

Instructions for Documentation of Exceptions, Waivers, and Modifications for Lease Stipulations, Terms and Conditions, and Conditions of Approval

Exceptions, waivers, and modifications provide an effective means of applying “Adaptive Management” techniques to oil and gas leases and associated permitting activities to meet changing circumstances. The criteria for approval of exceptions, waivers, and modifications should be supported by National Environmental Policy Act (NEPA) analysis, either through the land use planning process or site-specific environmental review.

Note: While the term lease “stipulation” is used frequently in this document, it should be noted that the concepts contained within this policy can also be applied with some adaptation to Terms and Conditions and to Conditions of Approval.

Terms Defined:

- A **Condition of Approval** means a site-specific and enforceable requirement included in an approved Application for Permit to Drill (APD) or Sundry Notice that may limit or amend the specific actions proposed by the operator. Conditions of Approval minimize, mitigate, or prevent impacts to resource values or other uses of public lands.
- A **Lease Stipulation** is a condition of lease issuance that provides a level of protection for other resource values or land uses by restricting lease operations during certain times or locations or to avoid unacceptable impacts, to an extent greater than standard lease terms or regulations. A stipulation is an enforceable term of the lease contract, supersedes any inconsistent provisions of the standard lease form, and is attached to and made a part of the lease. Lease stipulations further implement the Bureau of Land Management’s (BLM) regulatory authority to protect resources or resource values. Lease stipulations are developed through the land use planning process.
- An **exception** is a one-time exemption for a particular site within the leasehold; exceptions are determined on a case-by-case basis; the stipulation continues to apply to all other sites within the leasehold. An exception is a limited type of waiver.
- A **waiver** is a permanent exemption from a lease stipulation. The stipulation no longer applies anywhere within the leasehold.
- A **modification** is a change to the provisions of a lease stipulation, either temporarily or for the term of the lease. Depending on the specific modification, the stipulation may or may not apply to all sites within the leasehold to which the restrictive criteria are applied.

What are the criteria for granting an exception, waiver or modification?

An exception, waiver, or modification must be based on one of two criteria. According to 43 CFR 3101.1-4, “A stipulation included in an oil and gas lease shall be subject to modification or waiver only if the authorized officer determines that the factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified or if the proposed operations would not cause unacceptable impacts.”

What are some examples for granting lease exceptions, waivers, and modifications where the “factors leading to its inclusion in the lease have changed sufficiently to make the protection provided by the stipulation no longer justified”?

Refer to Appendix A and the following example. In the example, circumstances have changed and there are no expected impacts from granting an exception, waiver, or modification:

Example #1:

The lease stipulation requires elk winter range avoidance from November 15 through April 15.

- A one-time **exception** to this type of seasonal restriction could be granted if a mild winter was occurring and the elk left their winter habitat early.
- A **waiver** could be granted if it was determined elk no longer use the area for winter range.
- A **modification** could be granted if it was determined the elk have changed their migration patterns and are not entering the area until mid-December, thus justifying a change in the start of the seasonal constraint to December 15.

What are some considerations in granting lease exceptions, waivers, and modifications where “...the proposed operations would not cause unacceptable impacts”? How do we identify what impacts are acceptable?

Exceptions, waivers, and modifications may also be granted when the authorized officer determines that impacts will be acceptable. This determination should be fully documented in the case file with an appropriate level of environmental review and made on a case-by-case basis after asking not one, but a series of questions, such as:

- Would the BLM remain in compliance with laws and regulations?
- Is the proposal in conformance with the objectives of the Resource Management Plan?
- What would be the level of harm to the protected resource, both locally and regionally?
- What would be the economic or public safety concerns if an active operation near completion was shut in to comply with a seasonal closure? (For example: economic, multi-stage fracturing not completed; safety, casing and cementing of fresh water zones not completed.)
- Are the impacts temporary, rather than long term?
- Is the resource being protected rare, or is it relatively common? Is it a special status species?
- Based on existing knowledge of a species and its use of an area, would impacts be confined to single or a small number of individuals, or would there be impacts on local or regional populations? Would impacts be allowed under existing law and policy?
- Is off-site mitigation an appropriate option? (For example, where individual or cumulative impacts cannot be effectively mitigated on site?)
- Can the impacts be reduced to an acceptable level through intensive use of environmental Best Management Practices?

In the following example, impacts will result from granting an exception or waiver, but the impacts are determined by the authorized officer to be acceptable.

Example #2:

The lease stipulation requires elk winter range avoidance from November 15 through April 15.

- An **exception or waiver** to this type of seasonal restriction could be granted to allow year-round drilling if the long-term viability of the elk population would not be affected. This conclusion could be reached by the authorized officer in coordination with potentially interested agencies, such as the State Fish and Game, if an environmental review (energy and environmental cost/benefit analysis) indicates that disturbance or displacement of the elk during drilling is acceptable.
- Acceptability may be based on considerations such as: (1) the availability of suitable habitat nearby and intensively drilling year-round to shorten the overall drilling time period in the habitat vs. multiple years of seasonal drilling; (2) staged development with intensive development in one defined habitat area followed by reclamation, prior to moving development into the next habitat area; (3) economic, environmental, or social costs of moving large drilling operations into and out of the defined area on a seasonal basis for multiple years; (4) use of additional mitigation such as environmental Best Management Practices that reduce the short-term impacts of drilling on the elk. Best Management Practices might include the use of quieter drilling rigs or noise abatement, locating the well pad and access road behind a ridge, use of bus or van transportation for all employees, limitations on hours of operation, or placing restrictions on the use of certain roads.

How should lease stipulation exceptions, waivers, and modifications be addressed in the land use plan?

Lease stipulations and related exceptions, waivers, and modifications are to be developed during the land use planning process through an interdisciplinary team approach with management oversight and public review to ensure consistency, reasonableness, and appropriateness. Developing exceptions, waivers, and modifications is a creative process requiring the authors to think of situations that could occur well into the future and anticipate various scenarios that may render the stipulation unnecessary or ineffective, or may require increased flexibility in the application of the stipulation. Nearly all lease stipulations should have exception, waiver, and modification criteria documented in the land use plan and on the lease. In limited circumstances it may be possible to identify, for example, waiver criteria that are appropriate, but due to the nature of the resource that is being protected, not exception or modification criteria. In other cases there may be general exception, waiver, or modification criteria developed in the land use plan that applies commonly to all or most lease stipulations and does not need to be repeated individually for each lease stipulation identified in the plan.

(See attached Appendix A for examples of typical land use plan lease stipulations with documented exception, waiver, and modification criteria.)

The land use plan should also identify the documentation requirements and, if required, public notification or review associated with granting exceptions, waivers, and modifications to a lease stipulation. For documentation and public notice recommendations, refer below to *B*.

The Process for Reviewing and Approving an Exception to, Waiver of, or Modification to a Stipulation on a Lease That Has Been Issued.

Can lease stipulations be written in a “performance-based” format?

The preferred lease stipulation format is included in Appendix A. Lease stipulations can also be written in a performance-based format provided provisions are made for generally addressing exception, waiver, and modification criteria. Caution is advised when writing performance-based stipulations. Not all lease stipulations lend themselves to a performance-based format. In many cases, a combination of performance standard, a set of minimum prescriptive actions, and an identified opportunity for adaptive changes to achieve the standard may work best when developing a performance-based lease stipulation.

An example of a performance-base lease stipulation:

“In order to protect the desert grasslands of Otero Mesa and associated threatened and endangered wildlife species, the combined un-reclaimed and un-revegetated surface disturbance from exploration, drilling, production, and other activities associated with lease operations will not exceed five (5) percent of the leasehold(s) at any one time.”

How does the process differ for making changes to a leasing decision/stipulation in the land use plan vs. granting an exception, waiver, or modification after the lease has been issued?

Areas open to leasing, along with their applicable lease stipulations, are identified in the land use plan. Lease stipulations can be added, deleted, or modified within the land use plan through the plan maintenance or amendment processes. After the lease has been issued, changes to the requirements of the lease stipulation are made through the exception, waiver, or modification process. The criteria used for granting exceptions, waivers, and modifications after lease issuance are generally the same criteria used for changing the stipulation in the land use plan prior to issuance of the lease.

A. The Process for Adding, Deleting, or Modifying an Existing Leasing Decision/Stipulation in the Land Use Plan:

It may be necessary to add, delete, or modify lease stipulations in the land use plan as a result of pre-lease issuance parcel reviews, statewide lease stipulation consistency reviews, plan amendments, changed circumstances on the ground, or changed resource protection priorities. This is accomplished and documented through either the plan maintenance or the plan amendment process (below).

Leasing decisions/stipulations changed through plan maintenance do not generally require public notification. Plan maintenance is easily documented in a Resource Management Plan - Plan Maintenance Tracking Log or other tracking system. Changes made through the more involved land use plan amendment process do require public notification as part of the plan amendment process. Public review of at least 30 days must also be provided for any waiver or modification of a lease stipulation within the land use plan that involved an issue of major concern to the public (43 CFR 3101.1-4).

The guidance provided in the Land Use Planning Handbook H-1601-1, Section VI (H)(Maintenance) and Section VII (B)(Amendment) further explains how and when leasing decisions/stipulations may be added, deleted, or modified in the land use plan.

Maintenance or amendments are generally required under the following circumstances:

- Maintenance Examples (further refining a previously approved land use plan decision):
 - When deleting a lease stipulation or modifying its language in the land use plan consistent with the waiver, modification, or other criteria outlined in the plan. For example, prior to the lease sale, deleting a protective stipulation for a species that is no longer protected, or making minor changes to the dates or distances in one of the leasing stipulations specified in the plan.
 - When making minor changes to the stipulation wording to better clarify the intent of a specific plan decision.
 - When applying an existing oil and gas lease stipulation to a new area prior to the lease sale based on new inventory data. For example, applying an existing protective stipulation for sage-grouse to a newly discovered sage-grouse lek.

- Amendment Examples (a change in one or more decisions of the plan):
 - When the change results in expanding the scope of resource uses or restrictions on a landscape scale (plan level).
 - When creating an entirely new lease stipulation, particularly if it is not in conformance with a resource decision, goal, standard, objective, or desired outcomes contemplated in the land use plan.
 - When making major changes to leasing decisions/stipulations and the plan does not identify applicable criteria for making changes, such as exception, waiver, or modification criteria.

B. The Process for Reviewing and Approving an Exception to, Waiver of, or Modification to a Stipulation on a Lease That Has Been Issued:

Once the lease is issued, use the following process if: (1) The exception, waiver, or modification criteria were analyzed and are specified in the Resource Management Plan/Environmental Impact Statement; (2) The criteria have been met; and (3) There is no significant new information bearing on the environmental effects. (See, BLM H-1790-1, Chapter III, Using Existing Environmental Analysis; and 2007 Onshore Oil and Gas Order Number 1, XI. Waivers, Exceptions, or Modifications):

- The authorized officer generally requires the operator to submit a written request for an Exception, Waiver, or Modification and information demonstrating that (1) the factors leading to the inclusion of the stipulation in the lease have changed sufficiently to make the protection provided by the lease stipulation no longer

justified or (2) that the proposed operation would not cause unacceptable impacts. Requests from the operator should contain, at a minimum, a plan including related on-site or off-site mitigation efforts, to adequately protect affected resources; data collection and monitoring efforts; and timeframes for initiation and completion of construction, drilling, and completion operations. The operator's request may be included in an APD, Notice of Staking, Sundry Notice, or letter. The BLM may also proactively initiate the process.

- During the review process, BLM coordination with other state or Federal agencies should be undertaken, as appropriate, and documented. For example, it may be appropriate to coordinate the review of wildlife exceptions, waivers, and modifications with the local office of the State wildlife agency. The BLM will also consult with the Federal surface management agency if other than the BLM.
- The BLM staff's review and recommendations should be documented along with any necessary mitigation and provided to the authorized officer for approval or disapproval. The applicant is then provided with a written notification of the decision. Decisions on exceptions, waivers, and modifications are subject to administrative review by the State Director and thereafter may be appealed to the Interior Board of Land Appeals pursuant to 43 CFR Part 4. However, decisions on exceptions, waivers, and modifications submitted by the operator after drilling has commenced are final for the Department of the Interior and not subject to administrative review by the State Director or appeal pursuant to 43 CFR Part 4.
- After drilling has commenced, the BLM may consider verbal requests for, and grant verbal approvals of, exceptions, waivers, or modifications. However, the operator must submit a written notice within 7 days after the verbal request. The BLM must also confirm verbal approvals in writing. This requirement is provided for in Onshore Oil and Gas Order No. 1. Operators should not be encouraged to submit requests unless the delay in completing the well was due to unforeseen circumstances beyond the reasonable control of the operator or a serious economic or a public health and safety problem could result from denial of the request.

Public notification (30-day public review) is generally not required for exceptions because an exception is seldom a substantial modification or waiver of a lease term or stipulation (43 CFR 3101.1-4), particularly if the exception criteria is outlined in the lease or the land use plan. Nor is public review required for waivers or modifications that the authorized officer determines are not substantial and do not substantially waive or modify the terms of the lease. "Substantial" in this case would include the exception, waiver, or modification having a "substantial" effect on the environment that was not previously considered. However, the applicable land use plan may contain additional notification requirements. The public notice, if required, should include identification of the modified lease terms and a description of the affected lands or a map.

When Public Notice is appropriate, the following procedures may apply:

- Approval of an exception, waiver, or modification with the APD approval: A notice describing the modified lease terms, when required, may be posted for 30 days in the Field/State Office concurrently with the posting of the APD or Notice of Staking; posted on the agency website; posted in a local paper as a legal notice or incorporated into a newspaper article; or the notice may be included as part of the NEPA document's public review, if the NEPA document is offered for review.
- Approval after the APD has been approved: Public notice, if required, may take the form of a 30-day posting on the agency website, a legal notice or article in the newspaper, or a notice and associated public review conducted as part of the public review of a NEPA document.
- Approval after drilling has commenced: Unless specified in the land use plan, it is unlikely public notification would be necessary.

Can exceptions, waivers, and modifications be approved by the authorized officer when they are not specified or analyzed in the Resource Management Plan/Environmental Impact Statement or if there is significant new information?

- Yes. Analyze and document how the waiver, exception, or modification is in conformance with the land use plan and identify the plan decision (including goals, objectives, or desired outcomes) supported by the proposed exception, waiver, or modification. If existing NEPA analysis requires supplementation, prepare appropriate NEPA analysis.
- If the proposed exception, waiver, or modification is not in conformance with the land use plan, either amend your land use plan or deny the exception, waiver, or modification.

Can the authorized officer grant appropriate exceptions, waivers, and modifications to APD Conditions of Approval, Geophysical Terms and Conditions, and Energy-related Rights-of-way Terms and Conditions?

The authorized officer has the option of adding exception, waiver, and modification criteria to permit APD, Geophysical conditions of approval, and Rights-of-way terms and conditions. Not all permit conditions of approval or terms and conditions warrant exception, waiver, or modification criteria. Adding criteria to a permit condition would be most appropriate if the permit condition serves a purpose similar to a traditional lease stipulation, such as a timing limitation or a permit condition that restricts development in a particular area.

In most circumstances, consideration of an "exception," rather than a waiver or modification, would be the most likely scenario for a permit condition. For associated rights-of-way, it is generally appropriate to apply the same exception criteria to the right-of-way grant as applies to the APD. It would be inconsistent to have a situation where the construction of the well pad and the drilling of the well qualifies for an exception, but construction of the adjacent off-lease road to the well location, under the same environmental conditions, does not qualify for an exception.

- It is preferred to have the exception criteria incorporated directly into the terms of the permit/grant, just as you would for an oil and gas lease stipulation. This provides clarity to the operator/grantee and the authorized officer. In the case of an associated right-of-way grant, the grant for an off-lease road, pipeline, or power line could be written so that it incorporates the same exception criteria as applies to the related on-lease development. In this example, the right-of-way term and condition would be written to match the APD lease stipulation. For example:
 - “This access road right-of-way is subject to the same Greater Sage-grouse timing limitation stipulation and applicable exception, waiver, and modification criteria as the associated APD for Deep Oil LLC, well number 12-3: ‘STIPULATION: Greater Sage-grouse Nesting/Early Brood-rearing Habitat. This area encompasses suitable sage-grouse nesting habitat.....’ ”
- However, if the exception criteria were not originally included in the permit/grant, document how the exception is in conformance with the land use plan and the appropriate NEPA decision record. It may be necessary to conduct additional environmental analysis or, in very rare cases, modify the terms of a grant through the right-of-way amendment process, described at 43 CFR 2807.20.

For further information refer to additional exception, waiver, and modification discussions contained in the following documents:

- 2007 Onshore Oil and Gas Order Number 1, Section XI.
- 43 CFR 3101.1-4 (Modification or Waiver of Lease Terms).
- Planning for Fluid Mineral Resources, Manual Handbook H-1624-1, Chapter IV.C.2 and 3.
- Land Use Planning Handbook H-1610-1, Appendix C, (H) Fluid Minerals.
- BLM Handbook H-3110-1 – Noncompetitive Leases.
- BLM Handbook H-3120-1 – Competitive Leases.
- 43 CFR 1610.5-4 (Maintenance).
- 43 CFR 1610.5-5 (Amendment).
- Federal Onshore Order Oil and Gas Leasing Reform Act of 1987, SEC. 5102(f).
- Uniform Format for Oil and Gas Lease Stipulations, March 1989, Rocky Mountain Regional Coordinating Committee.

See Appendix A (below).

Oil and Gas Leasing Stipulations (Land Use Plan Format - Example)
Appendix A
(Table A-1 Continued)

Type of Stipulation	Protected Resource	RMP Acres Affected (Approx.)	Stipulation Description
NSO	Greater Sage-grouse Leks [CODE XXX]	[insert total RMP NSO acres for Sage-grouse]	<p>STIPULATION: Greater Sage-grouse Leks. This area encompasses sage-grouse leks. Surface Occupancy is not allowed within [insert distance] of identified lek sites.</p> <p>Purpose: To protect greater sage-grouse lek activities and lek and nesting habitat within [insert distance] of active leks. XXXX RMP ROD, Page XX)</p> <p>EXCEPTION: The authorized officer may grant an exception if an environmental review determines that the action, as proposed or conditioned, would not impair the function or utility of the site for current or subsequent reproductive display, including daytime loafing/staging activities. An exception may also be granted if the proponent, BLM, State wildlife agency, and where necessary, other affected interests, negotiate compensation or mitigation that satisfactorily offsets anticipated impacts to sage grouse breeding activities and/or habitats.</p> <p>MODIFICATION: The authorized officer may modify the area subject to the stipulation if an environmental analysis finds that a portion of the NSO area is nonessential, or that the proposed action could be conditioned so as not to impair, the function or utility of the site for current or subsequent reproductive display, including daytime loafing/staging activities.</p> <p>WAIVER: This stipulation may be waived, if after consulting with the State wildlife agency, it is determined that the site has been permanently abandoned or unoccupied for a minimum of __ years; site conditions have changed such that there is no reasonable likelihood of site occupation for a subsequent minimum period of __ years, or sage-grouse are no longer a BLM sensitive or special status species and are not listed by the USFWS.</p>
TL	Greater Sage-grouse Nesting Habitat Associated with Leks [CODE XXX]	[insert total RMP TL acres for Sage-grouse]	<p>STIPULATION: Greater Sage-grouse Nesting/Early Brood-rearing Habitat. This area encompasses suitable sage-grouse nesting habitat associated with individual leks. No new surface use is allowed (exploration, construction, and drilling), within [insert distance] of identified leks from [insert date] through [insert date]. This stipulation does not apply to operation and maintenance of existing production facilities and roads.</p> <p>PURPOSE: To protect greater sage-grouse during nesting/early brood-rearing activities associated with individual leks on sagebrush vegetation types during major operations. (XXXXX RMP, Page XX)</p> <p>EXCEPTION: The authorized officer may grant an exception if an environmental review determines that the action, as proposed or conditioned will not affect nest attendance, egg or chick survival, nesting/early brood-rearing success. An exception could also be granted if the proponent, BLM, and State wildlife agency and where necessary, other affected interests, negotiate compensation or mitigation that would satisfactorily offset the anticipated losses of nesting habitat or nesting activities. Actions designed to enhance the long-term utility or availability of suitable sage-grouse habitat may be exempted from this timing limitation.</p> <p>MODIFICATION: The authorized officer may modify the size and shape of the Timing Limitation area if an environmental analysis indicates the actual habitat suitability for nesting/early brood-rearing is greater or less than the [insert distance] radius. Timeframes may be modified based on studies documenting local periods of actual use.</p> <p>WAIVER: This stipulation may be waived, if after consulting with the State wildlife agency, it is determined that the described lands are incapable of serving the long-term requirements of sage-grouse nesting habitat and that these ranges no longer warrant consideration as components of sage-grouse nesting habitat.</p>