

Considerations for Assessing the Effectiveness and Continued Need for Existing Resource-Related Constraints and Closures

What is your current process of stipulation assessment?

The process of stipulation assessment will include tools to determine whether stipulations are presently being consistently and appropriately applied, whether they are effective and necessary. Some states are currently conducting reviews of lease sale processes to determine if stipulations are being applied consistently and appropriately (one process that's being used can be found in Attachment 4). This will be done in every state having oil and gas lease sales on a regular basis.

One goal of the EPCA integration process is the development of tools allowing the field to, in consultation with other federal and state agencies and the public, determine the appropriateness and effectiveness of stipulations to protect the resources they are designed to protect. Below is a process outline to ensure consistent review of the EPCA information on both the fluid mineral resources and the access constraints.

Data Needed for Analysis:

1. What are the stipulations for the Focus Areas (map from Land Access Categorization GIS data)?
2. What are the waivers, exceptions, or modifications that are commonly granted? For instance, wildlife winter range timing stipulations or road closures during the spring to prevent road damage?
3. How many times and for what reasons have stipulation waivers, exceptions or modifications been granted for oil and gas activities? What percentage of the time are specific stipulations waived?
4. Specific to the intent of the stipulation(s), what is the resource condition or trend?
5. What data is available regarding the effectiveness of the stipulation(s) in the vicinity?
6. If local or regional data is available, what literature is now available that could be used to confirm the need to retain, modify, or drop the stipulation(s)?
7. Are stipulations consistent from one office jurisdiction to another?

The guidance in Manual Handbook H-1624-1, Chapter IV.C.3, explains how a stipulation to an existing oil and gas lease may be removed or modified using the land use planning process. If the circumstances for granting such waivers,

exceptions, or modifications are properly documented in the current land use plan, then no additional documentation is needed. Also, no additional documentation is needed for minor modifications to the language of a stipulation as long as the correcting language does not substantially reduce the protection or change the intent of the mitigation. For either of these two cases, if the waiver or modification will apply to future oil and gas leases as well, the Plan Maintenance process should document the modified stipulation.

Major modifications, waivers or exceptions to stipulations (on existing leases) that have not been explained in current planning documents may be accomplished without initiating formal plan amendment processes as long as the justification for such modifications are explained through NEPA documentation (EA). The Leasing Reform Action (FOOGLRA, 1988) allows these major changes, but requires a 30-day public notification period that can be met during the NEPA process. If the major modification, waiver or exception will apply to future oil and gas leases, the change should be documented in a land use plan revision or amendment.

8. Has the effectiveness of any existing stipulations been questioned for this area? Which ones? What information is available on the effectiveness of the stipulations in question?

Effectiveness monitoring, and analysis that follows, should give the field offices documentation needed to demonstrate that we have an array of tools (stipulations, mitigation measures, conditions of approval, design features, etc.) that will actually work in different situations and with different effects on the activities that BLM authorizes on the landscape. The array of tools could be included in a plan amendment in the form of an adaptive decision for addressing a particular concern. This will lead BLM to a results-oriented approach to management, as opposed to a position that there is only one way to address a problem.

There are options both in the short term and the long term to address disagreements over the effectiveness of stipulations. It is imperative that there be consistency in dealing with these issues. Field offices can work with State office program leaders on individual situations to establish a forum for resolving the conflict.

9. Are there opportunities to minimize surface disturbance and maximize restoration efforts over time?

Consider plans of development that show best management practices with identified goals for limiting the profile of the development, focusing facilities and roads in areas where the resources are not sensitive (timing and location), and planning restoration to bring native vegetation back as quickly as possible during and after development (also see #5 on page 3-4).

10. What existing laws and BLM policies influence the management of the area? Have there been any changes to the laws, regulations, or policies since the planning process was completed?
11. Are there Threatened and Endangered species present? Are BLM sensitive species present? Are there significant paleontological, archaeological or historical resources? Are there traditional cultural properties present? Are stipulations tied to legal decisions or requirements such as Biological Opinions or are they discretionary?

Evaluation Needed:

1. As an outcome of your land use planning, have you established or do you need to establish lease notices to inform oil and gas operators of Bureau actions that could impact their operations?

There may be instances where field staff believe it is necessary to remind or warn a prospective lessee about possible lease restrictions and environmental mitigation. Or, there may be a need to convey information about potentially restrictive conditions of approval. In these instances, a Lease Notice may be more appropriate. The regulation in 43 CFR part 3101.1-3 defines and explains lease notices. A Lease Notice will be used to replace stipulations that have been dropped because the mitigation is already within the authority of Section 6 of the lease terms. When a Lease Notice is used to replace a stipulation, the Notice should contain references to possible protective conditions of approval that would be attached to lease permits in order to mitigate or protect the resources the stipulations were originally designed to protect.

2. Are stipulations which are commonly excepted, modified, or waived good examples of less rigid protections that are meant to be waived under certain conditions (e.g. when wintering animals aren't in the area because of a mild winter, or the roads have dried out)? Or is waiver more often a sign that the resource being protected does not warrant the level of protection currently being given?
3. How much and what types of information or data are essential to reasonably assess the effectiveness and continued need for existing lease stipulations, COAs, closures, etc.?

We are not always going to have all the information that is ideally necessary to make assessments. An example of essential information would be that information needed to address a listed, candidate or proposed species.

4. What will be the cost in time and money to obtain essential information to assess the effectiveness of stipulations, closures, etc? Can this data be obtained at a reasonable cost in a reasonable amount of time?

When considering costs of information that will be needed to reasonably assess the effectiveness and continued need for existing lease stipulations, it is essential to consider the costs of conducting an active and effective monitoring program in EPCA Focus Areas. Monitoring needs to be an integral part of the integration effort. Coupled with use of alternative strategies for mitigation of impacts, monitoring will lead to better knowledge about what will work in certain circumstances.

With regard to projects or studies related to effectiveness of stipulations, funding may be available for these efforts under EPCA implementation and should be requested through BPS.

5. Adaptive options- are there opportunities for goal-oriented or outcome-based adaptive management solutions that would be more, or as effective, as stipulations? What options have you pursued other than stipulations to achieve resource protection?

In cases where the stipulations are modified, consideration should be given to converting prescriptive stipulations to performance-based stipulations to improve adaptive management capabilities. An example of a performance based stipulation is, "In order to protect the desert grasslands of Otero Mesa and associated threatened and endangered wildlife species, the combined unreclaimed and unvegetated surface disturbance from exploration, drilling, production, and other activities associated with lease operations cannot exceed five (5) percent of the leasehold(s) at any one time." Minor plan amendments could be made at the activity approval stage to include alternative mitigation strategies. Options that describe the desired outcome after the activity is undertaken (e.g. that the floodplain is protected from oil field products and contamination or degradation), and that allow the proponent to determine how to achieve that outcome, should be tested. A monitoring strategy to determine effectiveness would be necessary.

When dealing with special status species, alternatives could include actions such as development of a conservation strategy (which can be measured by the US Fish and Wildlife Service for progress made toward moving away from listing) or off-site mitigation (which can allow the focus of efforts to improve the conditions and therefore the success of species) to allow the "release" of stipulations for special status species. One corollary to this exists when the stipulation is a legal requirement like a biological opinion. These would likely require re-initiation of consultation to gain approval on waivers or modifications.

When dealing with traditional cultural properties of significance to Federally recognized tribes, alternatives should be explored with tribes which can address their concerns while facilitating energy development. For example, an alternative would be to craft management models with relevant tribe(s), for significant areas, which would ensure their active involvement during development stages under

leases in those areas. This involvement could ensure ongoing mitigation and monitoring of any potential adverse impacts not only to the resource, but to visual and audible intrusions to the setting, or to continuing use of the areas for traditional cultural and religious practices.

Conditions of Approval (COAs) could be considered as an alternative to lease stipulations in some situations and areas. COAs are attached to the approved Application for Permit to Drill (APD) and are developed through site-specific NEPA analysis, tailored to the specific project and circumstances.

6. Predictive modeling- Are there opportunities for developing predictive models using GIS in specific functional areas, such as archaeology, fish, wildlife, botany, etc., to enable more rapid permitting in areas lacking site-specific inventory information?

When dealing with historic and pre-historic resources an alternative would be to develop regional research designs for cultural sites (where we can come to agreement with the SHPO on the use of the design to focus efforts in critical areas and release stipulations or reduce requirements in other areas), and/or to develop a management model in which a variety of inventory requirements are mapped as zones which have specific management guidelines for exploration and development of energy resources.

Evaluation Outcomes:

The evaluation must be documented. In the evaluation of the current constraints, we must document whether the existing constraints are required to protect the surface resources beyond the Standard Lease Terms and Conditions, whether they are better as Lease Notices and/or other options for managing the conflicts between oil and gas and the surface resources. Possible outcomes are:

1. No changes are needed. Document the rationale.
2. Minor changes are needed that can be accomplished as plan maintenance.
3. Additional site-specific evaluation or information is needed before a determination can be made. Propose a strategy for accomplishing.
4. Some changes are needed but they are within the criteria documented in the land use plan for exceptions, waivers, or modifications.
5. A land use plan amendment (or revision) is needed because the existing land use plan does not contain criteria for exceptions, waivers, or modifications, or the needed changes are not within the constraints of the criteria.

The evaluation of the data may lead to consideration of a reasonable range of alternatives for analysis through a land use plan amendment and attendant NEPA: 1) the current management (or no action alternative), 2) modifications indicated from changed resource conditions (e.g. new presence or absence of a species), 3) new, flexible, performance-based stipulations focused on offsite opportunities, etc.