well as other non-profit trade and professional organizations that have joined together to promote the interests of the oil and gas industry relating to responsible and environmentally sound exploration and development oil and gas resources on federal lands.
- ❖ IAGC is the international trade association which represents the industry that provides geophysical services (geophysical data acquisition, seismic data ownership and licensing, geophysical data processing and interpretation, and associated services and product providers) to the oil and gas industry.
- ❖ CPA is a non-profit organization and the only statewide oil and gas association that represents all sectors of Colorado's oil and gas industry before state, regional, and federal governmental entities.
- ❖ PAW is Wyoming's largest and oldest oil and gas organization dedicated to the betterment of the state's oil and gas industry and public welfare. PAW members, ranging from independent operators to integrated companies, account for approximately ninety percent of the natural gas and eighty percent of the crude oil produced in Wyoming.

- ❖ NDPC is a trade association representing more than 500 companies involved in all aspects of the oil and gas industry including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in ND, SD and the Rocky Mountain Region. Our members produce 98% of the 243 million barrels of oil produced in ND in 2012.
- ❖ WEA represents more than 430 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in Colorado and across the West.
- ❖ IPAA represents thousands of independent crude oil and natural gas explorers and producers and is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy.

The recent IM and the Draft MS represent a significant departure from historic BLM policy which places a priority on mitigating impacts of projects on public lands onsite. The Department of Interior (DOI) and BLM are now seeking to adopt a revised policy that we fear might lead DOI and BLM to favor project mitigation outside a project area of impact at a regional scale. We are concerned that these new objectives may constrain the interests of local communities, public land users, and the states that rely heavily upon revenue and products generated from public lands by imposing more costly and burdensome requirements on project proponents.

SIGNIFICANT DEPARTURE FROM EXISTING POLICY

The Draft MS describes regional mitigation as *“a landscape-scale approach to mitigating impacts to resources and values managed by the BLM, from authorizations approved by the BLM...A regional approach to mitigation occurs across the landscape and focuses on attaining the highest mitigation benefit, regardless of land ownership.”* Both the IM and the Draft MS create profoundly altered policies and procedures that would impose newly created regional off-site mitigation strategies on public land users. In 2011 when ruling on *Western Energy Alliance v. Ken Salazar*, a Wyoming District Court judge overturned BLM’s policy IM 2010-118 regarding the Energy Policy Act Section 390 Categorical Exclusions because BLM had failed to conduct the proper rulemaking necessary to implement a substantial policy change. Whereas BLM had argued that its instruction memorandum was simply a policy statement, the judge ruled that the requirements imposed by the IM were substantial and could not be implemented without the proper public notice and opportunity to comment. We believe imposition of a new requirement for regional mitigation also exceeds the mandate of existing regulations or statutes through mere policy interpretation rather than through the rulemaking process. In accordance with the laws discussed below, we urge that before this new policy is adopted and implemented, it be vetted in accordance with regulatory review requirements.

LEGISLATIVE RULE UNDER THE ADMINISTRATIVE PROCEDURES ACT

The Draft MS seeks to modify current authorities granted under statutes such as the Federal Land Policy and Management Act (FLPMA), the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), among others, by decreeing new mitigation requirements not only on public lands, but also on private lands. In view of the scope of these proposed revisions to existing policy and procedures, we have been advised that the Draft MS would actually result in substantial alteration of existing NEPA procedures invoking legislative authority without benefit of the required procedures. BLM is attempting to make changes tantamount to a “legislative rule.” As such, in seeking to adopt the Draft MS, BLM must comply with the Administrative Procedure Act (5 USC Section 553) (b) which requires the

agency to issue a “*General notice of proposed rulemaking shall be published in the Federal Register,*” and (c) “*the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.*”

FLPMA ALSO REQUIRES A RULEMAKING AND OPPORUNITY FOR PUBLIC COMMENT

FLPMA requires the Secretary to “*...promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act...*” Since BLM is contemplating a substantial revision in the manner in which it manages activities on public lands by establishing a new regional mitigation program, the agency must also comply with FLPMA at Section 309, which requires the agency to afford the public full opportunity to comment on all management, programs, policies and guidelines: *(e) In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.*” [Emphasis Added]

As proposed, adoption of the new program procedures and requirements outlined in the Draft MS will substantially impact the economic viability of many projects proposed on public lands (including oil and natural gas exploration and development activities). If implemented in its present form it would likely result in the imposition of new limits on the ability of private landowners to manage their own holdings in areas where private holdings and public lands adjoin or are intermixed. We are concerned it would lead to broad scale regional mitigation requirements that would affect not only federal, but also, state and private lands that would extend the reach of BLM policy to lands over which the agency has no administrative authority. The scope of this policy makes it incumbent upon BLM to publish the Draft MS as a proposed rule for public review and comment while providing an adequate time frame in which to provide such comments before it is implemented. Moreover, during this review process as this rule is promulgated, we encourage BLM to engage state and private stakeholders early in the process.

LEGAL AUTHORITY

BLM cites the following statutes as granting the authority to create these significant new policy actions under the Draft MS:

- The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 et seq.
- National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 et seq.
- Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. 181 et seq.
- Endangered Species Act (ESA), 7 U.S.C. 136, 16 U.S.C. 1531 et seq.
- The Wyden Amendment, 16 U.S.C. 1011.
- Council on Environmental Quality (CEQ) Regulations, 40 CFR 1500-1508.
- Department of the Interior (DOI) NEPA Regulations, 43 CFR Part 46.
- Bureau of Land Management Planning Regulations, 43 CFR Part 1600.

We have found no legal basis for BLM’s purported authority to require regional or landscape mitigation in addition to onsite and compensatory mitigation. For example, the ESA limits mitigation of a federal

action to that which may impact a listed species and provides no additional requirement for regional mitigation. BLM also relies upon FLPMA as its authority to adopt the Draft MS by citing Section 102 (8), managing public lands to protect resource values, Section 202, land use planning, and Section 302, Management of Use, Occupancy, and Development; none of which grant authority for or identify the need for regional mitigation. No justification or the need for this change has been provided or discussed.

While the Draft MS cites FLPMA's requirement to prevent "unnecessary or undue degradation," it fails to consider that this is defined as "*harm to the environment that is either unnecessary to a given project or violates specified environmental protection statutes.*" *S. Fork Band Council of W. Shoshone of Nev. v. United States DOI*, 2009 U.S. App. LEXIS 26329 (9th Cir. Nev. Dec. 3, 2009). The Draft MS evidently assumes that virtually all projects would result in unnecessary and undue degradation and seems intent upon dismissing current mitigation measures, which were expressly designed to avoid this level of degradation, already prescribed in the 2006 Gold Book – Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development. Of primary importance is that none of these procedures cite the need for regional mitigation in order to avoid unnecessary and undue degradation.

NEPA is a procedural statute, which requires public disclosure of proposed decisions and their alternatives, rather than requiring specific environmental outcomes. Fundamentally, NEPA does not require or instruct specific mitigation measures to be adopted that offset the possible impacts of a proposed project. Therefore, BLM's citation of NEPA as a statute that authorizes the adoption of regional mitigation is incorrect.

LACK OF JURISDICTION OVER PRIVATE LANDS

The Draft MS appears to extend BLM's authority to require off-site mitigation on private or state lands when the agency's jurisdiction is limited by statute to public lands. While BLM intends to identify potential mitigation areas through the land use planning process, we are concerned that the agency may seek the purchase of conservation easements or title transfers on private lands as a federal permit condition to offset perceived impacts from projects on public lands. Moreover, the Draft MS does not provide direction in the event a state or private landowner refuses consent to BLM mitigation plans. It is unknown whether a project could be conditionally approved upon BLM recommending alternative mitigation measures.

VALID EXISTING RIGHTS

Federal oil and gas leases constitute a contractual agreement between the lessee and the government, which establish the conditions under which the lease can be utilized. The courts generally recognize that the lease imparts the right to produce and market, protect from drainage, to reasonably develop, further explore, to operate prudently and properly, and to explore based on economic justification. The Draft MS fails to recognize that oil and gas leases are existing rights that cannot be modified by a subsequent land use plan. *Sierra Club v. Peterson*, 717 F.2d 1409, 1411 (D.C. Cir. 1983); *Solicitor's Opinion M-36910*, 88 I.D. 909, 912 (1981). The same limitation applies to any other decision, including one of policy. Moreover, these rights extend to existing facilities and infrastructure and BLM has no authority to require their modification or removal.

MITIGATION IMPLEMENTATION

The Draft MS directs that “*when conditioning a BLM authorization on the performance of mitigation outside the area of impact, the BLM should identify a “reasonable relationship” between the resources and values affected by the authorization and the resources and values benefitted by the mitigation.*” It further states that BLM may condition its approval on the applicant’s commitment “*to perform or cover the costs of mitigation, both onsite and outside the area of impact.*” These statements reveal that BLM has misinterpreted precedent-setting case law requiring “an essential nexus and rough proportionality.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013). In addition, the term “reasonable relationship” is not defined, which leaves it open to broad interpretation and possible misuse.

According to United States Supreme Court ruling *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013), BLM “*may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.*” A definite nexus between a proposed project and resources to be protected through mitigation must be clearly proved, regardless of the type of mitigation selected for implementation. Additionally, BLM must make “individualized determinations” that the mitigation is related in “*both nature and extent of the impact of the proposed development*” as required by both *Koontz v. St. Johns River* and *Dolan*, 512 U.S. at 387. The Draft MS fails to provide the establishment of both a well-defined nexus between the project and the mitigation needed and that the mitigation must be in proportion to the project impacts.

MITIGATION RATIO

The Draft MS provides that BLM can require off-site mitigation at another location to compensate 3:1 or more for one (1) acre of surface disturbance within the project area. There are several reasons why such a ratio is unsuitable. First, no reference material demonstrating this ratio is scientifically substantiated is cited. Rather, it seems to reflect a matter of opinion. Second, case law has established that a 1:1 ratio rather than a 3:1 ratio is sufficient. *Nat'l Parks Conservation Ass'n v. Jewell*, 2013 WL 4616972, 5* (D. D.C. Aug. 30, 2013) Third, there is no requirement to distinguish management between suitable, unsuitable or nonexistent habitat within a region. We also point out that any prescribed mitigation cannot exceed the value of the permit, which is not addressed in the Draft MS.

PERMIT DENIAL

The Draft MS states that if BLM and the applicant cannot reach agreement on the scope and level of mitigation, the authorized officer may deny the application. *Methow Valley Citizens Council*, 490 US, found that “*although NEPA and CEQ regulations require detailed analysis of off-site mitigation measures, there is no basis to conclude that [BLM’s] own regulations must also be read in all cases to condition permit issuance on consideration (and implementation) of such measures.*” As stated in the Draft MS, denial will likely be appealed to the Interior Board of Land Appeals or directly to federal district court. Since BLM recognizes that its ability does not have unilateral authority to deny a permit based upon the inability to reach agreement on BLM’s demands for mitigation is constrained, this section needs to identify the specific conditions under which a permit could be denied.

PRE-IDENTIFICATION OF OFF-SITE MITIGATION AREAS

BLM indicates it has already begun “strategically pre-identifying” Offsite Mitigation Areas without complying with the NEPA or other procedural laws. We point that that the courts have required agencies to comply with NEPA even when identifying broad areas to be mitigated or protected. *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *Wyoming Outdoor Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973). BLM must comply with NEPA when identifying Offsite Mitigation Areas. Therefore, we ask BLM to reveal how and when it will meet the requirements of NEPA in developing this new regional mitigation strategy. Public involvement must be an essential component of all determinations regarding appropriate locations and the extent of specific off-site mitigation. We also urge BLM to strive for consistency between federal and state agencies when identifying such areas. Additionally, in order to provide a measure of regulatory certainty, it is crucial for BLM to apprise stakeholders and future project proponents when and where offsite mitigation requirements may be imposed before they are applied to a project. As currently outlined, this new mitigation plan will result in increased regulatory uncertainty which may cause project proponents to abandon future development plans involving both federal and private interests.

FEASIBILITY AND EFFECTIVENESS

The Draft MS indicates BLM will analyze “*the need, feasibility, and effectiveness of the proposed mitigation (e.g., how the proposed mitigation will actually mitigate the impacts).*” No mention of cost factors is made or considered. Nevertheless, in addition to technical feasibility, the economic feasibility of the proposed mitigation is correspondingly important. The financial burden of increased mitigation techniques or requirements is of major significance because the Draft MS would require the project proponent to be responsible for funding this type of mitigation project. Therefore, such costs must be given equal weight in any determination of the need for and type of off-site mitigation.

LARGE-SCALE DEVELOPMENT

The Draft MS indicates that regional mitigation would be required where the BLM anticipates “large-scale” development projects. However, BLM has not defined what would constitute large-scale development. We also point out that not all large-scale development projects warrant the use of regional mitigation, because in many cases impacts can be adequately addressed on a local, site-specific basis. Therefore, we advise BLM that it must not automatically assume that impacts from such projects cannot be adequately mitigated onsite. It is crucial for each project to be evaluated on a site-specific basis.

While certain geophysical projects could be considered “large,” many such exploration programs are categorically excluded from NEPA where they do not require construction of a temporary or new road. It is unclear how BLM would categorize such programs; but, we strongly recommend against identifying them as requiring off-site mitigation.

CONCLUSION

Contrary to FLPMA and the APA, the Draft MS side-steps the regulatory review process by formulating and implementing far-reaching land management changes through a policy document instead of a proposed rule. Due to the scale and scope of changes being considered, it is necessary for the Draft MS

to be released as a proposed regulation. We are concerned by many facets of the Draft MS because they are inconsistent with existing laws, both in terms of authority and specific program elements. Moreover, the Draft MS appears to reject valid existing lease rights held by oil and gas lessees whereby the terms of the lease would be markedly altered through the requirement of new, unforeseen mitigation measures and costs. Similarly, we would oppose any proposal that recommends the relocation of existing infrastructure and facilities, at tremendous cost and disruption of operations, because such facilities are already part of a federally approved project. Finally, the Draft MS exceeds BLM's statutory and regulatory authority by its direction to pursue off-site mitigation on state or private lands through the purchase of conservation easements, title transfers and other means.

BLM's attempt to further expand its authority and programs is ill-considered because budgets and staffing are already at such a low level that the agency is unable to manage its current programs efficiently and effectively. In fact, BLM routinely looks to industry to help fund positions that are clearly the responsibility of the agency in order to run their programs in a proficient and timely manner.

Sincerely,



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