

COALITION OF CONSERVATION ORGANIZATIONS

USDA-Forest Service.
Attn: Director-MGM Staff
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Via electronic web submission at: <http://www.regulations.gov>.
RIN number 0596-AD33.

October 29, 2020

Dear USDA Forest Service:

The following are the comments of the undersigned on the proposed regulations governing Federal oil and gas resources on National Forest System lands, 36 CFR 228.100 et seq., as described in the Federal Register notice of September 2, 2020 (85 Fed Reg 54321 et seq.) and the environmental assessment (EA) prepared for this rulemaking.

All of the endorsers of this letter are interested in management of our national forests and grasslands, including decisions concerning leasing such lands for oil and gas. Development on such leases has many adverse impacts, including, but not limited to: impacts to air quality, wildlife habitat effectiveness and connectivity, soils, water quality, travel management, and scenery.

Overall, we believe the proposed new rule would reduce, if not minimize, opportunities for meaningful public involvement, and lead to more adverse impacts to the environment in areas where oil and gas leasing (and subsequent development) occurs. The rule would encourage the agency to avoid applying the National Environmental Policy Act (NEPA), in violation of that Act and its implementing regulations. The proposed rule also is overly favorable to the energy industry, at the expense of other users of, and the ecologically valuable resources on, national forest lands and national grasslands.

The proposed rule is not acceptable and must be scrapped.

Citations to sections 1XX refer to 36 CFR 228.1XX, either the existing or the proposed rule as indicated.

I. IMPLEMENTING THE PROPOSAL TO ELIMINATE THE LEASING SPECIFIC LANDS PROVISION, FOREST SERVICE LEASING DECISIONS WOULD VIOLATE NEPA AND CUT THE PUBLIC OUT OF IMPORTANT DECISIONS ON LEASING

The current rule requires a national forest unit to make two decisions prior to consenting to the issuance of oil-gas leases: 1) a forest-wide determination of which lands are administratively

¹ The Federal Register Notice has an incorrect address, as it has "Lakewood" instead of Golden.

available for leasing and 2) a decision on leasing specific lands. 36 CFR 228.102(d) and (e), respectively. The latter requires the Forest Service to “[v]erify[] that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document and is consistent with the Forest land and resource management plan.”. Current section 102(e)(1).

This step would be eliminated in the proposed rule, as the individual units would issue a leasing consent decision (103(c)(1)) based on “a forest-wide or area-specific leasing analysis in either a land management plan or a separate leasing analysis”. 103(b). See also preamble at 54315.

The leasing consent analysis would necessarily be broad-scale and not site-specific, as it would cover very large areas, in many cases an entire national forest and/or grassland of a million or more acres.² The specific areas that would be offered for lease in subsequent lease sales would not be known, thus site-specific impacts could not be disclosed accurately, if at all.

The preamble attempts to justify the proposed elimination of the requirement for a leasing specific land decision with the following:

The existing regulation directs an administrative review by the Forest Service at the time that specific lands, which have already been subject to an area or forest-wide leasing analysis, are being scheduled for leasing by the Bureau of Land Management. This is not a second, more detailed analysis, but a validation review verifying that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document and is consistent with the applicable land management plan. The proposed rule would remove this largely duplicative administrative procedure.

85 Fed Reg 54315.

The procedure to ensure that the impacts of leasing specific tracts of land have been disclosed is not duplicative. It ensures that finer-scale details, like habitat for threatened, endangered, and conservation concern species; impacts to scenery and recreation; and possible needed changes to travel management are considered, and requires an additional NEPA analysis if they have not been adequately considered and disclosed. All of these details are easily missed in a broad-scale analysis. An analysis of site-specific effects of leasing and subsequent operations would necessarily be more detailed.

The preamble goes on to complain that the current procedure, requiring a review of impacts from leasing specific lands, causes confusion “among government personnel and the public” and has led to litigation. Preamble, *ibid*. To the extent the latter is true, it is likely because the Forest Service has not disclosed the impacts of leasing specific lands, i. e., has not complied with NEPA. If it had, there would be no basis for such litigation.

² Each national forest unit in Colorado is well over one million acres. This is likely true also for every western national forest unit. The only smaller western units would be national grasslands, if analyzed separately from the national forests they are attached to.

Applying the current rule should not be confusing. Admittedly, it is a judgement call as to what constitutes adequate disclosure of site-specific impacts. But the Forest Service makes these judgements for various projects just about every day. A forest-wide analysis that covers a broad area will not address specific leases or the proposed impacts of operations on them. That means the Forest Service would consent to leasing specific lands without full information on the possible impacts of such an action. That would violate the Council on Environmental Quality regulations implementing NEPA:

The regulations in this subchapter are intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies.

40 CFR 1500.1(b) (2020).

Implementation of the proposed new rule would be likely to generate confusion and consternation among concerned members of the public when leases were issued because people concerned about certain areas being leased and developed would have had no opportunity to comment on the proposed leases and the possible site-specific impacts of developing them.

Relying only on broad-scale analyses for NEPA documentation has been ruled legally insufficient. See *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999). The Court held that the project-specific NEPA analyses that tiered to a programmatic EIS needed to consider the site specific impacts of a federal action because the programmatic EIS could not consider the site-specific impacts of later developed actions. See also *Southeast Alaska Conservation Council v. U. S. Forest Service*, Case No. 1:19-cv-00006-SLG, where a federal district court in Alaska overturned approval of a timber sale because the FEIS failed to disclose site-specific locations for roads and treatments.

Failing to provide notice of specific lands prior to being offered for lease would also violate the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA):

At least 45 days before offering lands for lease under this section, and at least 30 days before approving applications for permits to drill under the provisions of a lease or substantially modifying the terms of any lease issued under this section, the Secretary shall provide notice of the proposed action.

30 U.S.C. 226(f).

To further complicate matters, the new rule states the following:

(d) *Effect of leasing consent decision.* An authorized Forest Service officer's identification of lands as open to leasing does not commit the Bureau of Land Management to future leasing actions, nor does it constitute an irretrievable or irreversible commitment of resources.

Proposed section 103(d).

This is misleading. Once a forest-wide or area-wide leasing consent analysis has been approved, the public would have no chance, short of a lawsuit, to have any input on whether any particular lands would be leased.³ Leases could subsequently be issued, creating basically a property right for the lessee that could not be revoked without the government incurring a large fee. Though a leasing consent decision under the proposed rule would not commit the Forest Service to consent to BLM issuing specific leases, it would ensure that leases could be issued somewhere on all of the lands open to leasing, with only some operational details to be worked out. Thus for the public, the leasing consent decision would be irreversible and ensure an irretrievable commitment of resources.

In spite of the above, the Forest Service appears to have already eliminated consideration of this issue because it has determined it to be “outside the scope of the decision to be made by the Department of Agriculture on the proposed rule”:

Procedural matters regarding requirements of the National Environmental Policy Act, particularly opportunity to comment on site-specific or project-level analyses under 36 CFR 218.

EA at 9. We disagree strongly – the issue of site-specific analysis and opportunity for public comment on proposed leasing is very important for any rule involving analysis and decisions on oil-gas leasing, as is discussed in detail above. Indeed, the Forest Service itself recognizes this importance, at least for ESA-listed species and critical habitat:

If the Forest Service determines that site-specific leasing or operational projects may affect threatened or endangered species or their designated critical habitat, the agency will initiate consultation at the project level as appropriate.

EA at 11. However, under the proposed rule, the site-specific analysis to determine possible impacts to ESA-listed species would never occur, or at least never be required, prior to a decision on whether to consent to leasing any specific areas of land. There would also be no requirement for seeking public input for this critically important issue on any given lease or group of them.

Waiting until the SUPO stage, i. e. after the lease has been issued, for this important analysis of possible impacts, is not acceptable. By then, it may be too late to adequately protect ESA-listed species and their critical habitat because operations would have to be allowed somewhere on each lease. It makes more sense, and much better ensures ESA and NEPA compliance, to identify possible impacts to listed species and habitat well before a lease is issued, and not issue leases in areas where adverse impacts might be the greatest or be too difficult to mitigate.

Similarly, adverse impacts on other resources, such as soils; non-listed wildlife and plants (but ones for whom continued viability is a concern, such as species of conservation concern and

³ Public comment is allowed on surface use plans of operation (SUPOs), but at that stage, the only remaining issues are the details of surface disturbance for operations on the lease, not whether a lease should be issued, as it will have been issued by then.

sensitive species); watersheds; recreational opportunity; scenery; etc. might not become apparent at the broad, forest-wide scale of the leasing consent analysis.

Site-specific information is also necessary to determine exactly where and what type of stipulations should be applied. For example, the extent of geologically unstable areas and those with high erosion potential will not likely be determined at the forest-wide scale undertaken for the broad-scale analysis that would be used for the proposed leasing consent decision. These are among the areas that would require a no surface occupancy stipulation. See EA at 18, fn 10.

It is very disturbing that the Forest Service seems to believe that avoiding NEPA in oil-gas leasing decisions is a benefit. The Costs and Benefits section of the EA (Appendix D) states in its introduction:

The following table [of costs and benefits] assumes that the agency avoids 50 to 100 percent of supplemental environmental impact statements for lease decisions, and corresponding agency costs are avoided.

EA at 50. But the introduction further states that only seven supplemental EISs have been done since 1998, and the agency would save a mere \$200,000 per year (out of an annual budget of over \$5 billion) with the new rule. In other words, the new rule would save little personnel time and money, but would still cut the public out of decisions about leasing specific areas and would not ensure compliance with NEPA.

More detailed analysis is needed to ensure that impacts from oil-gas operations can be minimized. The rule must retain a leasing specific lands decision or the equivalent and allow public input on any decision to consent to lease any lands. It must also contain a requirement that specific leases are consistent with the forest plan.

II. ALL REQUESTS FOR WAIVERS, EXCEPTIONS, AND MODIFICATIONS NEED NEPA REVIEW PRIOR TO APPROVAL

The existing rule has the following requirement for consideration of any waivers, exceptions, or modifications (WEMs)

...the authorized Forest officer shall ensure compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4331 *et seq.*) and any other applicable laws, and shall ensure preparation of any appropriate environmental documents.

Existing section 104(b)(1).

The omission of this important provision in the proposed rule (see proposed section 104⁴) is not acceptable. Application of any WEM would allow action that had not undergone an analysis of its impacts. This would be true even if specific leases had been subjected to a site-specific effects analysis and disclosure prior to approval; it would especially be true with no such analysis, as

⁴ The preamble does not mention or try to justify this omission. See *id.* at 54316.

would be the case under the proposed rule. This would further reduce opportunities for interested parties to have any meaningful input into how areas of national forests were to be managed.

In some cases, the requested WEM might be shown to have only a very minor effect, in which case additional NEPA document preparation (or supplementation of an existing NEPA document) would not be needed. However, it is important that the potential effects be examined, and where appropriate (i. e., where potential effects are more than very minor), that the potential impacts of implementing the proposed WEM be disclosed to the public with an opportunity for comment.

III. ENSURE THAT ADVERSE IMPACTS ARE MINIMIZED DURING SURFACE-DISTURBING OPERATIONS.

The current rule has detailed surface use requirements at section 108. The proposed rule contains most of these requirements in proposed section 105; however, two important ones are omitted: cultural and historical resources, and fisheries, wildlife and plant habitat. Existing sections 108(d) and (f) respectively. These are important resources that can be disturbed, damaged, or destroyed by oil and gas exploration, drilling, and production. The new rule must contain provisions requiring protection of these resources to ensure operators know in advance of the need for this protection.

At a minimum, any new rule must contain a requirement that discovery of possible historical or cultural resources be reported to the agency (as the current rule does at section 108(d)), and requirements for protection of habitat for all ESA-listed and -proposed species, and Forest Service sensitive species and species of conservation concern.

IV. SURFACE USE PLANS OF OPERATIONS MUST BE SUBJECT TO NEPA AND BE SUPPLEMENTED AS NEEDED BEFORE UNAUTHORIZED SURFACE USE CAN OCCUR

Existing section 107(a) specifically requires surface use plans of operation (SUPOs) to be subject to NEPA review. Proposed new section 107(a) does not, although it does say that SUPOs proposed to be documented in a decision notice or record of decision are subject to pre-decisional objection under 36 CFR 218. To avoid confusion, this section should be amended to state that all SUPOs shall undergo NEPA review and comment unless it is demonstrated that effects would be minimal. If a CE would be used, the rule should require the agency to identify which CE would be applied and to seek public comment on the proposed use of the CE.

Any revision to the current rule should retain the provision that requires the public to be notified of decisions approving or disapproving SUPOs. Existing rule at 107(c). The proposed rule would eliminate this provision. See proposed rule at 107(c).

Supplements to SUPOs are needed where operations not authorized in the SUPO are proposed. The existing rule has the following provision:

(d) *Supplemental plan.* An operator must obtain an approved supplemental surface use plan of operations before conducting any surface disturbing operations that are not authorized by a current approved surface use plan of operations. The operator shall submit a proposed supplemental surface use plan of operations to the appropriate Bureau of Land Management office for forwarding to the Forest Service, unless otherwise directed by the Onshore Oil and Gas Order in effect when the proposed supplemental plan of operations is submitted. ...

A supplemental plan is otherwise subject to the same requirements under this subpart as an initial surface use plan of operations.

Existing rule at section 106(d). This provision is transferred to a new section 108, Sundry Notices, in the proposed rule. A sundry notice is defined as follows:

An operator's request submitted to the Bureau of Land Management to perform work or conduct lease operations not covered by another type of permit or authorization, or to change operations in a previously approved permit; ...

Proposed section 101. In other words, operators would submit proposed changes in SUPOs to the BLM, even though the Forest Service would still be required to review and approve any changes. Proposed section 108(b). It is not clear that the public would have to be notified about possible changes to SUPOs.

The preamble explains why the change is proposed:

The proposed rule would remove paragraph (d), which uses terminology that is inconsistent with the Bureau of Land Management regulations and would instead clarify Sundry Notices in § 228.108.

Preamble at 54316. The fact that the language in existing section 106(d) is inconsistent with BLM regulations (if it even is inconsistent) should not determine the Forest Service's rule language. While it may be desirable for the Forest Service to have rules that mesh as well as possible with BLM's rules, the Forest Service must protect the resources on land under its jurisdiction. As with WEMs, omission of the supplementation requirement could allow operations to occur without the possible impacts to surface resources first being disclosed, subjected to public comment and then mitigated or minimized. This further removes possible operations on leases from public review and scrutiny of possible impacts.

Existing section 107(e), which requires review of a supplemental SUPO in the same manner as an initial SUPO, would be removed for the same reason – inconsistency with BLM regulations. Preamble, *ibid.*

The possible inconsistency with BLM regulations is no excuse for the Forest Service to avoid its responsibility to analyze impacts, involve the public, and protect national forest surface resources.

V. BONDS MUST BE POSTED WITH THE FOREST SERVICE AND BE SUFFICIENT TO ENSURE FULL RECLAMATION OF LANDS DISTURBED IN OIL-GAS OPERATIONS

FOOGLRA requires that bonds be posted prior to surface disturbance for oil-gas operations:

The Secretary concerned⁵ shall, by rule or regulation, establish such standards as may be necessary to ensure that an adequate bond, surety, or other financial arrangement will be established prior to the commencement of surface-disturbing activities on any lease, to ensure the complete and timely reclamation of the lease tract, and the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease.

30 U. S. C. 226(g).

The preamble to the proposed rule notes the need for adequate bonds to ensure that surface areas of national forests that are disturbed during oil-gas operations can be reclaimed:

The Forest Service's experience in managing Federal oil and gas resources since the existing regulations were promulgated in 1990 indicates that in many cases the Bureau of Land Management lease bonds are insufficient to support surface reclamation needs if a lessee or operator defaults.

Id. at 54317. See also EA at 50.

The existing rule requires the Forest Service to determine the cost of reclamation of sites where the surface is disturbed by oil-gas operations:

As part of the review of a proposed surface use plan of operations, the authorized Forest officer shall consider the estimated cost to the Forest Service to reclaim those areas that would be disturbed by operations and to restore any lands or surface waters adversely affected by the lease operations after the abandonment or cessation of operations on the lease.

Existing rule at 109(a). The proposed rule would remove this language and require the agency to determine if the operator's performance bond with the BLM was sufficient. Proposed rule at 109(a). However, the BLM is not responsible for surface resources on national forest lands; rather, the Forest Service is. Therefore, the Forest Service should determine the bond needed for reclamation independent of the bond posted with the BLM, and require operators to post adequate bonds with the Forest Service for complete surface reclamation.

In that light, the following provision should be rewritten:

If the authorized Forest Service officer determines that additional bonding is necessary, the officer shall give the operator the option of either increasing the bond

⁵ It is clear from the paragraph in the US Code that this means the Secretary of Agriculture for national forest lands.

held by the Bureau of Land Management or filing a separate reclamation bond with the Forest Service in the amount deemed adequate.

Proposed section 109(d). Since any increased bond would ensure protection of surface resources, it should be posted to the Forest Service, since that agency is responsible for the surface resources on its lands.

Under proposed section 109(c),

the authorized Forest Service officer may specify a bond amount to any level, provided that the amount does not exceed the total estimated cost of reclamation based on surface disturbance.

In other words, the authorized officer could choose to require no bond at all, or one that covered only a fraction of the cost of reclaiming the area where oil-gas operations occurred. This is especially inappropriate given that the Forest Service already believes many existing bonds are insufficient. (See quote above in this section.)

Bonds must be sufficient to cover the full cost of reclamation. This provision must be rewritten to require, in all cases, an adequate bond.

Proposed section 109 assumes that the operator has a bond with the BLM. But what if s/he does not? If the operator is new to oil-gas leasing on federal lands, the BLM may have no bond from this operator prior to approval of an application for permit to drill. In any case, as argued above, bonds for reclamation of surface resources for leases on national forests and grasslands should be posted with the Forest Service, and must be high enough to cover the cost of reclaiming the land. Section 109 must be rewritten to reflect this.

VI. COMPLIANCE DEADLINE EXTENSIONS WOULD BE TOO EASILY GRANTED

In the existing rule, an operator, after receiving a notice of non-compliance, may request an extension of time to come back into compliance

if the operator is unable to come into compliance with the applicable requirement(s) or standard(s) identified in the notice of noncompliance by the deadline because of conditions beyond the operator's control.

Existing rule at 113(a)(2); emphasis added. The proposed rule would remove the highlighted clause. See proposed section 112(c). This weakens the requirement for operators to comply with lease provisions and other applicable requirements. It would encourage the Forest Service to become very lax in holding operators to these requirements, i. e., operators could be allowed additional time to comply just because they were careless, lazy, or didn't want to comply with lease provisions and other requirements. This could increase the time duration and/or intensity of impacts to water quality, wildlife habitat, scenery, etc.

We agree that operators should be given a reasonable amount of time to come back into compliance with lease provisions and other requirements. However, this time should not be indefinite. Extensions of time for achieving compliance with all requirements must not be extended when it is the operator's malfeasance or mismanagement that has caused the non-compliance or failure to achieve compliance. Therefore, the provision allowing extensions of time to meet lease and other requirements only for circumstances beyond an operator's control must be retained in the rule.

VII. THE PROPOSED RULE WEAKENS STANDARDS FOR DETERMINING MATERIAL NON-COMPLIANCE

The proposed rule would reduce the factors considered in determining material non-compliance. Compare new section 113(a) with existing section 113(b)(1). The former does not include the following from the existing rule:

operating without an approved surface use plan of operations, conducting operations that have been suspended, ...failing to comply with any term included in a lease, stipulation, or approved surface use plan of operations, the applicable onshore oil and gas order, or an applicable Notice to lessees, transferees, and operators, relating to the protection of a threatened or endangered species.

Existing rule at 113(b)(1). All of these factors should be grounds for determining that an operator is in material non-compliance. Except for failure to timely reclaim, post bond, or reimburse the Forest Service for the costs of abating emergencies, the proposed rule would limit a determination of material non-compliance to

cases where the noncompliance resulted in danger to public health or safety; caused irreparable resource damage; or resulted in an emergency.

Proposed section 113(a)(1). The Forest Service needs to be more proactive here, i. e, to insist on compliance with lease terms and other requirements before the non-compliance results in danger to public health or safety, irreparable resource damage, or an emergency. Under the proposed rule, long-term non-compliance with requirements could continue indefinitely as long as they did not result in an emergency.

The existing standards for determining non-compliance must be retained.

CONCLUSION

The proposed rule weakens existing requirements for public involvement and analysis of impacts leading to consent for leasing of specific lands. It also weakens standards for compliance with lease terms and other requirements, and for posting bonds. It is not acceptable and must not be made final.

Sincerely,

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