UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

February 23, 2004

In Reply Refer To:
3100/3200/1610 (210/310) P

EMS TRANSMISSION 02/26/2004
Instruction Memorandum No. 2004-110
Expires: 09/30/2005

To: All WO and FO Officials

From: Director

Subject: Fluid Mineral Leasing and Related Planning and National Environmental Policy Act (NEPA) Processes DD: 04/01/2004

Program Area: Fluid Minerals and Related Planning

Purpose: This Instruction Memorandum (IM) clarifies existing NEPA guidance in regard to case law concerning the implementation of land use allocation decisions and the processing of oil, gas and geothermal leasing decisions authorized under existing land use plans. This IM also clarifies and provides proper application of the Council of Environmental Quality (CEQ) regulations contained in 40 CFR 1506.1 on the implementation of existing Resource Management Plan (RMP) decisions during a planning process to amend or revise the RMP.

This IM replaces all discussion pertaining to oil and gas leasing (not APD or other permit processing) contained in IM No. 2001-191 - "Processing of Applications for Permit to Drill (APD), Site-Specific Permits, Sundry Notices, and Related Authorizations on Existing Leases and Issuing New Leases during Resource Management Plan (RMP) Development." The related IM previously issued, IM No. 2001-075 - "Bureau wide Implementation of Solicitor's Opinion on Jack Morrow Hills Coordinated Activity Plan" has expired and has been replaced a change in the Bureau of Land Management (BLM) manual handbook H-1601-1, page VII E, rel.1-1675 and by this memorandum.

Background: Field and State Offices have indicated the need for clearer policy direction in regard to implementing existing land use plan decisions, especially during in the process preparing a land use plan amendment or revision. In addition, further guidance has been requested on how to proceed when new information is provided by the public regarding issues to be addressed in pending or upcoming planning efforts, or which may indicate a need to supplement existing NEPA analyses. This has become an issue of concern in regard to issuing oil, gas and geothermal leases.

ENCLOSURE 2

There has also been confusion on the interpretation of the CEQ regulations contained in 40 CFR 1506.1(a) and (c) in regard to preserving alternatives in consideration during land use plan amendment and/or revision.

Policy/Action: It is Bureau of Land Management (BLM) policy that the State Directors follow current land use allocations and existing land use plan decisions for Fluid Minerals and related energy actions when preparing land use plan amendments or revisions. This policy is consistent with BLM handbook H-1624-1 "Planning for Fluid Mineral Resources" chapter I B.2, rel.1-1583. In a related matter, nothing in the CEQ NEPA regulations requires postponing or denying a proposed action that is covered by the Environmental Impact Statement (EIS) for the existing land use plan to preserve alternatives during the course of preparing a new land use plan and EIS (see 40 CFR 1506.1(c)(2)). Consequently, all Field Offices are expected to follow their respective approved land use plans in offering for sale, parcels with expressions of interest.

The Associate Solicitors for both the Divisions of Land and Water Resources and Mineral Resources have prepared a joint memorandum that addresses this issue in greater depth. That memorandum is included in attachment 1.

Fluid mineral leasing allocation decisions are made at the planning stage. The EIS associated with the RMP is intended to meet the NEPA requirements in support of leasing decisions. A determination of adequacy of the NEPA document is required in conformance with chapter III of the NEPA Handbook H-1790-1 and related NEPA instruction memoranda. Preparation of another NEPA document, plan amendment or additional activity planning is not normally required prior to issuance of an oil and gas or a geothermal lease, except as discussed below.

Additional NEPA documentation would be needed prior to leasing if there is significant new circumstances or information bearing on the environmental consequences of leasing not within the broad scope analyzed previously in the RMP/EIS. Additional NEPA analysis should be completed according to BLM manual handbooks H-1790-1, H-1601-1 (with revisions), and H-1624-1. Field Offices should also distinguish new information bearing on the impacts of currently authorized actions in the land use plan (i.e., leasing) from new land use allocation proposals that may be submitted by a member of the public. Those proposals to add new land allocations or classifications should be analyzed in the context of land use planning and its NEPA work, not in the context of current plan implementation.

The next phase of Bureau NEPA analysis occurs when the lessee or the operator submits an application for exploration or development. When permit applications are submitted, site-specific NEPA impact analyses, as appropriate, are conducted to provide another tier of environmental protection through the development of conditions of approval to be included in the approved permits. This phased process is consistent with current policy and regulations (e.g., H-1624-1 Planning for Fluid Mineral Resources, rel. 1-1583; chapter 1, B.2.Resource Management

Planning Tier; 43 CFR 10.5-3(a); Onshore Order No.1, III.G.5; 43 CFR 3162.5-1(a)) and these longstanding Bureau practices remain unchanged.

It is Bureau policy that a decision to not implement oil and gas or geothermal leasing decisions, as contained in current RMPs/MFPs must be made by the State Director with appropriate input from the affected Field Manager. The State Director must provide a letter to those who submitted the expression of interest for the tract, stating the reasons for not offering the parcel(s), the factors considered in reaching that decision, and an approximate date when analysis of new information bearing on the leasing decision is anticipated to be complete and when a decision to lease (or amend the plan) is expected to be made. This would apply to tracts deferred for more than one lease sale. That notification should be provided as soon as practicable and shall be placed in the permanent file created for the lease tracts at issue.

The Assistant Director (WO-300) shall be notified in writing when a State Director decides to postpone a tract nominated for oil and gas leasing, that would delay offering the tract for a period of four quarterly sales or one year. You should provide the information in the following table. The first report is due April 1, 2004. One comprehensive table per state should be used regardless of the number of tracts and dates of delayed sales. This table is to be sent to the Assistant Director (WO-300) whenever there is a new tract added or when the sale is eventually held. Please note that a detailed justification must be given in the "Reason" column.

State: XXXXXXXXXXXXXXXX

Date nomination submitted	Section, Township and Range	Acres	Reason Tract Postponed	Name of Land Use Plan	Proposed Leasing Decision Date	Tract Offered Date
6-12-03	2, T13N; R15W	640	Significant Cultural Resources—full justification must be detailed here.	Oil Creek	7-10-04	
9-1-03	6, T 2N;R26E	80	Sage grouse Study area—full justification must be detailed here.	Hen Draw	10-1-04	

There may be many administrative reasons for temporarily not offering a particular nominated parcel, but those reasons narrow with time. Where existing NEPA documentation is sufficient to support continued implementation[1], a decision not to lease that extends beyond the one year could be considered a change in land use allocation outside of the planning process that effectively removes large parcels of land from mineral development without following appropriate planning procedures. The Bureau planning regulations state very clearly in 43 CFR 1610.5-3(a), *"All future resource management authorizations . . . shall conform to the approved plan."* Proposals for actions that do not conform to approved land use plans should be considered through the land

use plan amendment process, 43 CFR 1610.5-5. If a manager finds that a tract is more appropriately withheld from leasing in an area currently open to leasing under the RMP for periods longer than one year, the manager should strongly consider a plan amendment, with an appropriate range of alternatives, NEPA analysis and public participation.

1 - Documentation would be usually considered sufficient to support leasing when the State Director has determined there is adequate analysis of the impacts of the action detailed enough to identify types of stipulations to be attached to leases so as to retain BLM's full authority to protect or mitigate effects on other resources.

Time frame: This IM is in effect upon issuance.

Budget Impact: This IM may affect the planning schedules and scope of individual efforts and therefore may have budget implications for those projects.

Manual/Handbook Sections Affected: None.

Coordination: Preparation of this IM was coordinated with WO-170, WO-210, WO-300, WO-310, WO-320, and the Interior's Office of the Solicitor prepared the attachment included below.

Contact: Kermit Witherbee, WO-310, (202) 452-0319 or Tom Hare (202) 452-5182.

Signed by:
Jim M. Hughes
Acting Director

Authenticated by:
Barbara J. Brown
Policy & Records Group, WO-560

1 Attachment
1 - Implementation Actions During Land Use Planning (4 pp)

ATTACHMENT

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

JUN - 7 2002

Memorandum

To: Henri Bisson, Assistant Director, Renewable Resources and Planning, BLM
Pete Culp, Assistant Director, Minerals, Realty and Resource Protection, BLM

From: Robert D. Comer, Associate Solicitor, Division of Land and Water Resources
Fred E. Ferguson, Associate Solicitor, Division of Mineral Resources

Subject: Implementation Actions During Land Use Planning

Issue

You have asked if the National Environmental Policy Act (NEPA) regulations promulgated by the Council on Environmental Quality (CEQ)at 40 CFR §1506.1 require BLM to defer or deny a proposed action, which is not inconsistent with an existing land use plan, during a plan amendment or revision process when the action will not preserve all of the alternatives BLM is considering in the plan amendment and accompanying EIS. This question arises from the situation described in the Land Use Planning Handbook, BLM Handbook H-1601-1 (Nov. 22, 2000), paragraph VII. E. The relevant provision reads:

> E. Status of existing decisions during the amendment or revision process.
>
> * * *
>
> During the amendment or revision process, the BLM should review all proposed implementation actions [under the existing plan] through the NEPA process to determine whether approval... would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined . . . . Subject to valid existing rights, proposed actions that cannot be modified to preserve opportunities for selection of any of the reasonable alternatives should be postponed or denied. (See 40 CFR 1506.1)

We conclude that, while postponement to preserve alternatives may be desirable in some cases, NEPA does not compel an agency to postpone taking implementation actions which are not inconsistent with the existing land use plan and supported by adequate NEPA documentation. We reach the same conclusion whether we analyze plan EISs as outside the scope of 40 CFR §1506.1(c), which is concerned only with actions during preparation of "program statements," or whether we rely on the exception in that regulation for "actions covered by an existing" EIS of such breadth. In fact, section 302(a) of the Federal Land Policy and Management Act (FLPMA), requires that BLM manage the public lands "in accordance with the land use plans developed by [it]." 43 U.S.C. 1732(a).

Discussion

The Land Use Planning Handbook, quoted above, refers to 40 CFR §1506.1 ("Limitations on actions during the NEPA process"). The only provisions of §1506.1 that could bear on this question are subsections (a) and (c).

Subsection (a) of 40 CFR §1506.1 addresses implementation of elements of an action under analysis in an EIS.[1] Subsection (a) prohibits an agency from taking any action that would adversely impact the environment before the NEPA analysis and record of decision covering the proposed action is final and formally adopted. We are examining a different question. It involves BLM's discretion to take an action that implements an existing land use plan (such as a resource management plan or "RMP") during the planning and NEPA processes that may amend or revise the existing land use plan based on the analysis in a new or supplemental plan EIS.

Subsection (c) of 40 CFR §1506.1 addresses an agency's ability to take actions when the agency is working on a "required program environmental impact statement." Subsection (c) provides:

> While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:
>
> (1) Is justified independently of the program;
>
> (2) Is itself accompanied by an adequate environmental impact statement; and
>
> (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

It is unclear whether an RMP/EIS is a program statement within the scope of this regulation. This prohibition only applies where a "program statement" is "required." Several provisions of the CEQ regulations indicate that program statements are but one of several types of environmental impact statements. In addition to project-specific actions, statements may be

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[1] 40 CFR 1506.1(a) provides:

Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would

(1) Have an adverse environmental impact; or
(2) Limit the choice of reasonable alternatives. (emphasis added)

required for several types of broad proposals or actions: program, policy, and plan. See 40 CFR §1508.18(b). See also 40 CFR §§1500.4 and 1508.28. According to the regulations, a federal action will tend to fall into one of these categories. The regulations describe a program action as the "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 CFR §1508.18(b)(3). The Secretarial Decision for the federal coal program, pursuant to the Federal Coal Leasing Amendments Act and the Surface Mining Coal Reclamation Act, was a program action. In contrast to a program action, a planning action involves "[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based." 40 CFR §1508.18(b)(2). A program statement thus would be one addressing the implementation of a specific plan or policy, such as a statute or executive directive, while plans provide for the coordination of many resource use programs within a specific agency or (in the case of land use plans) geographic areas. Since subsection (c) only applies to "program statements," one could argue that it does not apply to an RMP/EIS, if an RMP action is seen as a planning action rather than the implementation of a program.

However, one reaches the same conclusion if one treats §1506.1 as applicable to a plan EIS, blurring any distinction between "program statements" and environmental impact statements for formal plans (such as land use plans) or agency policies (such as regulations). By its own terms, subsection (c) does not limit agency decisionmaking with respect to actions "covered by an existing program statement." Subsection (c) permits an agency to take implementation actions covered by an existing programmatic EIS during work on a new programmatic EIS, even if the action would limit the range of alternatives in the new "program statement."

In ONRC Action v. Bureau of Land Management, 150 F.3d 1132 (9th Cir. 1998), plaintiffs requested that BLM impose a moratorium on certain actions during preparation of the "Eastside Management Plan," which would result in the revision of three existing RMPs. BLM responded that it would continue to take actions under existing program statements in reliance on the exception in 40 CFR §1506.1(c) for "existing program statements." The United States Court of Appeals for the Ninth Circuit upheld the BLM position, stating that plaintiffs failed to show any clear duty under NEPA or FLPMA with which BLM must comply. The court dismissed as unfounded the argument that an outdated RMP/EIS cannot serve as the "existing program statement" referenced in §1506.1(c), stating that "it is reasonable to conclude that the RMPs are existing program statements for purposes of NEPA. The fact that revisions of the RMPs are not necessarily current does not change this result." 50 F.3d at 1140. The court also concluded there was no provision in FLPMA or its regulations "that would require BLM to cease actions during the revision process." Id.

In Western Land Exchange Project v. Dombeck, 47 F. Supp.2d 1196 (D. Ore. 1999), plaintiffs contended the CEQ regulations prohibited the Forest Service from proceeding with a land exchange pending completion of the Eastside and Upper Columbia River Basin EIS. Relying on the analysis in ONRC Action, the court upheld the land exchange, reasoning that: "[T]he land

exchange in the case before us is being conducted pursuant to the Forest Plans of the three National Forests involved in the proposed exchange. Each of these three National Forests has its 'existing program statement'. . . . The exception in 40 CFR 1506.1(c) applies to the facts in this case." 47 F. Supp.2d at 1213. In addition, the court noted the land exchange itself was accompanied by an adequate EIS. See also In re Bryant Eagle Timber Sale, 133 IBLA 25 (1995) (denied claim that BLM violated 40 CFR §1506.1(a) and (c)). Thus, even if a plan EIS is treated as if it were a "program statement" covered by §1506.1(c), implementation actions under existing plans would not be limited by that regulation because of the exception for actions "covered by an existing program statement," inasmuch as all actions authorized by such plans have been covered by previous programmatic EISs.

It is important to recognize that the limited applicability of section 1506.1 does not relieve BLM from the need to evaluate and document plan conformity and the adequacy of NEPA analysis in support of the proposed action. For example, in Upper Floras Timber Sale, the decision to approve a timber sale was vacated pending the preparation of a supplemental EIS and plan amendment, where the "plan being implemented can no longer be fairly said to encompass the same plan described in the EIS," and "the increase in the acreage designated for clearcutting" goes beyond what might be treated as "merely a fine-tuning adjustment" to the program envisaged by the original EIS. 86 IBLA 296 (1985). See 40 CFR §1502.9 concerning the circumstances in which additional NEPA work may be required. Provided that the action conforms to the RMP, BLM may choose to carry out any necessary NEPA supplementation of the existing plan EIS as BLM performs NEPA analysis of the site-specific proposal.

Conclusion

Nothing in the CEQ NEPA regulations require postponing or denying a proposed action covered by the EIS for the existing land use plan to preserve alternatives during the course of preparing a new land use plan and EIS. Of course, BLM must undertake appropriate NEPA analysis of the site specific action being proposed under the existing land use plan.