COMPLIANCE WITH LAND USE PLANNING AND NEPA
PRIOR TO ISSUANCE OF FEDERAL OIL AND GAS LEASES

NOVEMBER 15, 2002
DENISE A. DRAGO

I. INTRODUCTION

The tremendous increase of coalbed methane (“CBM”) exploration and development occurring in the Powder River Basin (“PRB”) of Wyoming and Montana has tested the limits of existing land use plans governing federal lands. The Bureau of Land Management (“BLM”), as land management agency within the U.S. Department of the Interior (“Department”), developed Resource Management Plans (“RMPs”) for the PRB some 10-15 years ago, prior to commercial-scale CBM development. BLM has recognized the need to update all 162 of its land use plans under the Federal Land Policy & Management Act of 1976, 43 U.S.C. § 1701 (“FLPMA”), and National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (“NEPA”). Priority has been given to RMPs affecting the National Energy Policy and the BLM has recently undertaken environmental impact statements (“EISs”) addressing CBM development within RMPs for both the Montana and Wyoming PRB. The Draft EIS and Draft Planning Amendment for the PRB Oil and Gas Project (WY-070-02-065) released in January, 2002, proposes to amend the Buffalo and Platte River RMPs and develop some 39,400 new CBM wells over a 10-year period in the 8,000,000 acre project area encompassing Campbell, Converse, Johnston and Sheridan Counties, Wyoming. In Montana, BLM is amending the Billings and Powder River RMPs to address CBM development. BLM and the State of Montana are preparing a joint EIS accompanying the RMP amendments to address oil and gas (and CBM) leasing decisions on state and federal lands.

Under current BLM policy, existing land use decisions remain in effect during the amendment of RMPs, unless decisions are specifically determined to violate federal law. Leasing may occur during the amendment process so long as it does not constrain the choice of reasonable alternatives under consideration. Therefore, the Wyoming and Montana BLM state offices have been proceeding with competitive oil and gas lease sales in the PRB every sixty days. These leasing decisions have been challenged by environmental groups in both states. In Wyoming Outdoor Council, 156 IBLA 347, April 26, 2002 (“WOC”), the Interior Board of Land Appeals (“IBLA”) reversed BLM’s decision to issue oil and gas leases with potential for CBM development within three parcels offered in the February 2000 lease sale. The IBLA found the Buffalo RMP/EIS insufficient to support BLM’s leasing decisions. On October 15, 2002, the WOC decision was reaffirmed by the IBLA and BLM’s petition for reconsideration was

---

denied.\textsuperscript{5} Wyoming Outdoor Council has protested every lease sale by Wyoming BLM with CBM potential since February, 2000, and appeals on some 40 leases are pending before the Department.\textsuperscript{6}

Environmental groups in Montana have bypassed this administrative forum, instead filing a complaint directly in federal district court to challenge the issuance of all federal CBM leases within Montana’s Billings and Powder River Basin resource areas.\textsuperscript{7} Northern Plains Resource Council (\textit{“NPRC”}) seeks an order canceling, or in the alternative, suspending all surface operations on approximately 575 federal leases issued to some 40 operators until a pre-leasing EIS is completed. NPRC asserts that the Billings and Powder River RMPs fail to address the impacts of CBM development. The pending Montana Statewide Oil and Gas DEIS and Amendment of the Billings and Powder River Resource Areas RMPs released in January, 2002, addressing CBM impacts, has yet to be finalized. Therefore, NPRC alleges that BLM’s continued lease of CBM minerals without a pre-leasing EIS violates NEPA and FLPMA.

In addition, the DEIS for pending RMP amendments in both states have been rated by the United States Environmental Protection Agency (\textit{“EPA”}) Region 8 as “environmentally unsatisfactory” due to the alleged impact of CBM development on irrigated agriculture. By letters dated May 15, 2002, EPA further asserts that CBM development presents inter-jurisdictional water quality issues and recommends a combined NEPA analysis for the Wyoming and Montana PRB.\textsuperscript{8}

The purpose of this paper is to consider the IBLA’s decision in \textit{Wyoming Outdoor Council} and pending litigation challenging CBM leasing in the Wyoming and Montana PRB in the broader context of BLM’s efforts to update its RMPs nationwide. This litigation has immediate impact on RMPs prioritized for update under the National Energy Implementation Plan.\textsuperscript{9} Specifically, the paper considers what NEPA analyses are needed to support CBM leasing decisions under RMPs, how project-level and site-specific environmental analysis are “tiered” to these RMPs, and in turn update and amend the RMP; the impact of this dynamic process on oil and gas leases suspended or amended in response to a new round of land use plan amendments and revisions; and finally, an examination of reform efforts to streamline the BLM’s planning process and NEPA analysis.

\textsuperscript{5} Wyoming Outdoor Council, et al. (On Reconsideration),157 IBLA 259 (October 15, 2002) (herein \textit{“WOC on Reconsideration”}). On August 29, 2002, the BLM requested the Office of Hearings and Appeals (\textit{“OHA”}) to assume jurisdiction and grant a stay of the Board’s decision. OHA assumed jurisdiction, granted the stay and remanded the matter to IBLA for reconsideration. See In the Matter of Wyoming Outdoor Council and Powder River Basin Resource Council, 21 OHA 246 (September 10, 2002).

\textsuperscript{6} See Protest of June 4, 2002 lease sale, filed with Wyoming State Director by Wyoming Outdoor Council.

\textsuperscript{7} Northern Plains Resource Council (\textit{“NPRC”}) v. BLM, Case No. CV-01-96 BLG-RWA, (D. Mont., filed March 27, 2002.)

\textsuperscript{8} Letters from Robert E. Roberts, Regional Administrator, U.S. EPA, Region 8 to Al Pierson, State Director, BLM Wyoming State Office, and to Sherry Burnett, Montana BLM, Acting State Director.

Peter Schaumberg, Deputy Associate Solicitor, Mineral Resources, U.S. Department of the Interior, will discuss the procedural posture of the *Wyoming Outdoor Council* decisions and provide commentary from the Department’s perspective as a co-presenter on this topic.

II. BLM LAND USE PLANNING

A. Overview

1. FLPMA Land Use Plans

FLPMA requires that public lands be managed under the principles of multiple use, in accordance with land use plans developed under Section 202 of the Act.\(^\text{10}\) Mineral resources are among a variety of potentially competing resource values incorporated by Congress under the term “multiple use.”\(^\text{11}\) With respect to oil, gas and CBM resources, FLPMA also requires that “the public lands be managed in a manner which recognizes the nation’s need for domestic sources of minerals.”\(^\text{12}\)

The RMP is the basic planning tool which governs decisionmaking on public lands. Under FLPMA, the RMP serves as a regional land use plan to define broad, long-term,\(^\text{13}\) multiple-use objectives and resource uses for the public lands. The RMP inventories resources within geographic management areas and determines whether areas are open or closed to certain land uses. Areas of critical environmental concern and areas unsuitable to surface coal mining are designated in the RMP.\(^\text{14}\) The BLM must assure that its land use decisions conform to the RMP and other local, state, federal and tribal plans.\(^\text{15}\)

The RMP has been compared to a local zoning plan or general land use code.\(^\text{16}\) The plan identifies general categories of land use and those lands available for those uses. The RMP does not approve any specific action or leasing decision. Assuming that BLM follows the general process for adopting an RMP, and considers multiple uses, it has broad discretion to select the mix of uses under the RMP.\(^\text{17}\) Appeal of RMPs is exclusively to the BLM State Director.\(^\text{18}\)

---


\(^{11}\) FLPMA § 103(c); 30 U.S.C. § 1702(c) (2000).


\(^{13}\) BLM planning regulations at 43 C.F.R. Part 1600 set forth requirements for adopting RMPs. BLM also follows recently revised general planning guidelines and specific planning guidelines for fluid mineral resources. Land Use Planning Handbook, BLM Handbook H-1601-1 (11/22/00); Planning for Fluid Mineral Resources, BLM Handbook H-1624-1 (5/7/90).

\(^{14}\) 43 C.F.R. § 1610.7 (2001).


\(^{17}\) BLM has broad discretion to determine the mix of uses under its land use plans, so long as it considers the various multiple uses before committing lands to a particular use. Headwaters, Inc. v. BLM Medford Dist., 914 F.2d 1174 (9th Cir. 1990), *rehearing denied*, 940 F.2d 435 (9th Cir. 1991); Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979); Wind River Multiple Use Adv. v. Espy, 835 F. Supp. 1362, 1372 (D. Wyo. 1993), *aff’d* 85 F.3d 641 (10th Cir. 1996).
whose decision is the final decision of the Department; subject to appeal to district court under the federal Administrative Procedures Act (“APA”), 5 U.S.C. § 553, et seq. Therefore, the IBLA does not have authority to review the RMP itself, only the site-specific application of the RMP.\textsuperscript{19}

In sum, while FLPMA does not provide detailed planning guidelines, it does require that RMPs be developed, following an “interdisciplinary approach” developed with public involvement and in coordination with other federal, state and local plans.\textsuperscript{20}

2. Integration of NEPA Into Land Use Plans

Each RMP and plan revision is a “major federal action significantly affecting the human environment” requiring an EIS under § 102(2)(C) NEPA.\textsuperscript{21} NEPA also provides the process for public involvement, including notice and comment, on RMP adoption and amendment.\textsuperscript{22} The regulations of the Council on Environmental Quality (“CEQ”) implementing NEPA require public involvement in defining the scope of the environmental analysis and in commentary on the Draft and Final EIS accompanying the proposed RMP.\textsuperscript{23} In addition to public comment, the RMP/DEIS is subject to adequacy review by the EPA under § 309 of the Clean Air Act and CEQ rules at 40 C.F.R. §§ 1500-1508. A DEIS found by the EPA to be environmentally unsatisfactory may be referred to CEQ.

CEQ rules give form to FLPMA’s general planning procedures. The nine-step process for preparing RMPs or plan amendments set forth at 43 C.F.R. § 1610.4 reflects the major steps outlined in CEQ regulations for preparing an EIS. Compare 43 C.F.R. § 1610.4 with 43 C.F.R. § 1501.7 (scoping), § 1502.15 (alternatives), § 1502.16 (environmental assurances) and § 1505.2(c) (monitoring). The proposed RMP or RMP amendments are generally integrated into the RMP/EIS and circulated as one document.\textsuperscript{24} Once the RMP/EIS is final, a separate decision adopting or amending the RMP is set forth in a record of decision (“ROD”). The RMP/EIS supports the ROD adopting the RMP which must be appealed to the State Director and the RMP/EIS is subject to the same deferential standard of judicial review under the APA.

The RMP and the RMP/EIS are subject to review by the IBLA, only “as applied” to specific resource decisions such as oil and gas leasing. The IBLA will consider whether the environmental analysis is adequate under § 102(2)(C) of NEPA to support the land use decision. The RMP/EIS must reflect that BLM has “taken a ‘hard look’ at the environmental consequences of a proposed action” under Kleppe v. Sierra Club, 437 U.S. 390, 410 n. 21 (1976). The BLM

\textsuperscript{18} 43 C.F.R. § 1610.52 (protest procedures) (2001).
\textsuperscript{19} Id.
\textsuperscript{20} 43 U.S.C. §§1712(c)(2), 1712(f), 1712(c)(9), 1712(c)(4) (2000). FLPMA requires that the process: (1) integrate physical, biological, economic and other sciences; (2) rely on the inventory of public lands and their resources; (3) consider both present and potential uses; (4) consider the relative scarcity of resources and alternative means and sites; and (5) weigh their long-term and short-term benefits.
\textsuperscript{21} 43 C.F.R. § 1601.0-6 (2001); Departmental Manual § 516, Appx. 6.
\textsuperscript{22} 43 C.F.R. § 1601.0-6 (2001).
\textsuperscript{24} H-1624-1; 43 C.F.R. § 3101.1-4 (2001); see discussion infra at IV.B1.
must be fully informed regarding the environmental consequences of its decision.\textsuperscript{25} However, the IBLA applies a deferential standard and BLM’s decision will not be overturned unless it is shown by a preponderance of the evidence that it failed to consider “substantial environmental questions of material significance.”\textsuperscript{26}

In addition, the IBLA requires plaintiffs to exhaust administrative remedies and establish standing, under the “case or controversy” limitation, Article III of the U.S. Constitution. For example, the Wyoming Outdoor Council has participated in BLM’s leasing process, protesting numerous oil and gas lease sales to the State Director and appealing adverse decisions to the IBLA. However, the number of lease sales considered by IBLA has been substantially reduced by WOC’s failure to establish standing under IBLA’s fairly liberal test, requiring a showing of use of the subject lands.\textsuperscript{27} Notably, plaintiffs in \textit{NPRC v. BLM} have appealed directly to federal district court without pursuing administrative remedies before the Department.\textsuperscript{28}

3. \textbf{Leasing Decisions Under the RMP}

In the context of oil and gas leasing, the RMP authorizes areas open and closed to leasing, lease stipulations and mitigation alternatives.\textsuperscript{29} These determinations are made prior to offering lands for oil and gas lease sale. The environmental impacts of alternative leasing scenarios are set forth in the RMP/EIS. BLM predicts post-leasing impacts from oil, gas or CBM development using historic geologic data to project reasonably foreseeable development (“RFD”) scenarios. RFD scenarios are developed for each alternative to predict cumulative impacts from oil and gas operations and ancillary roads and support facilities. The RMP/EIS is used to determine whether areas are open to lease and to set general lease stipulations and mitigation alternatives. Site-specific conditions of approval (COAs) and mitigation plans are developed through further NEPA analysis of oil and gas development prior to approval of the Application for Permit to Drill (“APD”). Some leases are subject to an intermediate level of NEPA analysis if included in a new geologic development or “play” requiring a project-level environmental assessment (“EA”) or EIS. Significant new development may also trigger a change to the RFD scenario or amendment of the RMP.

B. \textbf{BLM’s Update of RMPs}

Although the RMPs are constantly being updated by new data and resource inventories, significant new circumstances require plan amendment and new NEPA analysis.\textsuperscript{30} BLM has recognized that many of its existing land use plans are outdated, making the plans and decisions based on these plans subject to numerous lawsuits, protests and appeals.\textsuperscript{31} Some 45 of the existing 162 land use plans are subject to litigation; 75% are in need of amendment, having been completed prior to 1990, and 52 plans are management framework plans (“MFP’s”) not in

\textsuperscript{26} Southern Utah Wilderness Alliance (\textit{“SUWA”}), 127 IBLA 331, 350, 100 ID 370 1380 (1993).
\textsuperscript{27} WOC stay decision, 153 IBLA 379, 383, dismissing WOC’s appeal on all but 3 of the 49 parcels appealed; Wyoming Outdoor Council, 156 IBLA 377, dismissing appeal on 19 parcels.
\textsuperscript{28} NPRC v. BLM, Case No. CV-01-96 BLG-RWA (D. Mont., filed March 27, 2002).
\textsuperscript{29} H-1624-1.
\textsuperscript{30} \textit{See} SUWA, 144 IBLA 70, 88 (1978).
\textsuperscript{31} Letter from BLM to stakeholders, Henri Bisson, BLM Assistant Director, Renewable Resources and Planning, dated January 17, 2002.
compliance with FLPMA. BLM has proposed to update all 162 land use plans over the next 10 years with priority given to those plans subject to litigation and those needing updating to implement the National Energy Policy, new listing under the Threatened and Endangered Species Act and to address community government issues.

Twenty-one land use plans have been identified as energy-related “time sensitive” to facilitate energy development and BLM has committed to update these plans in two to three years. CBM development has been identified as a key component the National Energy Policy, central to addressing the Nation’s near-term demand for natural gas. Therefore, RMP amendments relating to the development of CBM in the Power River Basin, including: Wyoming BLM’s Buffalo/Powder River Amendment to the 1985 Buffalo RMP; and Montana’s Billings/Powder River Amendment to the 1994 Billings RMP have been prioritized by BLM as “time-sensitive” plans.

III. ANALYSIS OF WYOMING OUTDOOR COUNCIL, 156 IBLA 347 (APRIL 26, 2002) (“WOC”)

In April, 2002, BLM’s fears regarding its outdated land use plans and NEPA analysis were realized in the WOC case. The IBLA reversed BLM’s decision to issue oil and gas leases with potential for CBM development within three parcels offered in Wyoming BLM’s February 2000 lease sale. These parcels involve approximately 1600 acres of federal land in Campbell County and Sheridan County, Wyoming. The IBLA found that the NEPA analysis accompanying the Buffalo RMP adopted in 1985 did not contemplate the impacts associated with the relatively new methods of CBM extraction, including produced water and air quality impacts of transportation. The IBLA rejected arguments that the Wyodak Final EIS, finalized in October, 1999, which specifically addresses the project-level CBM impacts of the three leases in question, adequately analyzed these impacts prior to lease. The IBLA found that the RMP/EIS did not take the required “hard look” at environmental consequences of CBM development and did not consider reasonable alternatives, “including whether the specific parcels should be leased, appropriate lease stipulations, and NSO [no surface occupancy] and non-ns0 areas.” In reaching its decision, the IBLA relied on BLM’s Congressional testimony acknowledging the inadequacy of the RMP/EIS in addressing the impacts of CBM development. Further, IBLA noted that BLM was addressing CBM development in a new DEIS proposing to amend decisions
under the Buffalo RMP concerning areas open or closed to leasing, lease stipulations and mitigation measures.\textsuperscript{41}

On October 15, 2002, the IBLA reconfirmed their decision in \textit{WOC} and denied BLM’s petition for reconsideration and dismissal.\textsuperscript{42} IBLA clarified that \textit{WOC} did not invalidate any previously issued leases other than the three leases at issue and did not create “extraordinary circumstances” justifying reconsideration. The IBLA also stated that it was not condemning the appropriate use of staged environmental analysis and tiering authorized in \textit{Park County Resource Council, Inc. v. U.S. Department of Agriculture}, 817 F.2d 609 (10th Cir. 1997) (\textit{“Park County”}).\textsuperscript{43} IBLA declined to further construe \textit{Park County} stating:

\begin{quote}
The issue in this case was not whether BLM was required to evaluate the impacts of full field development in an EIS before issuing the challenged leases; rather, the question was whether the existing NEPA documents were sufficient to provide the requisite pre-leasing NEPA analysis for the sale of the affected parcels in light of the probable use of the parcels for CBM development.\textsuperscript{44}
\end{quote}

Unless the Secretary of the Interior takes jurisdiction of the \textit{WOC} decision under 43 C.F.R. § 4.5, this matter is final agency action which will be considered by Judge Brimmer in \textit{Pennaco}’s pending appeal before the Wyoming Federal District Court.\textsuperscript{45} Although this IBLA decision directly invalidates only 3 leases, it has caused BLM to delay the lease sale of CBM leases in the Buffalo Resource Area, has motivated environmental groups to further protest Wyoming BLM oil and gas lease sales,\textsuperscript{46} has provided ammunition for plaintiffs seeking to cancel or enjoin surface operations on more than 500 leases in the Montana PRB and has delayed the amendment of time-sensitive RMPs in the Wyoming and Montana PRB.\textsuperscript{47}

\begin{footnotes}
\item[41] \textit{WOC}, 156 IBLA at 358, n. 6.
\item[42] \textit{WOC on Reconsideration}, 157 IBLA 259.
\item[43] \textit{Id.}, n. 5. To avoid duplication of NEPA analysis, CEQ rules and BLM guidelines encourage the “tiering” or cross-referencing of NEPA analysis which overlap the same geographic area or resources. 43 C.F.R. § 1502.20; BLM NEPA Handbook H-1790-1 at III-3.C.1; H-1601.1; H-1624-1.
\item[44] \textit{WOC on Reconsideration}, 157 IBLA at 262.
\end{footnotes}
IV. WHAT LEVEL OF NEPA ANALYSIS WILL SUPPORT AN OIL AND GAS LEASING DECISION UNDER THE WOC DECISION?

A. WOC Decision

In the wake of concerns raised by both BLM and the environmental community that the WOC decision somehow invalidates CBM leases and land use plans across the West, it is easy to lose sight of the narrow issue decided therein. IBLA did not invalidate the Buffalo RMP and indeed would not have the jurisdiction to do so. The much narrower issue before the Board was the adequacy of NEPA analysis to support the Wyoming BLM’s decision to offer three oil and gas leases with CBM potential at the February 2000 competitive lease sale. The BLM relied on both the 1985 Buffalo RMP/EIS and the project-level Wyodak FEIS (1999) to confirm that the lands in the proposed lease sale complied with NEPA and conformed to existing land use plans. This determination was documented in the BLM’s “Documentation of Land Use Conformance and NEPA Adequacy” (”DNA”) worksheets. The IBLA rejected BLM’s DNA determination and concluded that neither the pre-leasing NEPA analysis accompanying the 1985 Buffalo RMP nor the post-leasing Wyodak Project FEIS was adequate to support the leasing decision.

The 1985 Buffalo RMP/EIS did not consider CBM extraction and development which, according to the IBLA, were not uses contemplated in 1985 as to the subject lease parcels. The project-level environmental analysis under the Wyodak Project FEIS was found deficient under NEPA because although it analyzed the impact of some 5,000 CBM project leases (including the subject leases), these leases had already been issued, precluding pre-lease analysis of alternatives. The IBLA also disregarded the argument that periodic updates of the RMP with CBM geologic and project data through the “maintenance” process was adequate to address pre-leasing issues.

The IBLA hinted that the proper level of NEPA analysis was currently being undertaken in the DEIS and Draft Planning Amendment for the Powder River Basin Oil and Gas Project (“PRB DEIS”). Although not final, BLM conducted a pre-leasing analysis of the Buffalo RMP and proposed no changes to lands open and closed to leasing, no changes to or addition of new lease stipulations and no changes to resource objectives or decisions, but did require several new mitigation measures. On reconsideration, the IBLA further clarified that it did not direct BLM to prepare a supplemental EIS to the Buffalo RMP/EIS, but confirmed the need for further

---

48 WOC on Reconsideration, 157 IBLA 259 (Oct. 15, 2002).
50 WOC, 156 IBLA at 357.
51 WOC, 156 IBLA at 358-359.
52 Id.
53 WOC, 156 IBLA at 358, n. 6.
54 Id; PRB DEIS (WY-070-02-065), summary, at x, xi, xxi; see also BLM Notice of Intent to Amend Buffalo and Platt River RMPs (65 Fed. Reg. 69954 (Nov. 21, 2002), revealing that evaluation of RMP on variety of CBM project proposals in 1994-1997 confirmed that amendment of the Buffalo RMP was not required at that time.
pre-leasing analysis including consideration of the “no action” alternative and stipulations restricting CBM development.\textsuperscript{55}

**B. Staged Decisionmaking**

BLM’s Land Use Planning Handbook specifically addresses oil, gas and CBM and requires two levels of decisionmaking and NEPA analysis as to these resources: (1) land use plan decisions; and (2) site-specific “implementation decisions.”\textsuperscript{56} Although the WOC decision does not change the process for making general land use decisions regarding oil and gas resources, it alters the specificity of this analysis to include the surface impacts of CBM development, which BLM proposed to address at the site-specific level.

In the view of defendants BLM and Pennaco, lessees of the subject CBM leases, the impacts of CBM development are not materially different from the impacts of conventional oil and gas operations. Therefore the Buffalo RMP/EIS adequately considers these impacts and supports BLM’s leasing decision.\textsuperscript{57} The IBLA rejects this argument and makes a factual determination that CBM extraction and development in the PRB creates surface water production and transportation-related air quality issues not adequately addressed in the RMP/EIS.\textsuperscript{58} IBIA’s ruling alters BLM’s approach to staged NEPA analysis and decisionmaking under Park County by requiring that CBM surface impacts be analyzed earlier in BLM’s decisionmaking process in pre-leasing land use plans rather than in site-specific environmental analysis or post-leasing, project-level analysis.

In Park County, plaintiffs challenged issuance of leases by the Forest Service for failure to prepare an EIS, although an EA was conducted prior to leasing and a site-specific EA was conducted by the Forest Service and BLM prior to granting the APD. The court upheld this staged approach to environmental analysis, stating:

> When BLM is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken . . . In short, the specificity that NEPA requires is simply not possible absent concrete proposals.

817 F.2d at 64. The Buffalo Field Manager for BLM relied on the Tenth Circuit Court of Appeals Decision in Park County to reject Wyoming Outdoor Council’s protest to the February 2000 lease sale,\textsuperscript{59} on the basis that site-specific NEPA analysis of the CBM development was not possible, absent concrete proposals which accompanied the APD. This staged approach is supported by BLM’s procedures governing RMP leasing decisions.

\textsuperscript{55} WOC on Reconsideration, 157 IBLA at 263, n. 6, 267-68.
\textsuperscript{56} Appendix C.II.F., BLM Handbook H-1601-1.
\textsuperscript{57} WOC, 156 IBLA at 352; Pennaco Energy, Inc. response brief, dated December 21, 2000 at 25 and attached Affidavit of Richard A. Zander, Assistant Field Manager, BLM Buffalo Field Office, dated December 20, 2000.
\textsuperscript{58} WOC, 156 IBLA at 358.
\textsuperscript{59} WOC, 156 IBLA at 349.
1. RMP-Level Decisions and Staged Environmental Analysis

Three specific factors are considered by BLM in making fluid mineral determinations in RMPs or Plan amendments, including: (1) the potential for fluid mineral occurrence and development; (2) the cumulative impacts of reasonably foreseeable development (“RFD”) scenarios; and (3) the necessity for constraints.  

a. Potential for CBM Development Under the RFD

With respect to the first and second factors, BLM predicts post-leasing impacts from oil and gas development based on RFD scenarios. RFD scenarios are developed for each alternative in the RMP-EIS. The RFD projects development over the life of the RMP (10-15 years) and is based on local geologic data regarding potential oil and gas development and historic drilling records. BLM uses this data to project the number of wells anticipated to be drilled for the next 10-15 years. This scenario is then used to analyze potential direct, indirect and cumulative impacts.

The RFD scenario is a target for those seeking to challenge the adequacy of the RMP/EIS. In Wyoming Outdoor Council, 156 IBLA 377 (June 28, 2002), plaintiffs sought to stay lease sales within the Pinedale Resource Area as exceeding the RFD scenario under the current RMP/EIS. The IBLA denied plaintiff’s stay request, determining that BLM was in the process of amending the Pinedale RMP, and that Instruction Memorandum (“IM”) No. 2001-191 allows leasing during RMP/EIS amendment if BLM concludes that leasing will not constrain the choice of alternatives under consideration. Exceedence of the RFD Scenario has also been raised by the Northern Plains Resource Council (“NPRC”), in pending litigation challenging leasing during Montana BLM’s amendment of the Billings and Powder River RMPs.

The Buffalo RMP/EIS challenged in the WOC decision is currently being revised to incorporate CBM development in the RFD scenario. In their PRB/DEIS, BLM develops an RFD scenario which defines CBM development levels for each of three alternatives: (1) Proposed Action (51,000 CBM wells, including an existing 12,000 wells, untreated surface discharge); (2) Proposed Action with Reduced Emission Levels and Expanded Produced Water Handling Scenarios (51,000 CBM wells, with two additional water-handling methods: infiltration and treatment for beneficial uses); and (3) No Action (no new federal CBM wells, state and private CBM wells only). These RFD forecasts are then used to predict impacts from CBM well drilling and production, including ancillary facilities. The RFD is based on geological data, past and present oil and gas activity and other factors such as the economic, technological, and physical limits on access, infrastructure and transportation to support the development.

60 BLM Manual Supplement 1624.2, 1624.22; H-1624-1, III.A.
61 Id.
62 H-1624-1, Ch III.B.4, 5; Ch III.B.8; Illustration 5 - Examples of RFD Scenarios in Areas of Moderate to Low Oil and gas Potential; Illustration 6 - Areas of High Oil and Gas Potential.
64 PRB DEIS, Summary at xvi.
65 In early 1999, the Wyoming BLM and the U.S. Geological Survey initiated a cooperative project to collect technical data on CBM resources in PRB from coal cores provided by CBM operators. USGS Congressional Briefing, Asghar Shariff, BLM Resource Management Group, Sept. 20, 2002, Washington, D.C.
Despite the fact that both the Pinedale RMP and the Buffalo RMP have pending amendments addressing CBM development, the IBLA has applied IM 2001-191 to allow leasing during the amendment of the Pinedale RMP but not the Buffalo RMP.\textsuperscript{66} In considering Wyoming Outdoor Council’s recent request for stay of leases within the Pinedale RMP, the IBLA distinguished its April 26, 2002 decision in \textit{WOC} by determining that the Pinedale RMP lease parcels were not suitable for CBM development and, therefore, the Pinedale lease sale did not raise the same issues which justified a stay of leasing by the Buffalo Field Office.\textsuperscript{67} In addition, while the Buffalo Field Office had prepared a “DNA” without further environmental analysis of the Buffalo resource area lease parcels, the IBLA found that Pinedale Field Office had supported its leasing decision with an EA prior to offering the parcels for lease. This pre-leasing EA identified further stipulations and mitigation measures supporting a Finding of No Significant Impact/Decision Record. This more detailed environmental analysis allowed the IBLA to deny the stay of leasing and find that the Pinedale Field Office had met the requirements of IM No. 2001-191 pending amendment of the Pinedale RMP.\textsuperscript{68}

b. Lands Open for Leasing

The third factor considered by BLM in making leasing decision in the RMP is the necessity for “constraints.” Under BLM’s Handbook, land use plan decisions (RMP level decisions) preceding leasing include: (1) areas open to lease and subject to standard lease stipulation; (2) areas open to leasing, subject to minor constraints and moderately restrictive lease stipulations, such as seasonal restrictions; (3) areas open to leasing, but subject to major constraints and highly restrictive lease stipulations (i.e., no surface occupancy); (4) areas closed to leasing; (5) lease stipulations that apply to areas open to leasing; and (6) leasing decisions applicable to geophysical exploration. Notably, a determination that lands are available for lease carries with it BLM’s commitment to “allow surface use under standard terms and conditions unless stipulations constraining development are attached to leases.”\textsuperscript{69}

In \textit{WOC}, the IBLA was concerned that these determinations had not been made in the Buffalo RMP, specifically with respect to CBM development. These determinations had been considered in the 1985 RMP/EIS with respect to oil and gas reserves in general. Therefore, the \textit{WOC} decision appears to require further analysis of the oil and gas resources to address CBM. This decision may be distinguished by the fact that the Buffalo RMP was being amended to address CBM development at the time of the leasing decision. The IBLA specifically noted that the PRB DEIS evaluated the need to amend RMP decisions concerning areas open or closed to oil and gas development, lease stipulation or other mitigation measures necessary for CBM development.\textsuperscript{70} The PRB DEIS considers the Buffalo RMP and proposes that no amendment be made with respect to areas open and closed to leasing or lease stipulations, although it does require additional mitigation measures.\textsuperscript{71}

\textsuperscript{66} Compare Wyoming Outdoor Council, 156 IBLA at 385, with WOC stay, 153 IBLA at 388-89.
\textsuperscript{67} 156 IBLA at 384.
\textsuperscript{68} 156 IBLA at 385.
\textsuperscript{69} A comparison of standard lease stipulations and more restrictive resource protective stipulations and mitigation is set forth in the Pinedale Anticline Project Area DEIS (Nov. 1999); H-1624-1; 43 C.F.R. § 3101.1-4 (2001).
\textsuperscript{70} WOC, 156 IBLA at 358.
\textsuperscript{71} PRB EIS at xi.
2. **Post-Leasing Site-Specific Environmental Analysis**

The second category of land use decisions recognized by BLM guidance are site-specific “implementation decisions,” such as approval of the APD and pipeline routing. BLM generally conducts site-specific environmental analysis of federal oil and gas operations once an operator identifies a well site and submits an APD. NEPA analysis of the APD also includes consideration of cumulative of impacts of drilling and associated road improvements. Separate site-specific environmental analysis is also triggered when BLM considers applications for roads, pipelines and support facilities. BLM issues rights of way grants under Section 185 of the Mineral Leasing Act (“MLA”) and Title V of FLPMA for pipelines, compressor stations, access roads and other facilities on federal lands ancillary to oil, gas and CBM development. ROW grants may be conditioned upon approval of a plan of development and a notice of intent to proceed with development which impose stipulations and mitigation requirements to address environmental impacts identified in the NEPA analysis.

BLM is not required to undertake a site-specific environmental review prior to issuing an oil and gas lease when the RMP/EIS has previously analyzed the environmental impacts of leasing. In addition, the site-specific NEPA analysis may tier off or cross reference the RMP/EIS if the analysis is specific enough to address the site-specific proposal.

At the point of BLM’s consideration of the APD, the lessee’s right to explore and drill is already subject to standard lease stipulations and mitigation measures under the RMP. Following further site-specific environmental analysis, the operator is also subject to “such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations.” These “reasonable measures” must be consistent with the lease rights granted, and may include modifications to siting design facilities, timing of operations and reclamation measures provided they do not “require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.”

Further, upon submitting an APD, the operator is required to provide a surface use program and a drilling plan including environmental mitigation measures required by Onshore Oil and Gas Order No. 1. Before approving the surface use plan, the authorized officer is required to conduct an onsite inspection and prepare an environmental assessment. BLM uses this NEPA analysis to determine the site-specific conditions under which exploration and development will be allowed on specific leases and whether to grant waivers.

---

72 Implementation decisions for fluid minerals include site-specific actions such as approval of the Application for Permit to Drill, well siting, tank battery construction and pipeline routing. H-1601-1, Appx. C.II.F.

73 H-1624-1, Ch. I.B.3., refers to this “tier” of decisionmaking as the “Activity Planning and Implementation.”


76 Colorado Environmental Coalition, 149 IBLA 154, 159 (1999).


80 43 C.F.R. § 3162.3 (2001).
exceptions or modifications. BLM must also assure that site-specific activities conform to the RMP. 81

3. Project-Level Environmental Analysis

Oil and gas development may also be subject to an intermediate “project level” environmental analysis after a lease is issued pursuant to the general RMP/EIS and before site-specific analysis is performed in connection with an APD. BLM may combine the NEPA analysis of several proposed operations in an area of new development or increased development to consider their cumulative impacts and the need to amend the RMP. These project-level assessments often rely on geologic data provided by operators and compiled by U.S. Geological Survey (“USGS”), in defining “plays” or areas containing geologically-related oil and gas accumulations.

Since 1999, with issuance of the Wyodak FEIS, the Wyoming BLM has been requiring that CBM projects within geologic “plays” be submitted as Plans of Development (“POD”). In Southwestern Wyoming, some six oil and gas development projects are pending or have been recently completed since 1999, including the Pinedale Anticline Oil and Gas Exploration and Development Project involving 700 proposed oil pads in Sublette County, Wyoming, the Continental Divide/Greater Wamsutter Project EIS involving 3,000 wells and the Wyodak EIS (1999) involving a project-level analysis of some 900 potential CBM wells, and the PRB DEIS which is analyzing approximately 50,000 potential CBM wells. 82

To avoid limiting the choice of reasonable alternatives under consideration, drilling is often capped or restricted entirely while project-level EISs are completed prior to issuance of the project ROD. 83 In addition, project-level analysis may result in the imposition of additional mitigation measures not imposed at the leasing stage. The standard lease form adopted in the RMP may be modified at the project level by special or supplemental stipulations, such as no surface occupancy, controlled surface use and timing limitations. 84 For example, the PRB DEIS project-level analysis identifies mitigation measures for CBM development for incorporation into the Buffalo RMP and conditions the permitting of individual facilities in the APD or ROW grant. 85 However, the PRB DEIS makes it clear that the BLM’s proposed approval of the PRB Oil and Gas Project is not the final approval of site-specific action. The ROD for this project-level analysis will approve only the maximum level of CBM development and its general location within the resource area, with site-specific analysis to follow prior to issuance of the APD.

V. RIGHTS ASSOCIATED WITH LEASING

As indicated above, even if the RMP designates lands as available for leasing, BLM may refuse to lease parcels within those lands on the basis of environmental considerations which

82 Table 5-1, Summary of Oil and Gas Development Projects Previously or Currently Being Analyzed Under NEPA in Southwestern Wyoming, Pinedale Anticline Oil and Gas Exploration and Development DEIS, Nov. 1999.
83 See BLM Handbook H-1624-1, III.B.(c).
85 PRB DEIS at x.
may develop as a result of project-level or site-specific NEPA analysis.\textsuperscript{86} However, once BLM issues an oil and gas lease, BLM cannot unilaterally change the terms and conditions of its contract. Leases are contract rights granting definitive well field development rights.\textsuperscript{87} For instance, the Pinedale RMP/DEIS explains that any post-lease decisions reached in the RMP or an amended RMP that restrict oil and gas leasing, exploration or development or close an area to leasing would not affect an existing lease.\textsuperscript{88} These restrictions would not be implemented until after a lease expires without impairing lease rights. However, restrictions can be applied at the APD stage, following further site-specific NEPA analysis to mitigate potential impacts from oil and gas operations. \textit{See} 43 C.F.R. § 3162.3-1(h) (2001).

In \textit{WOC}, the IBLA confirmed that BLM’s issuance of a lease without a no surface occupancy stipulation constitutes “an irreversible and irretrievable commitment of resources,” triggering NEPA, citing \textit{Colorado Environmental Coalition}, 149 IBLA 154, 156 (1999) and \textit{Sierra Club v. Peterson}, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983).\textsuperscript{89} This finding is consistent with BLM’s Handbook H-1624-1 quoted in the \textit{WOC} stay decision:

Compliance with NEPA has been integrated into BLM’s resource management planning process. The BLM has a statutory responsibility under NEPA to analyze and document the direct, indirect and cumulative impacts of past, present and reasonably foreseeable future actions resulting from Federally authorized fluid minerals activities. By law, these impacts must be analyzed before the agency makes an irreversible commitment. In the fluid minerals program, this commitment occurs at the point of lease issuance. Therefore, the EIS prepared with the RMP is intended to satisfy NEPA requirements for issuing fluid minerals leases.\textsuperscript{90}

Emphasis added.

On reconsideration in \textit{WOC}, the IBLA reconfirmed that BLM’s authority to impose mitigation requirements post-leasing\textsuperscript{91} does not relieve BLM from considering the no leasing alternative or stipulations limiting CBM activities. IBLA rejected BLM’s argument\textsuperscript{92} that it retains sufficient authority to mitigate impacts that a lease does not constitute an “irreversible and irreversible” commitment to development.\textsuperscript{93} BLM’s position was undermined by the terms of Oil and Gas Lease Form 3110-2 which grants the lessee the “right and privilege to drill for mine, extract, remove and dispose of all oil and gas deposits” in the leased lands, “subject to the terms and conditions incorporated in the lease.”\textsuperscript{94} The concurring opinion of IBLA Judge Burski further clarifies that the “unnecessary and undue degradation” standard under FLPMA does not preclude all lease impacts but under 43 C.F.R. § 3809.0-5(k), only prevents “surface disturbance

\textsuperscript{86} Marathon Oil Co., 139 IBLA 347, 356 (1997); Harris-Headrick, 95 IBLA 124 (1987).
\textsuperscript{88} \textit{See}, e.g., Pinedale RMP, FEIS at 8 (1987).
\textsuperscript{89} \textit{WOC}, 156 IBLA at 357.
\textsuperscript{90} \textit{WOC}, 153 IBLA 379 at 389.
\textsuperscript{91} \textit{WOC} on Reconsideration, 157 IBLA at 264.
\textsuperscript{92} BLM cites as authority Section 17 of the Mineral Leasing Act, as amended by the Federal Oil Onshore Oil and Gas Leasing Reform Act of 1987, 30 U.S.C. § 226(g) (2000).
\textsuperscript{93} \textit{WOC} on Reconsideration, 157 IBLA at 265.
\textsuperscript{94} \textit{Id.} at 266, (citing PRB DEIS at 2-50 to 2-51; Oil and Gas Lease Form 3110-2).
greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary and proficient operation of similar circumstances . . . .” Judge Burski similarly dismissed BLM’s argument that it has virtually complete authority under the MLA to condition public land leases post-issuance comparable to that regarding offshore leases under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331-1356 (2000).  

Although IBLA makes a vigorous defense of federal oil and gas lease rights, this defense does not change the fact that the Board ultimately reversed and remanded the leasing decision to BLM for “additional appropriate action consistent with this opinion.” IBLA does not specify whether the three leases in question are cancelled. However, in Clayton W. Williams, Jr., 103 IBLA 192, 210 (July 25, 1988), the IBLA noted that because “NEPA is primarily procedural, even if a lease were issued in violation thereof, such a lease would be merely voidable rather than void.” When a lease might still issue after the completion of environmental review, the Board suggested that premature issuance of the lease renders it “voidable.” Therefore, in WOC, Pennaco’s leases appear to be “voidable” pending further pre-leasing environmental analysis. If the leases are cancelled, Pennaco may attempt to seek compensation under Amendment V, U.S. Constitution.

VI. MODIFICATION OF RMPS

Despite numerous project-level environmental assessments and CBM studies in the Wyoming PRB, the IBLA in WOC determined that the Buffalo RMP/EIS had not been adequately “modified” to consider the pre-leasing impacts of and alternatives to CBM development. This determination is somewhat antithetical to the intent of FLPMA which envisions the planning process as dynamic, with the RMP constantly being updated as decisions are issued implementing the land use plan. Under FLPMA, RMPs may be modified by: (i) maintenance; (ii) amendment; or (iii) complete revision.

A. Amendments/Revisions

FLPMA requires BLM to evaluate significant new data to determine whether land use plan amendments or revisions are required. In addition, BLM recommends a routine RMP evaluation process every five years to determine that the RMP-level decisions are current. BLM may be required to prepare supplements to draft or final EIS or prepare a new RMP/EIS or

95 WOC on Reconsideration, 157 IBLA at 273 (citing Nez Perce Tribal Executive Comm, 120 IBLA 34, 36 (1991) (“the fact that a proposed mine plan of operations would not cause unnecessary or undue degradation of public lands does not preclude the possibility that it would cause significant environmental effects that would require preparation of an environmental impact statement”).
96 WOC on Reconsideration, 157 IBLA 273.
98 WOC, 156 IBLA at 359.
99 103 IBLA 192 at 212.
100 WOC, 156 IBLA 358, n. 6.
102 43 C.F.R. § 1610.4-9 (2001); H-1601-1 VI.
103 H-1601-1.
EA if substantial changes are proposed or there are significant new circumstances or data relevant to environmental concerns. 104

An RMP is amended when new data, a change in circumstances, or a proposed action changes the scope of resource use or the terms and conditions of the approved plan. 105 A complete revision is triggered by circumstances affecting the entire plan or major portions thereof. 106 Both amendments and revisions require a NEPA analysis although an amendment may require an EA while a revision always requires an EIS. 107 If amendment of the RMP is required in response to a specific project or proposal, the amendment and the environmental analysis of the project may occur together. 108 For instance, the PRB DEIS involves a project-level analysis of some 50,000 CBM wells in the PRB and also proposes amendment of the Buffalo RMP to address this level of CBM development.

Amendment of the RMP is discretionary with BLM but may be triggered by: (1) new interpretations not known or considered in the RMP; (2) new information or changed circumstances which invalidate RMP decisions; (3) new information or changed circumstances which invalidate implementation decisions; (4) effects of ongoing actions, in light of new information or circumstances which are substantially different from those projected in existing NEPA analysis; and (5) new information which creates inconsistencies between the RMP and resource-related plans of Indian tribes, state or local government or federal agencies. 109

Notably, existing land use decisions remain in effect during the amendment or revision of RMPs, unless the decisions are specifically determined to violate federal law. 110 However, although the current RMP may allow an action, BLM has discretion during the amendment/review process to modify implementation-level actions, and further condition land use approvals, to reduce impacts on the values under consideration. 111 With respect to leasing decisions, Instruction Memoranda No. 2001-191 (Aug. 6, 2001) specifically provides that:

lands which are open for leasing under an existing RMP may be leased during a revision or amendment process when BLM management determines that leasing will not constrain the reasonable choice of alternatives under consideration in the planning process. For documentation to be sufficient to support a leasing decision, management must have made a determination that there is adequate analysis of the impacts of the action detailed enough to identify the types of stipulations that must be attached to

107 Id.
109 H-1601-1 VI.C. See SUWA, 144 IBLA 90, 89 (when RMP no longer accurately reflects facts known to BLM on matters critical to resource allocation decisions, BLM must initiate actions to amend or revise the RMP, whether changes occur within 2 years or 10 years of the ROD).
110 H-1601-1 VII.E.
111 Id.
leases so as to retain BLM’s full authority to protect or mitigate affects on other resources.\footnote{In WOC, 156 IBLA 377, 385, IBLA denied a petition for stay and found that Wyoming BLM met the requirements of IM No. 2001-191 in the Aug. 7, 2001 lease sale.}

B. **Maintenance**

While the amendment and revision process formally changes the land use plan, RMPs may be “maintained” with updated information which does not expand uses or change the conditions of the RMP.\footnote{43 C.F.R. § 1610.5-4 (2001).} Plan maintenance does not require public involvement, interagency coordination or NEPA analysis.\footnote{H-1601-1.}

However, a project-level or site-specific environmental analysis may generate information which is incorporated into the RMP through the “maintenance” process. For example, the Pinedale Anticline Oil and Gas Exploration and Development Project DEIS was classified as a “maintenance” action which did not amend the Pinedale RMP but did update the RMP EIS reasonably foreseeable development (“RFD”) scenario and the air quality cumulative impact analysis.\footnote{ROD for Pinedale Anticline Oil and Gas Exploration and Development Project EIS at 34 (July, 2000).} In WOC, the IBLA ignored BLM’s argument that the amendment of the Buffalo RMP by “maintenance” actions was sufficient to reflect the pre-leasing impacts of CBM development.\footnote{WOC Stay decision, 153 IBLA 379 at 388-89; WOC, 156 IBLA 347 at 351.} The 1985 Buffalo RMP was re-evaluated for CBM impacts from 1992 through 1997 by NEPA analysis of a variety of CBM project proposals, including the Wyodak CBM project. In each case BLM determined that specific amendments to the RMP were not required, but each analysis was viewed by BLM as supplementing and updating the Buffalo RMP/EIS.\footnote{Notice of Intent to Amend the Buffalo and Platte River RMPs, 65 Fed. Reg. 69954 (Nov. 21, 2000).} Despite the update of the Buffalo RMP/EIS by these post-lease project-level assessments, IBLA determined that BLM must consider the impacts of CBM development prior to leasing and suggested that this analysis occur in the pending DEIS accompanying amendment of the Buffalo and Platte River RMPs.\footnote{WOC, 156 IBLA 358, n. 6.}

VII. **EFFORTS TO REFORM OR STREAMLINE FEDERAL LAND USE PLANNING AND THE NEPA PROCESS**

The WOC decision and litigation challenging the adequacy of RMP in the Wyoming and Montana PRB serve to highlight the critical need for reforms in land use planning process and the accompanying NEPA analysis. The Bush Administration, through its National Energy Policy and other initiatives, has taken efforts to address these challenges with both short-term and long-term solutions. Rebecca Watson, Assistant Secretary for Land and Minerals Management, U.S. Department of the Interior, recently summarized these initiatives for Congress as including: (1) land use planning initiatives; (2) the Energy Policy and Conservation Act Study ("EPCA"), addressing access to public lands; (3) improving the timeliness of processing APDs and

\footnotetext{112}{In WOC, 156 IBLA 377, 385, IBLA denied a petition for stay and found that Wyoming BLM met the requirements of IM No. 2001-191 in the Aug. 7, 2001 lease sale.}  
\footnotetext{113}{43 C.F.R. § 1610.5-4 (2001).}  
\footnotetext{114}{H-1601-1.}  
\footnotetext{115}{ROD for Pinedale Anticline Oil and Gas Exploration and Development Project EIS at 34 (July, 2000).}  
\footnotetext{116}{WOC Stay decision, 153 IBLA 379 at 388-89; WOC, 156 IBLA 347 at 351.}  
\footnotetext{117}{Notice of Intent to Amend the Buffalo and Platte River RMPs, 65 Fed. Reg. 69954 (Nov. 21, 2000).}  
\footnotetext{118}{WOC, 156 IBLA 358, n. 6.}
development permits; and (4) streamlining pipeline rights of way and approval to assure the
delivery of natural gas.\(^\text{119}\)

A. Land Use Planning Initiatives -- Short-Term Solutions to CBM Development
in the PRB

Reflecting the objectives of BLM’s National Energy Plan Implementation, BLM has
scheduled the update of all RMPs nation-wide over the next decade, giving priority to
amendment of ten energy-related RMPs.\(^\text{120}\) Amendment of RMPs within the Wyoming and
Montana PRB have been initiated and DEISs have been published. BLM and EPA Region 8
have been working together to address the deficiencies in these DEISs set forth in the May 15,
2002 letters from EPA Regional Administrator Roberts. These cooperative efforts appear to
obviate the need for referral of these DEISs to the CEQ.\(^\text{121}\) EPA has now agreed that the
RMP/EIS for Montana and Wyoming should be issued separately, recognizing the unique
procedural issues created by the Montana State “NEPA” process.\(^\text{122}\) If it so chooses, BLM could
address the issues raised by the EPA and the WOC decision in a Supplemental or Final EIS to the
pending PRB DEIS. While the RMP amendment process is being completed, BLM may proceed
with oil and gas leasing under IM No. 2001-191, when it has determined that there is adequate
environmental analysis of impacts to identify lease stipulation and mitigation measures to
preserve a reasonable choice of alternatives.

In early 1999, the Wyoming BLM and USGS initiated a cooperative project to collect
technical data on CBM resources in the PRB.\(^\text{123}\) This data may be incorporated in amendments
to the RMPs to better predict CBM development under RFD scenarios. This data has already
been used to assess drainage of the federal CBM resources by state and private wells within the
PRB.\(^\text{124}\)

B. Energy Policy and Conservation Act (“EPCA”) Study -- Near-Term
Solutions

Access to oil and gas resources on public lands is another priority of the National Energy
Policy Implementation Plan. This issue is being addressed by an interagency study under EPCA
which includes BLM, USGS, the U.S. Forest Service and the Department of Energy.\(^\text{125}\) The
EPCA study will produce a scientific inventory of oil and gas reserves and analysis of the
restrictions on or impediments to development of these resources.\(^\text{126}\) This study is scheduled for
release this month and will include information on CBM resources in the Powder River, Green

\(^{119}\) Statement of Rebecca Watson, \textit{supra}, n. 10.

\(^{120}\) BLM Action 42, BLM National Energy Plan Implementation.

\(^{121}\) Secretary Gale Norton, Keynote Address, 48th Annual Inst. Rocky Mtn. Min’l. Law Foundation
(July 26, 2002).

\(^{122}\) Remarks, EPA Region 8 Administrator Robert Roberts to Utah State Bar (Oct. 1, 2002).

\(^{123}\) \textit{Supra}, n. 66.

\(^{124}\) \textit{Id}.

\(^{125}\) BLM Action 1, National Energy Policy Implementation Plan; National Energy Policy, May,

\(^{126}\) Statement of Rebecca Watson, \textit{supra}, n. 10.
River, Uinta/Piceance and San Juan/Paradox Basins and the Montana Thrust Belt. Data from this study will be incorporated into pending RMP amendments.\textsuperscript{127}

C. **Streamlining of Permitting and NEPA Review of Energy Projects -- Long-Term Solutions**

In conjunction with the National Energy Policy, President Bush adopted Executive Order No. 13212 on May 18, 2001, mandating the CEQ to lead an interagency task force to accelerate permit review and completion of energy-related projects.\textsuperscript{128} The Department has worked with the Task Force to develop several initiatives, including prioritizing major energy-related right-of-way projects, designating utility corridors in land use plans and development of an interagency agreement with the Federal Energy Regulatory Commission on early coordination of environmental review in conjunction with approval of interstate natural gas pipelines.\textsuperscript{129} In March, 2002, the BLM held an outreach meeting to take comments on mechanisms for expediting the processing of APDs. Among the proposals suggested was the grouping of APDs for processing and NEPA analysis.

CEQ has also organized a NEPA Task Force seeking to improve NEPA analyses and improve intergovernmental coordination. This Task Force accepted comments through September 23, 2002 on examples of effective NEPA implementation and best practices.\textsuperscript{130} Notably, the U.S. Forest Service, which is subject to similar land use planning requirements as BLM, is considering proposed regulations to categorically exclude new land use plans, amendments or revisions from NEPA analysis. An EIS or EA would still be required for site-specific decisions, but would eliminate the plan-level analysis which the Forest Service views as speculative without a concrete development proposal.\textsuperscript{131}

VIII. CONCLUSION

In sum, the Bush Administration has undertaken several short-term initiatives to amend RMPs in the PRB to address CBM development. Although the WOC decision has slowed this amendment process and required additional NEPA analysis, the BLM is well on the way to addressing the deficiencies in land use plans for the PRB. The PRD DEIS, although not final at the time of the February 2000 lease sale, appears to consider the issues raised in the WOC decision and concludes that, except with respect to mitigation, the Buffalo RMP needs no amendment as to lands open or closed to leasing. In the end, the mitigation measures proposed in the RMP/DEIS could be developed as well or better in a site-specific EA or EIS analyzing CBM development.

Long-term changes to BLM land use planning and the NEPA process await the results of the pending EPCA study and CEQ’s Task Force on Energy Project Streamlining, which may well be impacted by the debate in the Department of Agriculture over rules which would categorically exclude Forest Service plans and amendments from NEPA.

\textsuperscript{127} Remarks of Gale Norton, supra, n. 21.
\textsuperscript{129} Statement of Rebecca Watson, supra, n. 10; Interagency Agreement dated May, 2002.
\textsuperscript{131} Vol. 27 Public Land News, No. 20, at 3 (Oct. 11, 2002); the proposed rule amending 36 C.F.R. Part 219, to be published in December is available at http://www.fs.fed.us/emc/nfma/.