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BLM Directives Rein In the Federal APD Environmental Review Process

Insight — 06/19/2018

This article was also authored by Nils Lofgren, a law clerk at Holland & Hart.

In the first two weeks of June 2018, the Bureau of Land Management (BLM) issued two directives streamlining and clarifying the environmental review process undertaken by the BLM to approve an application for permit to drill (APD). The first directive was issued on June 6, 2018, as Information Bulletin (IB)¹ 2018-061, NEPA Efficiencies for Oil and Gas Development, found at <https://www.blm.gov/policy/ib-2018-061>. IB 2018-061 prioritizes the creation of efficiencies to meet the BLM's requirements under the National Environmental Policy Act (NEPA),² from using existing environmental analyses to evaluating groups of APDs under a Master Development Plan.

The second directive was issued on June 12, 2018, as Permanent Instruction Memorandum (PIM)³ 2018-014, Directional Drilling into Federal Mineral Estate from Well Pads on Non-Federal Locations, found at <https://www.blm.gov/policy/pim-2018-014>. PIM 2018-014 supersedes IM 2009-078 and emphasizes that the BLM's regulatory jurisdiction is limited to Federal lands and Federal actions. To the extent surface facilities are located on non-Federal lands, the BLM's jurisdiction extends mainly to ensure production accountability for royalties from Federal and Indian oil and gas.

1. IB 2018-061 NEPA Efficiencies for Oil and Gas Development

On July 5, 2017, the Secretary of Interior issued Order No. 3354, Supporting and Improving the Federal Onshore Oil and Gas Leasing Program and Federal Solid Mineral Leasing Program, directing the BLM to develop a strategy to address approving APDs efficiently and effectively as well as reducing the processing time. In response, IB 2018-061 was issued on June 6, 2018 “to remind BLM offices of the existing procedures for streamlining NEPA review under applicable statutes, regulations, and guidance and to encourage BLM offices to use these tools consistently and effectively.”

The IB first directs the BLM to consider whether it can rely on existing NEPA analyses for assessing the impacts of a proposed action and possible alternatives. If so, the BLM should: document its reliance on the existing analyses in a Determination of NEPA Adequacy (DNA); incorporate the analyses into a new NEPA document; or tier the new

analysis so that the existing analyses are effectively used as support for the new proposed action. This is the BLM's new preferred option of NEPA compliance for APDs. If there are no existing NEPA analyses, the BLM is directed to consider using an applicable categorical exclusion (CX), such as those identified in the Energy Policy Act of 2005, Federal regulations, and the Departmental Manual. Thereafter, the BLM is directed to use other methods in its effort to streamline NEPA compliance. For instance, APDs and applicable infrastructure should be grouped into a Master Development Plan (MDP) and evaluated in one NEPA document. Additionally, NEPA reviews should be tiered to existing NEPA documents when available.

Of particular note regarding the NEPA public review requirement, the IB emphasizes the discretion of decision-makers in determining public involvement. It states that public review may be necessary when: (1) the proposal is borderline; (2) it is an unusual case, a new kind of action, or a precedent-setting case, such as a first intrusion of even a minor development into a pristine area; (3) a scientific or public controversy exists over the effects of the proposal; or (4) it involves a proposal that is similar to one that normally requires preparation of an environmental impact statement. The IB clearly points out that a public review may not be necessary outside of these situations and the decision-maker can avoid unnecessary reviews through his or her discretion.

2. PIM 2018-014 Directional Drilling into Federal Mineral Estate from Well Pads on Non-Federal Locations

In 2009, IM 2009-078 was issued establishing procedures for processing a Federal APD for a well to be directionally drilled into Federal minerals from a multi-well pad located on fee⁵ surface and minerals and when the Federal minerals are located outside of the well pad location (Fee/Fee/Fed well).⁶ This IM found that although the BLM had no jurisdiction over the construction, operation, and reclamation of the well pad and infrastructure on the fee lands, Federal environmental laws applied, including NEPA, the National Historic Preservation Act (NHPA), and the Endangered Species Act (ESA) (collectively, the Acts). In approving an APD, the BLM had the responsibility to comply with the Acts and to consider the direct, indirect, and cumulative effects of the construction and operation of the well pad and infrastructure even though occurring on fee lands. Accordingly, the BLM could require that pre-drilling onsite inspections be undertaken and that additional information be provided to comply with the Acts. Furthermore, the operator was required to obtain permission from the fee owner granting the BLM access to perform surveys and inspections for its analysis under the Acts.

On June 12, 2018, the BLM issued PIM 2018-014, superseding IM 2009-078, again addressing the environmental analysis to be conducted by the BLM under the Acts in the APD review process for Fee/Fee/Fed wells. The PIM emphasizes that the Federal action to be analyzed is the approval of the APD and the BLM's environmental analysis should be focused accordingly. It addresses the application of the Acts in processing an APD for a Fee/Fee/Fed well under the following three situations:

Situation 1: *Pre-existing well pad with no new surface disturbances.* As to NEPA, the BLM should follow the guidance set forth in IB 2018-061 above, and determine whether a DNA or CX is appropriate. If neither is available, an EA or EIS will be required. For all of the Acts, the environmental analysis should be limited to the environmental effects of the downhole operations to be approved, such as: the proposed casing and cementing program and potential effects on aquifers and other subsurface resources; potential of drilling, completion, or production fluids migrating outside of the production zone; and the effects related to drilling and operating the Federal wellbore (e.g., dust, noise, and traffic). The cumulative effects on resources affected by approving the APD should include acknowledgment of any ongoing or future environmental effects of other actions, if the effects are relevant to assessing how the Federal action will affect specific resources. For example, if APD approval is expected to result in additional dust, noise, and traffic associated with drilling the Federal wellbore, the dust, noise, and traffic associated with the non-Federal drilling occurring from the well pad should be acknowledged in the cumulative effects analysis.

Situation 2: *Pre-existing well pad with additional new surface disturbances (e.g., well pad expansion).* Same as Situation 1. Additionally, the environmental analysis should consider the potential effects of the additional disturbance that would result from the approval of the APD. For example, where an existing pit is to be used, the environmental analysis should consider the potential environmental effects of operating the pit in support of the Federal well, but should not consider the pre-existing pit structure as an environmental effect of approving the APD.

Situation 3: *New proposed well pad for Federal well(s), no existing surface disturbances.* If it appears the new pad will be built as proposed even without a Federal APD, then the environmental analysis should be the same as Situation 1, focused on downhole disturbances. If the well pad will be built only if the Federal APD is approved, then all environmental effects associated with construction and operation of the well, including the well pad, access roads, pipelines, or other infrastructure, as appropriate, must be considered.

Additionally, the PIM provides the BLM with general guidance for processing APDs for Fee/Fee/Fed lands. The following is a brief overview:

1. **APD Submission:** At a minimum, the BLM field office will require the submission of the APD using the Automated Fluid Minerals Support System, the processing fee, drilling plan, well plat, operator certification, and evidence of a 3104 performance bond coverage. No other APD submission provisions of Onshore Order No. 17 or 43 CFR § 3162.3-1 will apply. The BLM has no jurisdiction to require an APD before an operator begins pad and road construction or drilling on the non-Federal land. However, an approved APD is necessary before an operator drills into the Federal minerals.
2. **Bonding:** The BLM has no authority to require a bond to protect

the fee surface owner's interests. Federal oil and gas bonds for Fee/Fee/Fed wells should be used to address downhole concerns only.

3. **Surface Access:** The BLM has no authority to enter the fee lands without the surface owner's consent. The inability to access the well pad surface is not a sufficient reason to deny an APD; however, the BLM may deny the APD if the lack of access prevents it from meeting its obligation under the Acts. After the APD is approved, the BLM must have access to the wellsite to perform necessary inspections. If access is denied, the BLM may order federally approved operations halted and the well shut-in.
4. **NEPA:** See IB 2018-061 and descriptions of the Situations above. After the APD is approved, if the BLM becomes aware of new facilities, activities, or surface disturbances for which no BLM approval was required, the BLM has no obligation to evaluate these new facilities.
5. **ESA:** See descriptions of the Situations above. Compliance with Section 7 of the ESA will be required if the BLM determines that the Federal action, approval of the APD, "may affect" listed species or critical habitat (e.g., the dust from drilling the Federal well might interfere with nesting of a listed species).
6. **NHPA:** See descriptions of the Situations above. Under NHPA Section 106 (54 U.S.C. 306108), the BLM is required to consider the effect of a Federal undertaking on any "historic property." Approval of an APD is a Federal undertaking even when the impacts are on fee lands. The BLM's level of effort in identifying historic properties should reflect the circumstances surrounding the APD. If the BLM is unable to gain access to the fee lands, it should employ alternative methods of gathering information. The BLM may impose a condition of approval on the APD that requires the operator to inform the BLM if the operator discovers any historic properties during operations approved under the APD.
7. **Resource Management Plan Conformance:** Resource Management Plans (RMPs) do not govern the use of non-Federal lands. Management actions in an RMP should only apply to the extent the activities authorized under the APD will impact Federal lands.
8. **Inspection and Enforcement:** The BLM's inspection and enforcement authority is generally limited to downhole operations, wellbore integrity, and production accountability directly related to the production of Federal minerals. Regarding the disposition of Federal production, the BLM retains full authority and responsibility for inspections, including those pertaining to measurement and handling of production from lands committed to a federally approved unit. Inspection and enforcement authority does not extend to the drilling of non-Federal wells or the handling and storage of non-Federal production. Generally, the BLM's inspection and enforcement authority does not extend to surface operations without production accountability implications.

To the extent IB 2018-061 and PIM 2018-014 can create efficiencies and a

pathway to the timely processing of APDs for the development of Federal minerals, they are a welcome relief to the oil and gas industry.

If you have any questions about these cases two directives, please contact Angela Franklin or a member of Holland & Hart's Oil and Gas team.

¹IBs are temporary directives that supplement the BLM manual sections but do not contain new BLM policy, procedures, or instructional material.

²NEPA requires every federal agency to consider the effect of its proposed actions before approving "major Federal actions significantly affecting the quality of the human environment." 40 CFR § 1500.1(a). NEPA sets forth the procedural process to be followed by the agency prior to reaching a decision on such proposed actions. Among other things, it must consider the environmental impacts of the proposed action, any unavoidable adverse environmental effects, and reasonable alternatives to the proposed action. NEPA only applies when the agency has discretion over a proposed action to either approve or disapprove. Major Federal actions that trigger NEPA include leasing of federal, Indian, and allotted lands, APDs, access roads, pipelines, and typically any type of surface disturbance.

³Instruction memoranda (IMs) are directives that supplement the BLM manual sections and handbook with new policies or procedures, interpret existing policies, or provide one-time instructions. IMs can be either permanent or temporary. Permanent IMs provide lasting guidance and remain in effect until superseded or deleted. Temporary IMs are operational, incident-specific, projected related, or one-time policy or guidance for evolving activities and expire at the end of the third fiscal year following issuance.

⁴Federal including federal, Tribal, and allotted.

⁵Fee including private, state, and other non-Federal governmental entities.

⁶This does not apply to split-estate situations where the surface estate is fee and the mineral estate in the same lands is Federal.

⁷Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number, 1, Approval of Operations, 72 F.R. 10308 (March 7, 2007), as amended.

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