



United States Department of the Interior



BUREAU OF LAND MANAGEMENT

New Mexico State Office
301 Dinosaur Trail
P.O. Box 27115
Santa Fe, New Mexico 87502-0115
www.blm.gov/nm

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To: All Employees, NM/OK/TX/KS

From: State Director

Subject: National Environmental Policy Act Third-Party Contracting Protocol

Purpose: This Instruction Memorandum summarizes procedures to follow when using third-party contracting for preparing National Environmental Policy Act (NEPA) documents within BLM New Mexico/Oklahoma/Texas/ and Kansas.

Policy/Action: A third-party contract is a contract that is funded and awarded by an applicant for a proposal to an outside contractor without direct Bureau of Land Management (BLM) funding. For such contracts, the BLM becomes the third-party to the contract between the applicant and the contractor. Third-party contracts are often utilized when an applicant pays a contractor to prepare a NEPA document because of limited BLM time, budget, personnel, or other constraints. The use of third-party contracts to facilitate the processing of proposals and applications through the BLM NEPA process is provided for in 40 CFR 1506.5, Agency Responsibility; in BLM Manual H-1790-1, BLM National Environmental Policy Act (Section 13.5, Contracting NEPA Work); and in the Council on Environmental Quality's 40 Most Asked Questions on NEPA (Question #16).

The following procedures should be followed when a third-party contractor is used:

- A Memorandum of Understanding (MOU) must be developed for all Environmental Impact Statements (EISs) and for major Environmental Assessments (EAs), to be signed by the BLM and by the applicant. For common EAs, such as for Applications for Permits to Drill, a blanket MOU may be developed that generally covers multiple future third-party contracting actions. The MOU should establish the roles and responsibilities of the applicant, the contractor, and the BLM. The MOU should also specify that all contracting costs associated with the preparation of the NEPA document will be borne by the applicant. Please refer to BLM Manual 1786, Memorandums of Understanding for guidance on preparing MOUs.

- The MOU should clearly outline that the BLM has ultimate responsibility for the content of the NEPA document and that the BLM approves the document for release to the public. The MOU should also include language that contractors report directly to the BLM and not to the applicant. Any NEPA document prepared by a contractor is a BLM work product and should not be shared with any outside party, including the applicant, unless the BLM requests to do so. The BLM has discretion whether to provide the applicant with sections of draft NEPA documents for review and input. The amount of applicant involvement in the NEPA process must be described in the MOU.
- For third-party contracts for EISs, the selected contractor must execute a disclosure statement prepared by the BLM that specifies that they do not have any “financial or other interest in the outcome of the project” (see 40 CFR 1506.5(c)). In particular, this means that the contractor must be independent of the applicant. For both EISs and EAs, offices within BLM NM/OK/TX/KS should not accept documents prepared by the applicant or by contractors who have a working relationship with the applicant that raises questions about their independence. In addition to the disclosure statement, field offices should develop a list of standard protocols and procedures that the contractor must follow and should provide this list to the contractor at the time of selection under a third-party contract. Such a document will assist the contractor in understanding their roles and responsibilities to both the BLM and to the applicant.
- The BLM must independently review the NEPA document prior to its acceptance. Standards for review and acceptance of the NEPA document are determined by the BLM authorized official and should be included in the MOU. Draft NEPA documents sent by contractors to the BLM for review must include all information necessary for making an informed decision and must identify where data or analysis gaps may exist. The contractor must not provide the BLM with a completed template with boilerplate information requiring BLM staff to conduct detailed site-specific analysis. All BLM comments and issues must be satisfactorily resolved by the contractor prior to publication.
- The BLM is wholly responsible for the selection of a contractor for the preparation of an EIS under a third-party contract. Applicants are not permitted to select an EIS contractor or to enter into a contract before the BLM has approved the awarding of the contract. While applicants may select contractors for EAs without the BLM’s approval, it is recommended that applicants work with the BLM before awarding the contract to ensure that the contractor is acceptable to the BLM and capable of developing a satisfactory NEPA product.
- The BLM is responsible for informing the applicant of notification of contractor delays or unsatisfactory NEPA products, and may recommend the termination of an EA contractor. The BLM retains the authority to terminate EIS contractors under a third-party contract. However, as third-party contracts are funded by the applicant, the BLM should recognize

and be sensitive to the estimated costs and concerns associated with termination of the contract. Documents and records used or developed by the contractor to support the NEPA process are part of the administrative record and should be made available to the BLM when the contractor's involvement in the NEPA process is completed, or at the request of the BLM authorized officer.

Timeframe: Effective immediately.

Budget Impact: Adherence to this policy will reduce BLM NEPA review and oversight costs associated with third-party contracting.

Background: The use of third-party contracting has become increasingly prevalent to facilitate processing of proposals and applications through the BLM NEPA process in NM/OK/KS/TX. The lack of formal guidance on the subject has led to issues in developing, reviewing, and completing NEPA documents written using third-party contracts. These issues include the lack of understanding of the contractor's responsibilities to the BLM and to the applicant, and a lack of clarity on the content of the documents to be provided to the BLM for review and approval.

Manual/Handbook Sections Affected: BLM Manual H-1790-1, BLM National Environmental Policy Act (Section 13.5, Contracting NEPA Work).

Contact: Dave Goodman, Planning and Environmental Coordinator, at 505-954-2181 or jdgoodma@blm.gov.

Authenticated by:
Veronica Maldonado
Program Management Analyst

Signed by:
Robert A. Casias
Acting State Director

Distribution
WO 212, U. Hong, 20 M Street - 1
NM9300, D. Goodman - 1