



September 27, 2021

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Re: Comments of the American Clean Power Association on Proposed Rights-of-Way, Leasing and Operations for Renewable Energy and Transmission Lines

Submitted via: energy@blm.gov

On August 31, 2021, the Bureau of Land Management (BLM) announced public meetings and a written comment opportunity to provide input on ways to update the BLM's regulations governing renewable energy permitting¹. The American Clean Power Association² (ACP) is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of renewable energy and transmission resources in the United States. ACP's members include wind and solar generation, battery storage, and transmission facility developers, owners and operators, construction contractors, equipment manufacturers, component suppliers, financiers, researchers, utilities, marketers, customers, and their advocates. ACP appreciates the opportunity to provide input on updating regulations for renewable energy permitting and linear rights-of-way on public lands.

ACP is encouraged by the BLM's eagerness to revise and improve renewable permitting on public lands. Solar and wind development on private lands has far outpaced development on BLM land: since 2015, less than 1,000 megawatts (MW) of solar photovoltaic and 220 MW of onshore wind projects have been deployed on public lands³. In the same period, 42,900 MW of utility-scale photovoltaic and 64,900 MW

¹ <https://www.blm.gov/press-release/bureau-land-management-solicits-initial-public-input-updating-regulations-rights-way>

² ACP is the national trade association representing the renewable energy industry in the United States, bringing together over hundreds of member companies and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. By uniting the power of wind, solar, storage, and transmission companies and their allied industries, we enable the transformation of the U.S. power grid to a low-cost, reliable, and renewable power system. ACP members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, renewable energy supporters, utilities, marketers, customers, and their advocates. Additional information is available at <http://www.cleanpower.org>

³ Bureau of Land Management. Wind Energy Rights-of-Way (ROW) on Public Lands. May 2021. https://www.blm.gov/sites/blm.gov/files/docs/2021-05/PROJECT%20LIST%20WIND_May2021..pdf
Bureau of Land Management. Solar Energy Rights-of-Way (ROW) on Public Lands. May 2021. https://www.blm.gov/sites/blm.gov/files/docs/2021-05/PROJECT%20LIST%20SOLAR_May-2021..pdf



of onshore wind was built across the country⁴. The contrast is particularly striking considering public lands often have rich solar or wind resources, and is thus better suited for renewable development than other parts of the country. It is also worth contemplating that less than one percent of onshore renewable resources are developed on public lands, while eight to nine percent of oil and natural gas extracted in the United States originates from public lands⁵.

Renewable deployment on public lands has lagged significantly due to primarily due to added uncertainty and complexity, longer development times, but also more expensive development costs compared to private lands. ACP's comments detail these elements, demonstrating how existing processes for public land development typically add over two years and require significantly more investment more than comparable projects on private lands. Cumbersome processes not only inhibit projects from moving forward, but also prevent applicants from pursuing offtake agreements and selecting optimal technology. This leads to diminished opportunities to securing financing, especially for smaller renewable developers.

ACP acknowledges the efforts of previous Administrations to address this issue. However, the approach developed in 2016 has not achieved the desired outcomes. The top-down approach, coupled with redundant application processes and outdated restrictions, yielded a cumbersome regulatory environment for renewable development.

Each of these barriers needs to be addressed to meet President Biden's Executive Order on Tackling the Climate Crisis at Home and Abroad,⁶ and the Administration's goal of a carbon free power sector of 2035. Furthermore, Section 3104 of the Energy Act of 2020⁷ sets a minimum permitting goal of 25 gigawatts of clean energy generation on public lands by 2025, which will require substantial changes to the permitting process in addition to a rapid increase in staff resources at all levels.

We hope this docket can lead to improvements that will make wind and solar development on public lands more realistic and attractive, while retaining robust environmental review and safeguarding natural resources. We understand that these efforts may require a combination of Instruction Memoranda (IM) to maximize alacrity, and rulemakings (RM) to ensure long-term durability of the policies.

ACP first strongly recommends revising the 2016 competitive leasing rule⁸ and zone-based approach into more efficient and practical alternatives. Next, BLM should rapidly increase staff resources to process permit applications and accommodate the deployment goals of the Administration. Finally, BLM should reduce inflated rents and arbitrary fees for renewables. Addressing these barriers, coupled with a

⁴ American Clean Power Association. CleanPowerIQ. Data Accessed 9/21/21. Available: <https://cleanpoweriq.cleanpower.org/>

⁵ Bureau of Land Management. "About the Oil and Gas Program." Available: <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about>

⁶ Executive Order 14008, available at <https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad>.

⁷ Public Law 116-260, Division Z, available at: <https://www.congress.gov/bill/116th-congress/house-bill/133/text>

⁸ <https://www.blm.gov/programs/energy-and-minerals/renewable-energy/laws/solar-and-wind-energy-rule>



concerted expansion of the U.S. transmission system, will set a standard of pragmatic pro-clean energy policies at the BLM.



MARKET REFORM: GROWING OPPORTUNITIES FOR RENEWABLES ON PUBLIC LANDS

Recommendation: Rapidly Facilitate Greater Variance Lands Projects

While well-intended, the top-down, agency-driven approach to development has not spurred deployment at the pace, volume, and cost as intended. Solar Energy Zone (SEZ) and Wind Energy Zone (collectively, Renewable Zones) lands have not been a feasible development option given the goals of the Administration and direction from Congress in the Energy Policy Act of 2020. At the same time, 19.5 million acres of public lands not in Designated Leasing Areas (DLAs) require more stringent, burdensome measures to development. Variance lands make up a considerable portion of potential public lands for renewable energy deployment and are comparable development areas that may only warrant additional due diligence than required in Renewable Zones. Spurring renewable development on variance lands will ultimately determine how successful BLM will be to achieve energy and climate goals set by President Biden and the Energy Policy Act of 2020.

Rather than focusing agency resources on expanding DLAs, BLM should primarily address the permitting process for Variance Lands. This can take place immediately, without sacrificing BLM's multiple-use mission. For example, an Instruction Memorandum (IM) inviting project-level Land Use Planning Amendments (LUPAs) to address 1) antiquated slope and insolation exclusions based on how renewable technology has evolved, and 2) address antiquated transmission corridors designed for fossil fuel use that are no longer needed would broaden the potential area for renewable development.

Developers also note that such requirements as Director approval to initiate processing of an application strictly due to it being a variance land (i.e., neither in a DLA or SEZ) creates an extra barrier to moving projects forward. This step should be eliminated. Applications for variance lands should be given equal processing priorities rather than treated as less-than-optimal applications relative to Renewable Zones. States (e.g., Utah) should also not have the option to defer applications on Variance Lands because of a preference for applications in Renewable Zones. The priority given to DLAs in §2804.35 should be modified or eliminated.

Developers may also offer additional mitigation measures to make renewables and transmission compatible with some use or resource that may be in direct conflict with the proposed use. This places the responsibility on the industry to use its commercial expertise and experience to meet the ecological guidelines set by the BLM. Other changes to §2804.12 could eliminate greater processing times and other delays, all without weakening resource protection and public participation requirements.

In conclusion, BLM's assumption of the project origination role has placed staff in the wrong stage of the development process. The responsibility of project origination should fall on developers, who have the resources to evaluate sites and determine how to maximize wind and solar resources. BLM staff resources are best utilized later in the process: determining how a selected site is compatible with the surrounding ecosystem and identifying adverse impacts.

Recommendation: Designated Leasing Areas (DLA) Should Supplement, Not Underpin, Public Lands Development (§2802.11)



As BLM prioritizes processing of applications on variance lands, ACP recommends a pivot away from the DLA approach. Although well-intentioned, the “zone-based” approach to siting on public lands has not succeeded in attracting renewable development to public lands. DLAs, by their nature, have served as more of an impediment to achieving federal and state renewable energy goals, because an assumption persisted that such Renewable Zones were sufficient to accommodate deployment goals for public lands. While recent progress has been made in this area, BLM continues to lack resources to process variance land applications and the lengthier procedural hurdles for such applications continue to operate as a disincentive for development of otherwise suitable public lands.

One pitfall to the DLA approach is that the planning function at the agency charged with selecting sites for designation does not have the resources or sufficient technical background in renewable siting and development. As a result, many identified zones attract limited interest from industry. Often the zones may not contain appropriate topography, drainage, and geotechnical elements suitable for renewable development. Perhaps of most importance, many areas are not close to transmission injection sites or load, or both. The wind or solar resource may be attractive from a desktop analysis, but factors that make or break solar and wind projects are often invisible. Complex technical and economic factors - that sometimes interrelate -- can take significant investment to study, such as solar or wind availability, grid injection capacity, and other technical, competing resource and market issues. DLAs inherently may not consider such factors as some of these elements features are unknown to non-industry experts.

With respect to solar, for example, as technology has advanced, projects can now be constructed on greater slope, more variable terrain and in lower insolation areas without sacrificing economics. Similarly, as wind turbine towers and blades have gotten taller with larger rotor swept areas, sites with lower wind speeds can be economical in a way they could not have been five or ten years ago. Like its technology, renewable energy markets are in a constant state of innovation and change. Permanently excluding land because of outdated assumptions from over a decade ago regarding technical and market assumptions is now artificially removing significant acreage from development.

Regional mitigation strategies for DLAs also need to be revised, as these locations, per the Solar PEIS and Competitive Leasing Rule, were selected because of low conflict with other public land resources. The Solar Regional Mitigation Strategies (SRMS), however, often exceed the level of undertaking taken for projects in variance areas or other environmental impact statements. While providing expectations to developers on mitigation requirements and avoidance areas is helpful for preliminary financial models and project design, the agency is allocating substantial planning resources for areas identified for low conflict and project streamlining. For example, in the Colorado SRMS, BLM completed a cultural study for most of the San Luis Valley Field Office. Additionally, a complex compensatory mitigation scoring program extended analysis far beyond the DLA. The SRMS is a multi-year effort that ultimately delays engagement by developers who are forced to wait for the outcomes of substantial mitigation requirements. BLM should narrow the scope of analysis when analyzing low-conflict areas.

One of the reasons for a specific zoning approach adopted in the 2012 Programmatic Environmental Impact Statement (PEIS) appears to have been a concern that developers would file applications without regard to resource conflicts, and that neither BLM nor conservation groups would have sufficient resources to constrain unwise development. Over the last decade-plus, however, developers have



become more knowledgeable about assessing potential sites for the probability of resource conflicts and apply learned experience to find project sites that are “smart from the start.” Sophisticated developers have little interest in siting and expending capital on lands with low renewable resource value or the potential for unresolvable conflicts. As a result, solar and wind development proposed and authorized on federal lands on a case-by-case basis has largely avoided resource conflicts and successfully minimized and/or mitigated for conflicts following robust scrutiny under the National Environmental Policy Act (NEPA), thereby achieving resource protection objectives and climate change priorities with a site identification process that remains more flexible for developers.

Finally, the top-down delineation sets arbitrary terms and conditions between projects inside and outside the DLAs. Developers have also found that environmental streamlining benefits inside of DLAs have not necessarily translated into cost or time savings, and disadvantage certain technology as BLM has not yet established market-reflected wind-specific DLAs. Similarly, established incentives to develop in DLAs (Variable Offsets, § 2809.16) should be revised with a different set of incentives. Consideration of power purchase agreements (PPA) (§ 2809.16.1) and interconnection agreements (IA) (§ 2809.16.2) are not possible to secure at such an early stage of development, so would never be utilized as incentives. As to the prior testing and monitoring (§ 2809.16.4) consideration, this is not commercially viable given the risk of losing the bid, so is similarly not likely to be utilized as an incentive.

BLM may also consider the inverse approach to DLAs: whereby the BLM identifies areas that are legally or by existing policy off-limits and allow developers to prospect and propose sites in the remaining areas. These areas could then be evaluated on a case-by-case basis. Historically, this approach has demonstrated its effectiveness: many early projects developed on public lands were “grandfathered,” and permitted in parallel with development and implementation of the PEIS. In some areas, such as Eastern Riverside County, the PEIS essentially followed the market by establishing zones in areas that had already been prospected for resource conflicts by developers and were proceeding with development.

Recommendation: Revise Section 2804.30 to Discourage or Prohibit District Imposition of Competitive Processes for Non-DLA Land.

Competition within the clean energy sector drives the lowest cost of power for customers and can maximize benefits to the host jurisdiction. However, competitive processes are most effective when applied to later stage assets, e.g. when a site has already been studied and a developer has performed requisite interconnection studies. By placing competition at the front end of the development process – site selection - there are unnecessary risks and added uncertainty. An unpredictable - and later redundant - process discourages capital investment and disincentivizes innovative developers that have their project areas of interest susceptible to a competitive process. ACP members report significant challenges developing solar in Southern Nevada, where despite strong solar resources, competitive processes are the norm.

First, competitive leasing is the wrong mechanism for ascertaining FMV of wind and solar sites on BLM lands. Traditionally, the practice is applied to sites with more uncertain value, such as gas and petroleum



leases, or more nascent renewables like offshore wind⁹. A renewable energy developer incurs a considerable amount of time, work and expense in preparing a specific proposal, including analysis of environmental impacts. A developer who successfully performs these studies should not see that investment placed at risk of loss to a higher bidder through the onset of a competitive bidding process. Unlike a competitive procurement process, an unsuccessful bidder does not instantly incur sunk cost. Rather, the company may continue pursuing the project and sell the power elsewhere. Further, the bidding process and the acceleration of payments by two years prior to obtaining a ROW burdens projects with risk when compared to alternatives for achieving site control on private lands or the use of issued ROWs on public land.

A case in point, the BLM set to auction three parcels in the San Luis Valley SEZ in 2013¹⁰. Despite preliminary interest by and presence at the auction of energy developers, no one submitted a bid on any of the parcels. Interestingly, the proximate area of the three parcels has solar generation facilities operating on private lands, suggesting the competitive bidding process and/or the relative cost of developing and operating on federal lands may have been the disincentive to participate rather than an absence of a viable market.

Should BLM continue to implement competitive processes, developers proposing a renewable energy project area should have exclusive rights to the area once an application is submitted. Alternatively, a competitive process can be imposed only when competing ROW applications are received by the BLM, similar to the Bureau of Ocean Energy Management's lease area approach for offshore wind when competitive interest is identified.¹¹

ACP recommends amending §2804.30 to make competitive processes an exception, only required when multiple applications for the same area are submitted and applicants are unable to resolve competing interests. The ability to impose of a competitive process should rest with the Director, rather than at the discretion of a local office.

Finally, ACP recommends removing the megawatt capacity fee to the minimum bid (§2804.30.e.2.ii). The justification for this additional fee is unclear for purposes of a bidding process, and effectively creates an artificial price floor on the site, similarly detailed in our recommendation on rents and fees.

⁹ Further, the competitive leasing process for offshore wind under Bureau of Ocean Energy Management regulations is different in important ways from what BLM has established for wind and solar. To cite just one example, for offshore wind, there is not a two-stage competitive process. The auction winner has rights to the lease area for site assessment and to apply to construct a facility. Under the 2016 competitive leasing rule, there is a two-stage process in which a wind developer that wins the ability to do site assessment activities could lose a subsequent lease auction that provides the right to apply to construct a facility.

¹⁰ <https://www.durangoherald.com/articles/bidders-avoid-solar-auction-in-droves/>,

¹¹ 30 CFR 585.230 and 585.232.



PRICE REFORM: REMOVING ARTIFICIAL PRICE FLOORS ON CLEAN ENERGY

Recommendation: Revise Rent Schedules and Fees for Solar and Wind Development to Adhere to FLPMA Fair Market Value (\$2806.54 & \$2806.60-2806.62)

Wind and solar development on public lands is significantly more expensive than private development in part due to artificially high rent schedules and arbitrary megawatt capacity fees. Based on third-party assessments, and extensive feedback from solar and wind developers, many rent schedules are significantly higher than Fair Market Value (FMV). In short, the cost of operating a wind or solar facility on public lands is far higher than what it is on private lands.

Acreage Rents Often Higher Than Fair Market Value

The Federal Land Policy and Management Act of 1976¹² (FLPMA) provides that the United States should receive FMV for the use of the public lands and their resources (FLPMA, §1701(a)(9) and §1764(g)). The total economic rents required for solar and wind facilities under the Competitive Leasing Rule consist of two components, which, added together, are intended to approximate FMV for the “highest and best use” of the land: (1) an annual acreage rent, and (2) a megawatt capacity fee.

Under the Competitive Leasing Rule, in some circumstances, the economic rents being charged to projects for Rights of Way (ROW) Grants on public lands vastly exceed FMV, in violation of FLPMA, resulting in an undue hardship for the companies. Acreage rents are based on National Agricultural Statics Service (NASS) value for what an owner claims is the value of land, not on sales. This has skewed costs upward for counties with high-end agriculture and urban development by combining, for example, an expensive urban area (e.g., Palm Springs, CA) with a low-cost desert area (e.g., Blythe, CA). NASS data sets also represent cropland values, and do not reflect reduced value for unimproved or unirrigated land more common to solar and wind development. Finally, land values within zones contain high variability and BLM often charges the highest value in the range.

A Valuation Services report prepared under Uniform Standards of Professional Appraisal Practice (USPAP 2020-2021) by the internationally recognized firm of CBRE, Inc. illustrates how BLM’s rents can be substantially out of step with other valuation information. BLM used NASS values for non-irrigated land values in those counties, subtracted an assumed 15% for the value of buildings and other improvements, disregarded the highest value within a zone, and established acreage rents for solar of \$544.66/acre for Riverside County and \$670.18/acre for San Bernardino County, beginning in 2022. In an exhaustive report analyzing hundreds of comparable land sales, CBRE observed that FMV charges in Riverside County, California ranged from \$37.50 to \$60.00 and in San Bernardino from \$22.50 to \$36.00 per acre. These discrepancies help illustrate why inflated acreage rents dissuade renewable developers from pursuing projects on public lands.

Megawatt Capacity Fees are Arbitrary, Violate Standard Appraisal Practice

It is worth noting that private landowners typically do not charge royalties, capacity fees, or other types of economic participation fees for solar development, while BLM levies a megawatt (MW) capacity fee

¹² https://www.blm.gov/sites/blm.gov/files/AboutUs_LawsandRegs_FLPMA.pdf



on renewable development. The MW capacity fee is based on the theory that land best suited for renewable development will inherently be valued higher. The referenced 2021 CBRE report disproved this theory: actual sales of land developed for solar energy were not valued higher than comparable properties developed for other uses. Furthermore, royalties like the MW capacity fee are meant to apply to finite, extractive resources like minerals, oil, or gas: extracted finite resources will eventually render the land unusable or uneconomic for that purpose, decreasing the land value over time. ACP maintains that FLPMA does not grant BLM the authority to require capacity payments for an infinite resource (i.e., renewables) that is not part of the land and does not involve the removal, depletion, or sale of federal property.

Furthermore, the methodology for a MW capacity fee violates both standard appraisal practice and principles for calculating FMV by imposing rents based on the value of the unimproved land and the productivity of that land after it is improved and made more productive entirely by the tenant's technology and enterprise. BLM's approach improperly combines a comparable valuation methodology with the income capitalization approach on vacant land. As explained in the Uniform Appraisal Standards for Federal Land Acquisitions, "[w]hen the subject property is unimproved . . . the primary method of land valuation is the sales comparison approach." According to this method, the "appraiser's opinion of value shall be supported by confirmed sales of comparable or nearly comparable lands having like optimum uses." In contrast, the income approach is "[a] method of appraising real property based on capitalization of the income that the property is expected to generate."¹³ Even under this method, "[p]roper application of the income capitalization approach requires a distinction between income generated by the property itself (such as rental or royalty income), which can be considered, and income generated by a business conducted on the property, which must be disregarded."¹⁴ A rent schedule charging grossly inflated amounts for the value of the land, and then adds additional fees not associated with existing improvements or the value inherent in the land, but rather tied to the productivity of the technology used on the property, as is the case here, both improperly applies and then misapplies inapplicable appraisal methodologies.

A Path Forward

Section 3103 of the Energy Act of 2020 stipulates the Secretary may reduce both acreage rents and capacity fees for existing and new projects if the Secretary determines that the existing rates (including both acreage rents and capacity fees) exceed FMV or are not competitively priced compared to other land, or that a reduced acreage rent or capacity fee is necessary to promote the greatest use of solar and wind energy resources. ACP encourages Interior to act under Section 3103 to adhere to FLPMA FMV standard and eliminate the megawatt capacity fee and revise acreage rents. To minimize BLM resource needs, ACP suggests using NASS rental survey values for non-irrigated agricultural land or pastureland values as a reference point for per-acre rent values under 43 CFR § 2806.62(a).

Finally, ACP recommends that rents should only be annually increased for inflation. The practice of additional adjustments to rents based on updated NASS rental surveys of incomparable land uses is not

¹³ Black's Law Dictionary 768 (7th ed. 1999)

¹⁴ UASFLA at 137



appropriate and artificially inflates BLM land value. The annual adjustments as described in § 2806.52 and § 2806.62 create uncertainty for developers when projecting life of project operational costs. Lease payments to private landowners are typically negotiated over a longer period, and local property taxes are not prone to significant, additive fluctuations. ACP recommends replacing the text in 43 CFR 2806.61 to codify that for new and existing grants or leases, the rent will increase every year by the change in the IPD-GDP for the preceding the year, or 2.1% whichever is less.

Recommendation: BLM Should Consider Lowering the Nomination Fee for Projects in DLAs

Fees for nominating sites inside Designated Leasing Areas are currently \$5/acre (§2809.11). Based on the most recent project list, this means a 200 MW project could cost a developer \$17,000 simply to nominate a parcel for development. Given the nomination is not refundable (unlike a bid), this discourages developers from pursuing projects in DLAs. ACP recommends eliminating the nomination fee entirely, or reducing it by 50% to encourage more interest in priority areas.



UPDATING STANDARDS TO REFLECT INDUSTRY ADVANCEMENT

Recommendation: Update Decommissioning Requirements to Reflect State Precedents

While decommissioning bonds are vital to ensuring the BLM is protected against liabilities associated with development, excessive bonding requirements raise the cost of capital for projects, raising the cost of renewable energy and making public lands less competitive relative to private lands. While bonds or letters of credit are not a major share of development costs, strict and or excessive bonding requirements can drive up the cost of renewable energy, to no benefit other than creditors. ACP recommends BLM consider revising decommissioning requirements to accurately reflect the level of risk associated with renewable deployment. The association's assessment concludes § 2809.18 departs from common practices, and BLM should base new decommissioning provisions based on recent state statutes.

Per § 2809.18, BLM requires bonds for decommissioning be at least \$10,000 per acre for solar, and \$20,000 per turbine greater than 1 MW in size. This estimate is both arbitrary and far higher than what is required in private land markets. ACP is not aware of states that require a bond based upon a flat, per acre dollar amount; most jurisdictions base bonding requirements on an assessment of decommissioning costs performed by a third-party engineering firm licensed in the state.

Since BLM last revised the regulations in 2016, many states have updated statutes related to wind and solar project decommissioning. New legislation reflects enhanced industry insight into the risks associated with project deployment, such as project abandonment, equipment failure, and the costs of revegetation.

ACP recommends BLM consider applying decommissioning requirements of the jurisdiction where the project is built, or examine precedent established on other states and apply a new standard all projects developed on public land. For example, the State of Texas revised its wind and solar decommissioning requirements in 2019 and 2021, respectively. Texas statute does not require the full bond amount until the 10th anniversary of commercial operation¹⁵. Nebraska also requires financial assurance to be provided within the tenth year of operation¹⁶. Since 2011, Oklahoma law allows for wind facilities to operate for up to 15 years before requiring security in the form of a surety bond, collateral bond, parent guaranty, or letter of credit¹⁷. These statutes corroborate a conclusion by the North Carolina Department of Environmental Quality, which determined "that there is a minimum 10-year time horizon for when the first significant tranche of PV modules may reach EOL [end-of-life], repowering efforts

¹⁵ Utilities Code of Texas. "TITLE 6. PRIVATE POWER AGREEMENTS CHAPTER 301. WIND POWER FACILITY AGREEMENTS." Available: <https://statutes.capitol.texas.gov/Docs/UT/htm/UT.301.htm>

REMOVAL OF SOLAR POWER FACILITIES, 2021 Tex. Sess. Law Serv. Ch. 582 (S.B. 760) Available: <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00760S.pdf>

¹⁶ Nebraska Revised Statute 70-1014.02 Available: <https://nebraskalegislature.gov/laws/statutes.php?statute=70-1014.02>

¹⁷ Oklahoma House Bill No. 2973 (2010). Available: http://www.oklegislature.gov/cf_pdf/2009-10%20ENR/hb/hb2973%20enr.pdf



notwithstanding.”¹⁸ These statutes all suggest that providing the full decommissioning bond prior to construction does not reflect the risks associated with development, nor reflect the near-term risk of project abandonment.

Furthermore, there is a growing body of independent cost estimates of decommissioning from third party engineers that demonstrate that the cost of decommissioning for some projects can be positive, given that collective salvage value exceeds the costs of recycling, removal, and revegetation. The requirement in 2805.20(b) is regardless of whether a subtraction for salvage value is accepted or not, which is permissive (2805.20(a)). ACP is aware of cases where BLM field offices have refused to accept salvage value in the Reclamation Cost Estimate. ACP recommends changing the regulations to always include salvage value when determining the bond amount, as those assets are tangible and represent real economic value.

Recommendation: Extend Wind and Solar Rights-Of-Way Term to 40 years; Establish Process for Extension

Based on improving technology and practices to extend long term power output, ACP recommends increasing the grant term in Section 2805.11(b)(2)(iv) from 30 to 40 years. Solar and wind plant lifetimes have lengthened over the last decade; there is a high likelihood of continued operational improvements over the next few decades. Extending the ROW term would also help facilitate better financing, which in turn lowers the cost of renewable energy and enhances the overall value of the ROW for the holder.

¹⁸ North Carolina Department of Environmental Quality. Final Report on the Activities Conducted to Establish a Regulatory Program for the Management and Decommissioning of Renewable Energy Equipment. 2021. Available: <https://files.nc.gov/ncdeq/Environmental%20Management%20Commission/EMC%20Meetings/2021/jan2021/attachments/AttachA-21-05-H329---FINAL-REPORT-Ellen--1-.pdf>



RESTRUCTURING & REHIRING TO MEET 2025 GOALS

Recommendation: Rapid Personnel Enhancement to Assure Timely Permitting

ACP acknowledges BLM faces challenges with respect to staffing, not only to undertake general program administration but to review and process renewable energy applications. The impact of under resourcing agencies disproportionately impacts siting on variance lands, as scarce staff resources are dedicated to siting in areas previously designated as a priority. ACP hopes these recommendations will serve the wide-ranging goals of BLM in addition to rapidly advancing renewable deployment.

First, as required by Section 3102 of the Energy Policy Act of 2020, BLM should reconstitute their Renewable Energy Coordination Offices (RECOs) in each state with their own specialist personnel (biologists, archaeologists, realty specialists, project managers) reporting to the state office. This would also help addressing staffing constraints at field offices. Consistency across state RECO offices would add clarity and certainty to developers investing in BLM land development in multiple states. The establishment of RECOs during the Obama administration advanced a significant level of efficiency in processing of applications as well as consistency throughout the Department.

Second, as to the staffing up of RECO and other offices supporting renewable energy development, BLM should evaluate resource needs across the agency and where resources available exceed staffing demands, and consider moving those labor resources on detail to support renewable energy. This would be an efficient interim step given long lead times to bring new staff onboard. In parallel, enhancements of Human Resource personnel and processes to more efficiently recruit and hire, such as delegating recruitment processes to state and field offices with support from headquarters would allow BLM to bring additional necessary personnel resources to this program area. This includes identifying resource needs and surgically recruit necessary specialists such as project managers and technical specialists. Coordination with National Occupational Classification (NOC) to assure grade levels sufficient to attract new and capable talent.

In the event a significant number of applications creates a bottleneck, a national permitting office should have the ability to retain a third-party contractor to perform the requisite reviews and analysis. These contracts can be funded by the applicant to ensure appropriation of public funds does not inhibit the process.

Lastly, ACP recommends BLM incentivize and advance current labor resources with promotions that facilitate use of their experience and knowledge passed on to fresh recruits to minimize learning curves and maximize efficiencies.

Recommendation: Accelerate Application Processing Standards

ACP members report that it can take three or more months to gain authorization to install a met tower, six months for authorization for geotechnical assessments, and six months to process a segregation notice, none of which require significant evaluation or assessment to authorize. Staffing shortages may be the root cause of these processing delays, but these processing timelines have cascading impacts such as delaying seasonally dependent cultural or biological surveys triggered by the SF-299 requirements, and regardless the level of perceived or real impact of such minor actions.



BLM offices have on occasion utilized the Form 2920 Land Use Application Permit process, which has proven to be relatively straightforward to process. Coupled with Categorical Exemptions for minor impact activities, the increased use of the Form 2920 process would lessen overall schedule and cost burdens for renewable energy applicants.

Other opportunities to increase certainty, reduce timelines, and thereby increase the appetite of renewable energy developers to public lands are:

- 1) Formally adopting a policy, for example by Instruction Memorandum, that segregates renewable energy land from mineral applications immediately upon receipt of a renewable energy application. Underlying mineral rights that do not subordinate to the renewable energy project leaves the developer at risk and disinclined from substantive investment
- 2) Serialize applications with Plan of Development (POD) and Cost Recovery Agreements as soon as possible. Competing applications could be left to work out an agreeable arrangement or, lacking such resolution between competing developers, the BLM could elect to pursue compete bidding to resolve.
- 3) Clarify the survey methodology and requirements for the Section 106 process, limiting to pedestrian, interval studies for initial analysis and allowing for construction monitoring.
- 4) Allow for flexibility in POD to allow for changes in site design based on site studies and changes in technology

Recommendation: Revision of Resource Management Plans or other Landscape Level Planning for Solar and Wind

At a broad planning level, ACP understands the BLM intends to revise dated Resource Management Plans (RMPs) to update with current policies, priorities, and added consistency across the districts. While ACP is in general support of such an undertaking, we strongly recommend that such efforts should be done independent of proceeding with timely processing, review and authorizations for renewable energy projects. Waiting until RMPs are updated practically results in upwards of 1.5-2 years of unnecessary delay. ACP members have reported some offices decline to process applications because land use planning processes are underway with the false rationale that uncertainty of applicable policies could render a ROD open to challenge. We do not concur with this perceived risk and believe BLM has a statutory obligation to continue with land management, including project approvals, alongside land use planning, as is the case with oil and gas and other resource-uses

Separate from RMP revisions, ACP is generally aware the administration might be considering additional landscape level planning similar to those that established Renewable Zones. Such efforts have heretofore not met the overarching goal of expediting low conflict renewable energy projects (see our earlier comment comparing wind and solar development on public versus private lands) despite the multiple year process of negotiating the Desert Renewable Energy Conservation Plan (DRECP).

Alternatively, as detailed throughout our comments, the BLM should instead improve and strive for more consistent usage of existing landscape level plans. The DRECP did not envision a prioritization of DLAs over Variance Lands. Yet, in practice such deprioritization of Variance Land applications is a



common occurrence. Rather, the intent was Renewable Zones were likely to be lower conflict projects than Variance Land projects; unfortunately the only material difference being higher risk and potentially more due diligence required of Variance Land applications, otherwise equally treated.

We believe the Squillace¹⁹ approach to Public Land Use Planning is a suitable pivot for the BLM to make in lieu of undertaking additional landscape-level planning efforts. Squillace describes in detail a landscape level conceptual approach but with a focus on project-level evaluation and mitigation measures such as excluding sensitive areas (e.g., roadless lands with wilderness characteristics), and development of standards and guidelines for project-level evaluations that direct proposed project activity to sequentially achieve avoidance, minimization, and mitigation. If the BLM wishes to incentivize development in perceived low conflict areas, monetary incentives is a welcome idea but as mentioned elsewhere in our comments, with more realistic incentives than the Variable Offsets in § 2809.16. Other areas of improvement are 1) eliminating antiquated technological limits on solar regarding slope and insolation; 2) providing more flexibility for wind, solar, storage, and combinations thereto; and 3) eliminating current increased barriers for variance land development. BLM could also direct field offices to accept and process applications for wind and solar projects in Field Offices where current RMPs do not specifically address renewable energy projects without going through an RMP revision or RMP amendment.

¹⁹ Mark Squillace. Rethinking Public Land Use Planning. 43 HARV. ENVTL. L. REV. 415 (2019), available at <https://scholar.law.colorado.edu/articles/1230>.



THE APPROPRIATE ROLE OF NEPA

Recommendation: Advance NEPA-Related Policy Reform

Increasing efficiencies in the NEPA process offers another key to expanding land available for renewable energy development. The average timeline for BLM and other federal agencies to complete a renewable energy project's Environmental Impact Statement (EIS) is over four years; Environmental Assessments (EAs) often take upwards of two years; and transmission project EIS reviews take up to seven years. Areas of efficiencies can be realized and as noted below have been successfully utilized by some BLM state offices.

At the national level, BLM should ensure consistency for processing of NEPA reviews by evaluating current processes at all state offices. Next, BLM should adopt - by Instructional Memoranda – best practices in state offices that have evidenced efficiencies while still producing defensible NEPA decisions. For example, adoption of allowing NEPA and National Historic Preservation Act Section 106 processes to proceed independently until the Record of Decision (ROD) prevents unnecessary staggering of the process, where NEPA substitution can be used instead under Section 106 regulations²⁰. Requiring EIS to be accomplished within one year of the Notice of Intent (NOI) and EAs completed within six months is common practice for the Nevada state office, due in part to effective pre-planning conducted between the BLM and industry prior to the NOI. Such defined timelines can be flexible by allowing deadlines to be extended in specific circumstances, including if a more robust review is needed and/or by mutual agreement between a project sponsor and the BLM.

Other NEPA-related actions include prohibiting or discouraging field offices from requiring joint NEPA documents for separate projects, given joint documents increase litigation risk and lessen the defensibility of the ROD. This negates the perceived efficiencies of combining projects. Similarly, BLM headquarters should ensure consistent application processing by explicitly allowing Categorical Exclusion (CatEx) for met towers and geotechnical assessments as currently done by BLM-CA. Doing so would help a significant initial barrier to wind deployment.

ACP members have also reported that projects with a minor presence on BLM land, e.g. an interconnection line to a substation- had the BLM field office assert jurisdictional review over the whole of the proposed project. Applications of NEPA to projects where BLM jurisdiction is limited, and the BLM's decision cannot control the outcome of the project, can cause unnecessary project delays without environmental benefit. To control for such complications, BLM could affirm by Instructional Memorandum that "major federal actions" only apply to the segment of the project that is on federal land, or that the scope of analysis for indirect impacts should be extremely limited.

Lastly and connected with the prior recommendations to expand opportunities on Variance Lands, the BLM should pivot away from landscape-level planning, as the top-down approach has not elicited the desired results of expedited renewable energy development. Subsequently, NEPA would be the primary mechanism for determining acceptability on a case-by-case basis.

²⁰ See 36 CFR 800.8



THE CRITICAL ROLE OF TRANSMISSION EXPANSION

Recommendation: Align Transmission Planning on Federal Lands with Renewable Energy Goals

ACP urges BLM, in coordination with other federal agencies, to use their authority over Section 368 corridors to ensure that sufficient transmission is available to deliver the 25 gigawatts of electricity to customers. Section 368 of the Energy Policy Act of 2005²¹ requires the Departments of Agriculture, Commerce, Defense, Energy, and the Interior (in consultation with the Federal Energy Regulatory Commission [“FERC”], states, tribes, local governments, utilities, and other stakeholders) to designate energy right-of-way corridors on Federal lands in 11 Western states. As noted above, Section 3104 of the Energy Act of 2020, contained within the Consolidated Appropriations Act of 2021, requires the Secretary of the Interior to “seek to issue permits that, in total, authorize production of not less than 25 gigawatts of electricity from wind solar, and geothermal energy projects by not later than 2025, through management of public lands *and administration of Federal laws.*”²² ACP submits that Section 368 is just such a Federal law.

As of 2019, there were over 5 gigawatts of renewable energy capacity on public lands;²³ while expansion to 25 gigawatts will not necessarily require a fivefold increase in transmission lines (due to use of existing lines in some cases), significant transmission development is nevertheless needed. Indeed, absent sufficient transmission capacity, projects may be unable to move forward with leases, putting this Congressionally-directed target in jeopardy. Transmission development – even with expedited processes, as discussed in the next section – remains a multiyear process,²⁴ and BLM should act quickly to align transmission development on Federal lands with national renewable generation goals. Additionally, ACP notes that five Western states have adopted 100% clean energy goals, and that the 2019 Western Flexibility Study noted the importance of coordinated transmission development to attainment of these goals.²⁵ BLM and other federal agencies should also use their Section 368 role to ensure that states can successfully attain these goals, which are consistent with (and, indeed, reinforced by) the 2020 Federal 25 gigawatt target.

Section 368 requires federal agencies (in coordination with FERC, utilities, and other stakeholders) to establish procedures that “expedite applications to construct or modify oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities within such corridors, taking into account prior analyses and environmental reviews undertaken during the designation of such corridors.”²⁶ This

²¹ See 2726.43k - Use of 368 Corridors In Siting Energy Projects (Aug. 8, 2014), https://corridoreis.anl.gov/documents/docs/Interim_Directive_2726.43k.pdf

²² See Pub. L. No. 116-620, Consolidated Appropriations Act, 2021, at Div. Z – Energy Act of 2020, §3104(b), <https://www.congress.gov/bill/116th-congress/house-bill/133> (emphasis added).

²³ See N. Springer and A. Daue, *Key Economic Benefits of Renewable Energy on Public Lands* at 5 (May 2020), <https://www.wilderness.org/renewableenergyreport>.

²⁴ See e.g. J. Eto, *Building Electric Transmission Lines: A Review of Recent Transmission Projects*, at 13 (Sept. 2016) (SunZia “process spanned approximately four years”) <https://www.energy.gov/sites/prod/files/2017/01/f34/Building%20Electric%20Transmission%20Lines--A%20Review%20of%20Recent%20Transmission%20Projects.pdf>

²⁵ See Western Interstate Energy Board, *Western Flexibility Study* (Dec. 2019), <https://westernenergyboard.org/wp-content/uploads/2019/12/12-10-19-ES-WIEB-Western-Flexibility-Assessment-Final-Report.pdf>

²⁶ 42 USC 15926(c)(2).



requirement for interagency coordination *resulting in expedited permitting* is at the very core of the statutory framework: once the agencies designate corridors, future infrastructure located within their bounds should be able to benefit from an expedited application and environmental review process.

Additionally, the January 27, 2021 Executive Order on Tackling the Climate Crisis at Home and Abroad²⁷ amplifies the importance of streamlining environmental permitting for electric transmission. Section 213 of the Climate Crisis EO requires agencies to coordinate through the Council on Environmental Quality and the Office of Management and Budget to “identify steps that can be taken, consistent with applicable law, to accelerate the deployment of clean energy and transmission projects in an environmentally stable manner.” ACP again submits that Section 368 is just such an “applicable law.”

BLM should read subsection 368(c)(2)’s directive to “expedite” reviews for electric transmission facilities in corridors as specific Congressional direction which supports the aims of the Climate Crisis EO.

ACP also notes that the Agencies’ guidance documents may require review and reissuance. For example, the Forest Service’s 2014 interim directive provided some indication of how projects in 368 Corridors would comply with the requirements of the National Environmental Policy Act (“NEPA”)²⁸, this directive expired in 2016. ACP urges the BLM to coordinate with other federal agencies to review and update their guidance consistent with the Climate Crisis EO, and to allow subsequent projects located in corridors to benefit from expedited NEPA reviews to the maximum extent possible. Specifically, ACP urges that the NEPA review process for projects within a Section 368 Corridor should utilize a single point of accountability, should impose a firm two-year limit from application to record of decision (ideally with anticipated action earlier than two years), and should not apply new or revised rules to pending applications.

In keeping with Section 368’s goals of ensuring effective infrastructure development on Federal lands while minimizing adverse impacts, ACP also urges the BLM to work with other agencies to carefully align corridors with locations where renewable energy is planned, or for high-potential areas. For instance, the 2009 Western Renewable Energy Zones report²⁹ noted transmission needs as a key constraint and identified “hubs” where significant renewables could be developed.³⁰ This type of analysis can be updated with modern technical assumptions – including more detailed hub height analysis for wind potential, and irradiance data for solar potential.

Additionally, the Agencies should also incorporate data from other sources. ACP suggests that the Agencies coordinate with grid operators (in Regions 4, 5, and 6, the California Independent System Operator and the Southwest Power Pool), utilities, and FERC to identify areas with significant renewable

²⁷ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> (“Climate Crisis EO”).

²⁸ See 2726.43k - Use of 368 Corridors In Siting Energy Projects (Aug. 8, 2014), https://corridoreis.anl.gov/documents/docs/Interim_Directive_2726.43k.pdf

²⁹ Western Renewable Energy Zones, Phase 1 Report (2009) https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/WREZ_Report.pdf

³⁰ Id. at 14, included as App’x A.



resources in interconnection queues. These are frequently high-potential areas for wind and solar, but insufficient transmission can prevent projects from moving forward, or can result in congestion or curtailment. The Agencies can and should account for this information, and consider whether new transmission corridors (or new projects in existing corridors) could support further deployment and delivery of renewable energy.

CONCLUSION

ACP appreciates the Department's consideration of the recommendations above. The association hopes that this process will lead to equal standing of, and elimination of barriers to, variance land development, and a significant revision to acreage fees and the elimination of megawatt capacity fees. Second, clarified policies to truly streamline development in and outside of renewable zones, coupled with an elimination of the excessive use of competitive bidding processes will support process improvements without the sacrifice of multiple-use mission. Third, an examination of changes to industry development: in decommissioning, technology capabilities, and project lifetimes will help inform new policies. Finally, ACP hopes that the Department will succeed in expeditiously restaffing Renewable Energy Coordinating Offices, and supplement project management and technical support resources.

Thank you for your consideration.

Sincerely,

David Murray

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