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On behalf of The Wilderness Society, Natural Resources Defense Council and The Nature Conservancy, please accept these comments regarding the proposed Rule on Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections published by the Bureau of Land Management (BLM).

The proposed rule is critical to securing an enduring renewable energy program for public lands, founded on responsibly and sustainably utilizing wind and solar resources in a manner that balances development with protection of sensitive lands, wildlife and other natural resources. Responsibly siting renewable energy on the nation's public lands will address the tangible and negative consequences posed by climate change and support conservation objectives.

Given these multiple goals, our organizations have worked diligently to promote policies that embrace a landscape level approach to deploying renewable energy that identifies the best places to site projects while also avoiding and protecting ecologically important areas. BLM's efforts over the last six years have made important commitments to developing renewable energy in a 'smart from the start' approach, but long term success requires cementing gains and ensuring consistent implementation.

Overall, we support BLM's initiative to update the regulatory basis upon which wind and solar projects are evaluated and permitted and to establish a competitive process for leasing public lands for wind and solar energy. The proposed rule is a critical step in modernizing the methods the BLM employs in permitting, ensuring a fair market value for our public lands and providing greater certainty around future operating conditions.

In addition, we support efforts to further build on progress made to identify and incentivize development in priority, low conflict zones. Establishing a landscape level approach to renewable energy development on public lands that includes avoiding sensitive wildlands, guiding development to low conflict areas and mitigating remaining unavoidable impacts will help meet both clean energy and conservation goals.

The proposed rule represents a necessary commitment to more efficiently and responsibly developing renewable energy on public lands, but we believe a long-term plan should also guarantee revenues collected are used to support local communities, restore fish and wildlife habitat and provide expanded opportunities for outdoor recreation on our public lands. This recommendation is consistent with the Public Lands Renewable Energy Development Act of 2013 (H.R. 596 and S. 279) of which also supports the use of a competitive leasing process for solar and wind development. This legislation should be used to complement BLM's rulemaking and further improve the renewable energy program on public lands.

We strongly recommend BLM proceed with this rulemaking in a manner that strikes a balance between protecting the environment and taxpayer interests and advancing needed clean energy. We have set out more detailed recommendations to fully realize a successful rulemaking.

Sincerely,

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I. Ensuring fair market value is received for leasing and development of wind and solar energy on public lands

A critical component of an effective wind and solar energy program is clearly establishing a sound mechanism to ensure public lands are fully and fairly valued in determining the right price companies will pay for the commercial production of electricity from wind and solar resources on the public lands. This is especially important at a time when the commercial viability of many of these projects is tenuous. A policy that is too lenient could shortchange taxpayers and have the effect of inducing development on public lands rather than on comparable private lands, where landowners could directly benefit from a stable revenue source. A policy that is too stringent could have the effect of forestalling development at a time when a shift to renewable energy is vital. Competition is one way to determine fair market value for areas where there is competitive interest, but the BLM should also ensure that fair market value is received for all lands leased for development.

The Wilderness Society joined with Taxpayers for Common Sense to commission a white paper that sets out detailed recommendations regarding how to ensure that fair market value is received for wind and solar development on public land that serves as the basis for our comments in this section.[1]

A. Wind and solar development on public lands should be undertaken using leases rather than right-of-way grants

We support BLM's efforts to move to a lease-based system, rather than right-of-way grants currently in use. The Federal Land Policy and Management Act (FLPMA) clearly allows for such a change.43 CFR § 2801.5. Such an approach has been advocated by industry watchers[2] and supported by some developers[3] as providing greater certainty for all parties.

FLPMA provides:

> In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licenses, published rules, or

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[1] Pamela Baldwin, "Fair Market Value for Wind and Solar Development on Public Land," November 2010. Accessed December 14, 2014, at http://wilderness.org/sites/default/files/Fair-Market-Value-Whitepaper.pdf

[2] E.g., see Scott Bank, "Practical Advice: Wind and Solar Projects on BLM (Bureau of Land Management) Lands," *Project Finance Newsletter*. Chadbourne & Parke LLP. November 2011. Accessed December 14, 2014, at http://www.chadbourne.com/practicaladvice_bureau_of_land_management_nov11_projectfinance/.

[3] Solar Energy Industries Association, "Comments to BLM on Proposed Rulemaking Regarding Competitive Process for Leasing Public Lands for Solar and Wind Development." February 2012. Accessed December 14, 2014, at http://www.seia.org/research-resources/comments-blm-proposed-rulemaking-regarding-competitive-process-leasing-public.

> other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands.

43 U.S.C. § 1732(b). Title V of FLPMA discusses the use of rights-of-way for a broad range of uses including canals, pipelines, transmission, generation of energy, and transportation routes. 43 U.S.C. § 1761(a). The FLPMA right-of-way regulations provide additional direction through the following definitions of types of right-of-way:

> (b) Easement means an authorization for a non-possessory, non-exclusive interest in lands which specifies the rights of the holder and the obligation of the Bureau of Land Management to use and manage the lands in a manner consistent with the terms of the easement.
> (c) Lease means an authorization to possess and use public lands for a fixed period of time.
> (d) Permit means a short-term revocable authorization to use public lands for specified purposes.

43 C.F.R. § 2920.0-5.

The regulations also provide guidance on when to use a lease in discussing "authorized uses" accordingly:

> Leases shall be used to authorize uses of public lands involving **substantial construction, development, or land improvement and the investment of large amounts of capital which are to be amortized over time**. A lease conveys a possessory interest and is revocable only in accordance with its terms and the provisions of Sec. 2920.9-3 of this title. Leases shall be issued for a term, determined by the authorized officer that is consistent with the time required to amortize the capital investment.

43 C.F.R. § 2920.1-1(a) (emphasis added). In contrast, "permits shall be used to authorize uses of public lands for not to exceed 3 years that involve either little or no land improvement, construction, or investment which can be amortized within the term of the permit" and "conveys no possessory interest." 43 C.F.R. § 2920.1-1(b). "Easements may be used to assure that uses of public lands are compatible with non-Federal uses occurring on adjacent or nearby land." 43 C.F.R. § 2920.1-1(c).

Generally, standard rights-of-way in the form of permits or easements are more suited to use of lands (crossing or placing something on the land) while leases are more suited to developing energy resources, as shown by BLM's historic use of leases for developing oil and gas and geothermal energy. Terms and conditions associated with leases set out a clearer way to govern conditions of use, grounds for termination, rights to amend terms, and compensation for both base rent and development of resources.

1. <u>Terminology – "lease" versus "grant"</u>

We concur with the comments of Defenders of Wildlife et al., submitted December 16th, with regard to the need to modify the use of the terms "lease" and "grant" in the proposed regulation to provide clarity regarding the distinction between the two terms and reduce confusion.

Recommendation: BLM should adopt a consistent set of terms that consistently differentiates between right-of-way leases and grants throughout the rule. The easiest approach would be to consistently refer to the term "ROW lease" as a property instrument that is distinct from a ROW grant. BLM should also refrain from using the term grant as a catch all for both leases under § 2809 and grants issued for projects outside of DLAs.

2. Applying lease-based approach to all commercial wind and solar development

The benefits of a lease-based approach extend well beyond the boundaries of a Designated Leasing Area (DLA). BLM has not made it clear why it will continue to administer commercial wind and solar energy development outside DLAs as ROW grants rather than ROW leases. In fact, all the benefits of leasing with regard to the agency administration of the development could be important to secure in a contractual form for projects outside DLAs.

Recommendation: BLM should establish that all commercial development will be undertaken using ROW leases, rather than grants. However, terms of leases should retain the core principles laid out in the proposed rule incentivizing development within DLAs.

B. Development of prime areas should be competitively offered, but elements of the variable offset auction process should be revised

Offering leases competitively is a straightforward way to determine the value of federal lands and resources for commercial electricity generation. Competitive offering appropriately shifts the risk burden from taxpayers onto the economic interests who stand to profit from access to the resource in question. All leased energy resources are offered competitively provided a competitive interest exists.

While competitive offering is the norm, it is important to note that many questions remain unanswered with regard to how a competitive system might best function for wind and solar resources. BLM's recent successful solar auction in the Dry Lake solar energy zone is encouraging, but other attempts to competitively offer wind or solar energy development ROWs encountered significant challenges, were missing key information, and did not ultimately result in project completion.[4]

1. Greater clarity that BLM can adjust process for competitively leasing

[4] Wind energy development areas were unsuccessfully auctioned off in 1993, 2000, and 2004 near Ridgecrest and Riverside, California, and near Las Vegas, Nevada, as well as Colorado's San Luis Valley in 2013.

The proposed rule clearly states that "[t]he BLM may use any type of competitive process or procedure to conduct its competitive offer and any method…to conduct the actual auction or competitive bid procedure". Proposed 43 CFR § 2804.30(b) and § 2809.13. While the explanatory notes go into great detail on the variable offset approach, the rule as proposed authorizes BLM to utilize any process it sees fit to conduct competitive offers of ROW leases or grants inside or outside DLAs for wind or solar energy development. The BLM needs clear implementing guidance to ensure that field offices understand the intended approach for these various instances. As well, the agency needs to ensure it is capable of modifying its approach as it gains experiences with different energy resource types in different circumstances.

2. Minimum bid should be revised to ensure fair market value

The minimum bid plays a critical role in determining fair market value. BLM proposes that the minimum bid is a combination of the administrative costs of preparing the sale and an amount determined by the authorized officer to comprise the "value of the land". Several factors are offered in the proposed rule including, but not limited to, acreage rent, megawatt capacity fee, and mitigation costs. Proposed 43 CFR § 2809.14(b)(2) and § 2804.30(e)(2)(iii). The explanatory notes add that, for other programs, the minimum bid is fixed in statute but such is not the case here. For the purposes of analyzing the potential impact of the proposed rule, BLM used only a fraction of the first year's acreage rent for this component: "For purposes of this analysis, the BLM will use 5 percent of the first year's acreage rent as the second component of the minimum bid. This is consistent with a competitive offer in Colorado that was held on October 24, 2013." (Economic Analysis of Proposed Rule, 32)

The wide discretion provided the authorized officer in the regulations is problematic. Without a consistent set of factors or standard in the rule against which to calibrate valuation methods, the agency is at risk of widely divergent approaches to determining resource value and potential legal jeopardy for making arbitrary decisions. For example, the Economic Analysis scenario could just as easily have used 50% of the first year's acreage rent, or the full MW capacity fee, which would surely be significantly greater. Since the proposed rule seems to intend to retain maximum flexibility in administering the program, BLM needs to provide clarity for what they intend the resource value component of the minimum bid to represent.

Recommendation: Proposed 43 CFR § 2809.14(b)(2) and § 2804.30(e)(2)(iii) should be revised to establish a standard that the resource value component of the minimum bid should meet. Specifically, "(2) An Amount determined by the authorized officer and disclosed in the notice of competitive offer that captures the value of the parcel in a manner consistent with Uniform Appraisal Standards, but is not less than $100 per acre." This approach is similar to how minimum bids are arrived at for other energy resources.[5]

[5] E.g., see BLM, "Competitive Leasing." Accessed December 15, 2014 http://www.blm.gov/wy/st/en/programs/energy/Coal_Resources/coalfaqs/competitive_leasing.print.html

C. Department should pursue authority to charge royalties; in absence of that authority, revise elements of proposed rental rate

The Department currently lacks statutory authority to charge an *ad valorem* royalty – a certain amount per unit of commodity produced – and, thus, resorts to charging annual rents that effectively function as a proxy for a production royalty.

1. Rents

Subject to specified exemptions, right-of-way holders must also pay rents for the use of lands "based on sound business management principles and, as far as practical and feasible, using comparable commercial practices." 43 CFR § 2806.10(a). In the absence of authority to charge royalty, we support the agency's effort to ensure annual rents capture both the value of occupying federal land and the value of the public lands as an input to commodity production. The BLM's formula captures this with two distinct elements:

- Acreage Rent – calculated by the number of acres within the authorized area times the per-acre county rate maintained by the agency.
- MW Capacity Fee – calculated by multiplying the approved MW capacity by the MW rate for the applicable type of technology, where *MW Capacity Fee = Approved MW Capacity x total hours per year x net capacity factor x MWh price x rate of return*

The Acreage Rent is adjusted annually, and the MW Capacity Fee is adjusted every five years by updating the MWh price and the rate of return.

We strongly support the BLM's decision to automatically update the rental fees, and to peg the MW Capacity Fee to market conditions rather than fixed price of power included in current guidance. We are pleased to see BLM establish a minimum rate of return while still allowing it to reflect a reasonable expectation from the market.

Recommendation: To better ensure fair return the MWh price should be updated every three years, rather than five. The transition to the new regime will be abrupt for current developers (particularly wind) as evidenced in the Economic Analysis accompanying the proposed rule. The power price should be more closely aligned with rapidly changing market conditions, particularly in the West. As evidenced by the change in power prices in the explanatory notes, regional power varies substantially year over year.

Recommendation: The agency should provide for a transition period applicable only to current developers to the extent this schedule is immediately in force.

2. Exemption or waiver of rental rates.

Existing regulations provide that BLM may waive or reduce rent payments in appropriate circumstances such as if the holder provides without charge or at reduced rates, a valuable benefit to the public at large or to the programs of the secretary, or in cases of undue hardship, and it is in the public interest to waive or reduce the rent. 43 C.F.R. § 2806.15. Development of clean renewable energy is clearly in the national interest (See President's Climate Action Plan, Secretarial Order 3285A1, etc.) but no statutory basis exists for production incentives in the form of reduced rents.

However there are clear provisions for incentivizing oil and gas development that are frequently employed.

> In order to encourage the greatest ultimate recovery of oil or gas and in the interest of conservation, the Secretary, upon a determination that it is necessary to promote development or that the leases cannot be successfully operated under the terms provided therein, may waive, suspend or reduce the rental or minimum royalty or reduce the royalty on an entire leasehold, or any portion thereof. 43 CFR § 3103.4-1

Recommendation: To level the playing field with traditional energy developers, the administration should seek legislative authority to waive or reduce rental rates under specific conditions to serve as a production incentive.

3. Royalty authority

The surest way to ensure a fair return to taxpayers is to pursue authority to capture a fraction of the revenue collected from the sale of the electricity generated on public lands. The BLM does not have the authority to charge a royalty for wind and solar.

Recommendation: The Department should pursue legislative authority to charge a production royalty that may only be reduced or waived by the administrative agencies in very narrow, specified circumstances.

4. Seek new authority to reinvest revenues

Given the unique impact profile of wind and solar generation, royalties and other revenues should be used to enhance the Department's ability to protect sensitive wildlife and ecosystems, including ensuring the conservation of lands essential for natural resource adaptation to unavoidable climate change. This precedent has been established in Public Law 88-578, 78 Stat. 897, for the development of non-renewable energy resources in public waters. With the anticipated scarcity of future appropriations to help address the adverse impacts of renewable energy development and other stresses on our public lands, including climate change, the Department should establish a program whereby a share of the revenues derived from future projects will be dedicated to a program designed to enhance the health and integrity of ecosystems adversely impacted by energy development.

Recommendation: The Department should seek clarifying legislation to ensure a permanent revenue stream, such as S. 279 or H.R. 596 (113th Congress).

D. Encouraging diligent and responsible development and operations

We support the efforts BLM has made to improve the siting practices for wind and solar development, in particular the development of DLAs and the use of screening criteria for prioritizing processing of applications outside of DLAs. Proposed 43 C.F.R § 2802.11 and § 2804.35. But how this development proceeds will be as, or more, important in shaping the legacy of this initiative as where development occurs. At a time when available capital for construction of new generation is limited and unpredictable, establishing clear financial expectations for public lands projects is essential to project planning for potential developers, the BLM, state and local government entities, and the interested public. Moreover, as the agency switches to lease-based development, the terms of these leases must be carefully crafted because leases do create a transfer of rights.

1. Ensure BLM has opportunity to screen viability of purchasers

Transfer of ownership of ROW leases and grants is occurring frequently and likely to continue. BLM should have the opportunity to evaluate the financial and technical viability of potential purchasers to ensure valuable sites are not tied up.

Recommendation: Incorporate a standard lease term that requires, as a condition of assigning or transferring all current and future right-of-way grants, that BLM will ensure technical and economic viability of parties interested in acquiring approved right-of-way grant authorization before approving reassignment or transfer.

2. Standard terms and conditions must account for unexpected changes

As BLM moves to a lease-based system, it cedes some of its discretion to the lessee in favor of certainty for both parties. However, unexpected changes can and do occur – in law, in policy, and in conditions on the ground. BLM must ensure it has flexibility to update terms and conditions as needed based on environmental performance, changed circumstances, new information, new law, guidance or policy, or changing technology (this could be modeled on the standard Section 6 in BLM's oil and gas leases, as well as the standard stipulations used to address changes of status under the Endangered Species Act or discovery of cultural resources).

Recommendation: Revise 43 C.F.R § 2805.12(a)(16) to read "(16) Comply with all other stipulations that the BLM may require, including modifications required pursuant to other federal law" to proposed and add new "(h) Comply with other stipulations that the BLM may require, including modifications required pursuant to other federal laws" to § 2809.18.

3. Institute robust bidder prequalification requirements

Existing Instruction Memoranda for wind and solar acknowledge BLM's authority to require that technical and financial viability be established before committing public resources to private development. However, these guidance documents do not establish when in the permit review process viability will be assessed. Nor are these ideas codified through the proposed rule.

This leaves the government exposed to the risk of committing public lands to project developers that cannot successfully construct a project, tying up prime sites. Diligence requirements that apply to a developer after obtaining site control are essential, but alone are insufficient. Viability evaluations should be applied as early in the permitting process as practicable.

Recommendation: BLM should require demonstration of technical and financial capability before proceeding with a notice of intent for environmental review during the processing phase of the application. Prior to NEPA analysis and necessary environmental reviews, Section 2804.25(2) should include that "applicants must have or be able to demonstrate technical and financial capability to construct, operate, maintain, and terminate a project throughout the application process and authorization period."

4. Bonding measures must ensure cleanup costs are covered within DLAs

We concur with the comments of Defenders of Wildlife et al., submitted December 16th, with regard to the need to ensure bonding requirements satisfy the purposes for which they are collected while attempting to utilize as a possible incentive for developing within DLAs. The discrepancy between the proposed fixed bond amount and the known reclamation costs used to prepare the rule must be reconciled. We recommend the BLM reevaluate the standard amounts and identify a range more commensurate with actual costs of decommissioning.

5. Require enforceable provisions for mitigation

Efforts to offset impacts have included a range of on- and off-site actions. As BLM increasingly turns to compensatory off-site mitigation, the agency should include a standard term to protect the likely need to modify mitigation packages to address adaptive management concerns.

Recommendation: BLM should include enforceable provisions for mitigation in the agency's grants and leases of rights-of-way.

E. Cost recovery for processing leases for wind and solar development

Under the draft rule, the BLM will receive funds for the pre-application period, processing of an application, monitoring, bonds, the competitive offer, and late payment penalties (§2809.18). The BLM should use such funds collected from the project process

to ensure efficient project execution and proper compliance with development standards and timelines. At a time of declining funding, administrative costs to prepare parcels of land, managing competitive processes, and the lease itself all warrant agency re-compensation by site developers.

1. Reconcile actual vs. reasonable costs

The proposed rule differentiates between "actual costs" and "reasonable costs" for cost recovery pertaining to the stages of development previously mentioned. Federal agencies, including the BLM, are eligible for reimbursement for reviewing and approving a project's Plan of Development; namely, the "reasonable costs" incurred by the agency. At the developer's discretion, they may elect to waive "reasonable costs" and pay "full actual costs incurred by the BLM" in order to expedite review of a POD or monitoring of a lease (§2809.18(d)).

BLM fails to clarify whether the agency will simply retain the cost recovery option decided by the developer, or whether the BLM will consistently receive the "reasonable costs" or the "actual cost" associated with lease terms and conditions. Such ambiguity is shown in the preamble where "some funds" would be received by the BLM including "those received for cost recovery" (p. 59032).

Recommendation: The BLM should clearly state in §2804.19 that it may seek "actual cost" for projects within DLAs, where required to make up for agency resources otherwise unavailable for processing applications.

2. Support use of Master Agreements

Key priorities must be reinforced with concurrent financial signals sent by agency policies. Because economic considerations are a major driver in siting decisions, the BLM should guide development to zones by making it more expensive for companies to pursue development elsewhere. The BLM's right-of-way guidance currently provides for six grant processing categories (See, BLM Manual 2804). Under current agency directives, any application that requires a project-level environmental impact statement is processed as a Category 6 grant. To incentivize development within DLAs, the BLM should afford field staff the authority to process applications within zones under Category 5 master agreements. A master agreement is a negotiated agreement, allowing considerable flexibility between the BLM and the applicant in terms of cost sharing.

Recommendation: BLM should retain the distinction between projects within and outside DLAs in this case into the final rule by providing for lease applications in DLAs to be processed under Category 5 master agreements.

II. Incentivizing development in low-conflict areas

We strongly support financial and administrative incentives to direct wind and solar projects to low-conflict areas. Increased certainty and limited costs for developers undertaking projects inside DLAs should be incorporated in the entirety of the rule. Financial and administrative incentives, however, do not have to equate to a discounted value for land identified as a DLA. We encourage the BLM to implement long-term cost and administrative structures that reflect a fair market value for these lands. Accordingly, lands outside of DLAs should come at a higher cost burden to potential developers.

A. Offsets for bids on Designated Leasing Areas

The proposed rule sets forth a variety of offset categories that the successful bidder may eligible for, depending on context of the DLA under nomination. At this time, we recognize that the agency is seeking adaptability and flexibility in determining appropriate offsets for projects inside of designated leasing areas. However, the rule lacks specificity in the categories of offsets.

1. Refining the purpose of offsets

BLM should identify standards for the intended purpose of bid offsets. In preparing DLAs for competitive offer, the BLM is to conduct necessary studies and site evaluations, including environmental review, before offering sites competitively (§2809.13(b)(6)). Consequently, the agency will have established strong understanding of the environmental and technological considerations and limitations of a particular site. Alongside the discussion in the preamble, this baseline data should drive offsets that promote thoughtful and reasonable development based on environmental factors and impacts of technology.

Recommendation: BLM's use of offsets should accomplish a clear purpose, and be relevant to a particular site. The purpose of the offsets should be defined in the rule, not the preamble, to limit confusion and decrease possible conflict over offset opportunities. Proposed §2809.16(b) should be revised as follows:

> "The BLM may apply a variable offset to the bonus bid of the successful bidder based upon *environmental concerns or technological limitation for thoughtful and reasonable development*" [emphasis added, taken from p. 59052]

2. Reconsider proposed offset categories

Certain categories of offsets warrant reconsideration. Discussion surrounding DLA offsets indicates that these economic incentives are used to promote thoughtful and reasonable development and consequently, offsets should be offered to project designs that incorporate a higher level of technological and environmental standards. Allowing developers to offset submission of nomination fees is inconsistent with this approach.

Recommendation: Revise §2809.16(c) by deleting subsection 6.

3. Public engagement on offsets

The BLM recognizes the potentially controversial nature associated with offsets in DLAs and, as such, includes an advanced notice of offset qualifications and incremental offsets for applications that do not fully meet these qualifications (p. 59052). Such inclusions are necessary both for full public disclosure and for the BLM to establish proper understanding of offset obtainability.

Recommendation: BLM should include relevant information and the rationale for offsets in the notice of competitive offer as per the requirements in §2809.13(b)(6). The public should be able to comment on offsets when preparing the designated leasing area, and as soon as the offsets are made available in the notice of competitive offer. BLM should retain the right to change or modify such offsets depending on additional information and comments provided by the public.

B. Operational incentives inside and outside of Designated Leasing Areas

The incentives for development inside DLAs focus largely on initial project planning, development, and construction. The final rule should include options to incentivize adoption of more efficient and more environmentally sound technologies and practices.

1. Operational incentives for adjustments for rents and fees

There is substantial opportunity for the BLM to incorporate incentives into cost structures that will apply following construction in various stages of a wind or solar grant. Accordingly, BLM should incorporate an adaptive approach into lease terms to encourage investments in technology or environmental conditions.[6] Integration of more efficient panels or blades, for example, will help ensure infrastructure on public lands reflects gains from new technology and that future land-use continues to serve the general public.

Recommendation: BLM should consider allowing for a temporary reduction in the acre rent payment applicable to adoption of technologies or practices evaluated and specified by the BLM that significantly improve efficiency or environmental performance but entail up-front cost in proposed § 2806.62, § 2806.54, § 2806.64 and § 2806.52.

III. Consistency with outcomes and implementation of the Western Solar Plan

The BLM has made significant progress in facilitating responsible renewable energy development and protecting sensitive wildlands and wildlife habitat by identifying

[6] Development of clean renewable energy is clearly in the national interest (See President's Climate Action Plan, Secretarial Order 3285A1, etc.) but no statutory basis exists for providing production incentives in the form of reduced rents. Congress has acted to provide oil and gas development such incentives. 43 CFR § 3103.4-1

priority, low-conflict development zones on public lands. Finalized in 2012, the Record of Decision (ROD) established the Western Solar Plan, identifying 17 solar energy zones (SEZs) and modifying 89 land use plans after assessing environmental, social and economic impacts associated with utility-scale solar energy development on public lands in six southwestern states.[7] This landscape-scale planning effort is a model for limiting conflicts, controversy and impacts while facilitating efficient and timely permitting for solar projects. Though still in the implementation phase, the Western Solar Plan has provided much needed guidance regarding where and how solar development should proceed on public lands. The recent successful competitive auction held for parcels of the Dry Lake SEZ in Nevada demonstrated that zones, mitigation certainty, and expedited permitting can be attractive for developers.

This rulemaking should reinforce and strengthen implementation of the Western Solar Plan, building on the progress to date to responsibly advance renewable energy on public lands. The lack of direct references to the Western Solar Plan should be remedied given the potential confusion if there appear to be multiple tiers of landscape level planning determinations. Such confusion could create conflicts in application in creating varying forms of leasing criteria. BLM should ensure all relevant policies and components on the Western Solar Plan are reflected in this rulemaking, including:

A. Final rule should include explicit criteria for creation of new priority zones/DLAs

The proposed rule supports wind and solar leasing in preferred areas, known as Designated Leasing Areas (DLAs). Proposed 43 CFR § 2801.5 defines the term "designated leasing area" as a parcel of land with specific boundaries identified by the BLM land use planning process as being a preferred location, conducted through a landscape-scale approach, for solar or wind energy where a competitive process must be undertaken.

The proposed rule indicates DLAs would include SEZs: "Designated leasing area is a new term that means a parcel of land with specific boundaries identified by the BLM's land use plan process as being an area (e.g., SEZ) established, conducted through a landscape-scale approach, for the leasing of public lands for solar or wind energy development via a competitive offer" (p. 59032). While we support this approach and the identification of SEZs as DLAs, DLAs would also include other designations established in land use plans, and it is not clear if standard criteria would be used to identify these areas.

We urge the BLM to provide a consistent framework and guidance for designating additional DLAs.

[7] Approved Resource Management Plan Amendments/Record of Decision (ROD) for Solar Energy Development in Six Southwestern States. October 2012. Assessed December 11, 2014. http://blmsolar.anl.gov/documents/docs/peis/Solar_PEIS_ROD.pdf

Recommendation: §2802.11 of the proposed rule should be revised to explicitly state minimum criteria for use in identifying and designating new DLAs as follows.

Although the rule does state that BLM would "identify locations that have fewer and less significant adverse resource impacts and are suitable for solar and wind energy development" (p. 59028) and "when determining which lands may be suitable…the factors the BLM considers include…(3) physical effects and constraints on corridor placement or leasing areas due to hydrology, meteorology, soil, or land forms" (§2802.11 (3)), we believe more specificity should be provided to land managers to ensure most suitable lands for development are selected. For example, criteria should include:

- Section B.4.6.5 of the Solar Programmatic (ROD) recommending SEZs in degraded, disturbed, or previously disturbed areas, including fallowed agricultural land, Brownfields and other previously contaminated sites
- Principles to guide the identification of areas compatible with renewable development in Title 1.3.5.3.1 of the Draft Desert Renewable Energy Conservation Plan. These recommend areas with high renewable energy potential, close to existing transmission that minimize disturbance to biologically, culturally, recreation and visual valuable resources (Vol. I of VI I.3-37, August 2014).

The rule also states that a "resource management plan or plan amendment may also identify areas where the BLM will not allow right-of-way corridors or designated leasing areas for environmental, safety, or other reasons" (§2802.11 (d)). We believe more specificity is needed to also ensure adverse resource impacts are in fact avoided by excluding areas unsuitable for these technologies. We recommend land use planners be given guidance for adopting specific exclusion criteria, as was identified in Table A-2 of BLM's Solar Programmatic ROD to help avoid resource conflicts.[8]

B. Final rule should provide greater clarity regarding process for creating new DLAs

New or expanded SEZs are considered every 5 years as identified in the Western Solar Plan: "The BLM will assess the demand for new or expanded SEZs at least once every 5 years in each of the six states covered by the Solar PEIS. The assessment of demand may take place as part of the regular land use planning process or as a separate effort to determine the role BLM-managed lands should play in broader energy and climate goals." (Final Solar ROD, October 2012, B.4.5.1).

Evaluating SEZs every 5 years through a land use planning process gives land managers an opportunity to consider new or shifting resource conflicts and/or other changes to adjacent population centers, adjacent land designation and federal policy that may impact the establishment of a SEZ. It also allows the BLM to take into account technology

[8] ROD Solar PEIS, Table A-2 "Exclusions Under BLM's Solar Energy Program" October 2012. Accessed December 11, 2014 at http://blmsolar.anl.gov/documents/docs/peis/Exclusions-ROD-Table-A-2.pdf

innovations and changes in transmission infrastructure and load centers. DLAs should follow this model and be evaluated every 5 years. Resource Management Plans are too long in duration (generally in place for decades) to adequately evaluate shifting resources or other changes to adjacent land. The need for more consistent review of resources will be even more necessary in coming years as climate change causes shifting habitats for wildlife and plant species.

Recommendation: Proposed 43 CFR §2802.11 should specify the need for revising existing DLAs and identifying new or expanded DLAs at least once every 5 years. A framework similar to the Final Solar ROD should be established that describes four steps for land managers in reevaluating SEZs (Final Solar ROD B.4.5):

1. Assess the demand for new or expanded SEZs
2. Establish technical and economic suitability criteria
3. Apply environmental, cultural, and other screening criteria
4. Analyze proposed SEZs through a planning and NEPA process

The BLM should stress that DLAs will not only be identified through a land use planning process, but also be revised or removed. Shifting resource conflicts, changes to adjacent land and changes in transmission resources could result in an established zone no longer meeting DLA criteria.

C. Final rule should prioritize development interest within DLAs

Another area where the Western Solar Plan can be consistent with this rulemaking is in regards to priority of DLAs over non-DLAs. The Western Solar Plan addresses prioritization of SEZs over variance areas, stating "ROW applications in variance areas will be deemed a lower priority for processing than applications in SEZs" (Final Solar ROD, October 2012, B.5). The proposed rule, however, does not indicate that BLM will prioritize processing of projects in DLAs over non-DLAs.

Recommendation: Add to the beginning of Proposed 43 CFR §2804.35 a new subpart explicitly stating that the BLM will prioritize NEPA analysis and application processing for leases inside of DLAs ahead of right-of-way grant applications on non-DLA lands.

§2809.10 should also indicate that BLM will prioritize application processing and environmental review for leases inside designated areas ahead of grants outside DLAs.

IV. Establishing Priorities for Review of Applications for FLPMA Grants Outside of Designated Leasing Areas

A stated goal of the rule is to provide direction to BLM on how to prioritize review of wind and solar energy applications outside of designated leasing areas "based upon categories of screening criteria" (p. 59028). As noted, "Prioritizing applications would

focus the BLM's efforts on those applications that are likely to have lesser resource conflicts before those with potentially greater impacts."

We support BLM's efforts to develop an effective system for prioritizing its processing of applications outside of designated leasing areas. The system proposed needs to be improved, however, to help project proponents make better, more informed siting decisions when considering applications outside of designated leasing areas. Screening criteria for prioritizing applications outside of designated leasing areas should be based both on resource sensitivity to impacts from development as well as on expected level of conflict with other uses.

As noted (p. 59039), this rule proposes criteria similar to—but not the same as—those in Instruction Memorandum (IM) 2011–061 (found at http://www.blm.gov/wo/st/en/prog/energy/renewable_energy.html). We believe the criteria for leasing should encompass at least the same range of issues covered in the IM, but be improved to provide better guidance to the BLM and project developers about the level of risk to an application from the presence of other resources.

A. Screening criteria for applications for FLPMA Grants outside of Designated Leasing Areas

We recommend that BLM change §2804.35 ("How will the BLM prioritize my solar or wind application?") to do the following: 1) recognize that processing leases within DLAs will receive highest priority over any applications outside of DLAs; 2) at a minimum, make the prioritization criteria consistent with existing policy for prioritizing applications; 3) include a broader set of criteria that better reflect resource sensitivities and conflicts; and make clear that BLM will not accept applications in areas that are closed to development.

Recommendation: We propose the following specific changes to the criteria for prioritization in §2804.35:

- As noted above, **add** to the beginning of §2804.35, a new subpart explicitly stating that the BLM will prioritize NEPA analysis and application processing for leases inside of DLAs ahead of right-of-way grant applications on non-DLA lands.
- **Add** to §2804.35(a) the following criteria for consideration in identification of HIGH PRIORITY applications:
    - Lands near existing infrastructure
    - Disturbed lands
    - High wind and solar potential as indicated by the WWWMP, Solar mapper and other mapping efforts.
- **Delete** §2804.35(a)(1) "Lands specifically identified for wind or solar energy development, other than designated leasing areas."
- **Remove** from §2804.35(b) the following criteria for identification of MEDIUM PRIORITY applications:

- §2804.35(b)(1) "special management areas that provide for limited development including recreation sites and facilities." This criterion is vague and the term "special management area" is not well defined by BLM. Some RMPs include only Areas of Critical Environmental Concern (ACEC), Wilderness Study Areas (WSAs) and designated Wilderness as "special management areas." Some might infer from this criterion that ACECs would be in the medium category since some ACECs do not preclude all development. This would be misleading as to the level of conflict and resource sensitivity that is likely present.
- §2804.35(b)(4). "Areas where a project may adversely affect conservation lands, to include lands with wilderness characteristics that have been identified in an updated wilderness inventory." Lands found to have wilderness characteristics in an inventory by the BLM should be low priority for processing and are likely to have a high level of conflict. To date, BLM has deferred oil and gas leasing of nominated parcels in areas found to have wilderness characteristics in an inventory by BLM, but for which management decisions have not been made. "Because the leasing of lands with wilderness characteristics is likely to result in indirect, adverse impacts to this resource value, it is recommended that until a decision is made on the management of these units, the areas where lands with wilderness characteristics units overlap with nominated parcels be deferred. . . ."[9]
- § 2804.35(b)(5): Sensitive habitat areas including important eagle use area, priority sage grouse habitat, riparian areas. These should be criteria for identification of LOW PRIORITY applications.

- **Revise** §2804.35(b)(3) to read "Right of way avoidance areas that do not overlap with administratively designated special management areas." As defined by the land use planning guidelines, right of way avoidance areas do not preclude the issuance of rights-of-way for solar or wind energy development and may be available with special stipulations or mitigation measures, but this should only be considered for medium priority case where ROW avoidance areas do not overlap with special management designations. The BLM Land Use Planning Handbook (H-1601-1, Appendix C, pp. 27-28) identifies special administrative designations. They include ACECs, National Scenic Byways, watchable wildlife viewing sites, and other special areas.
- **Add** to §2804.35(c)(1) the names of the types of areas to which the criterion (lands near or adjacent to lands designated by Congress, the President or Secretary for protection) apply.
- **Add** a new subsection to §2804.35(c) that reads: "Sensitive habitat areas including but not limited to important eagle use areas, priority sage grouse habitat (i.e., Priority Areas for Conservation identified by the U.S. Fish and Wildlife Service or Core or Priority Habitat identified by the BLM), and desert tortoise connectivity habitats."

[9] BLM, EA for the White River Field Office, June 2014 Competitive Oil and Gas lease Sale at 77, available at http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/oil_and_gas/Lease_Sale/2014/may_2013.Par.34116.File.dat/WR_doiblmco11020130099ea_3.12.14_EA_MLP%20format_Master.pdf.)

- **Add** a new subsection to §2804.35(c) that reads: "lands managed by the BLM for conservation including, but not limited to:
    - Areas of Critical Environmental Concern
    - Lands managed for Wilderness Characteristics."
- **Add** a new subsection to §2804.35(c) that reads: "Lands Inventoried by BLM and found to have wilderness characteristics, but for which management decisions have not been made in an RMP."
- ***Revise*** §2804.35(c)(5) to read: "Explicit and implicit right-of-way exclusion areas." The Solar PEIS explained the difference between explicit and implicit in this way: *"explicit exclusions that will be delineated in the Solar PEIS ROD by a land base that would not change except by future land use plan amendment; and (2) implicit exclusions that will be defined in the Solar PEIS ROD by the presence or absence of a specific resource or condition where the land base may change over time (e.g., critical habitat). Implicit exclusions will be determined at the time of application for individual solar ROWs, and based on information in applicable land use plans as amended, Species' Recovery Plans, or similar planning or guidance documents, and verified by site-specific information as necessary." Applicants should be aware that some exclusions will be identified on a site specific basis." (Final Solar PEIS, July 2012, page 2-19).*

B. Application requirements for FLPMA Grants outside of Designated Leasing Areas

In §2804.10(c) of the proposed rule, BLM identifies criteria for the BLM to accept an application for solar or wind energy development, for any transmission line with a capacity of 100 kV or more, or any pipeline 10 inches or more in diameter. We recommend that BLM include a preliminary disqualifier for places previously deemed inappropriate for renewable energy development. The proposed rule requires the applicant to "address known potential resource conflicts with sensitive resources and values that are the basis for special designations or protections" (§2804.10(c)(1)). This subsection alludes to the notion that there are certain places unsuitable for wind or solar development. Accordingly, the developer should be made aware that if an application is filed in an unsuitable location, such as a right-of-way exclusion area; their application will not be processed.

Recommendation: We recommend that in addition to the criteria listed under §2804.10(c), BLM add that applications will be accepted "only if: The proposal for solar energy or wind energy development is not sited on lands inside an exclusion area or area identified specifically as inappropriate or unsuitable for solar or wind energy development or pipeline or transmission placement." Developers should be made aware that some areas exceed "potential resource conflicts".

V. Developing and Leasing Designated Leasing Areas for Wind

Our colleagues at Defenders of Wildlife have, in their comments on this rule, noted the current lack of designated leasing areas for wind energy and identified particular challenges in moving forward with an effort to designate preferred development areas for wind, though, as noted in the rule "efforts could be initiated by the BLM for designated wind development areas that may be identified in the future." (p. 59022)

We encourage BLM to continue to develop a framework for identifying and designating DLAs for wind energy. The West-wide Wind Mapper Project is a good step toward identifying the information currently available to help inform such an approach and identifying the information gaps that need to be filled. The West-wide Wind Mapper should be publicly released and continuously updated and improved. Similarly, BLM should continue to pursue state-by-state efforts to better understand the relationship between wind resources, wildlife habitat and use, and other public land values, such as the Wyoming Wind and Transmission Study. In addition, BLM should invest in the collaborative efforts with other agencies such as FWS and DOE and organizations like the American Wind Wildlife Institute to improve our understanding of wind-wildlife conflicts and identify preferred landscape features for low conflict wind development.

And we agree with our colleagues at Defenders that BLM should also explore thoughtfully what DLAs may mean for wind and how this may differ from "solar zones." Developing a framework for identifying DLAs for wind energy is complicated by several factors including:

- Lack of good understanding of the relationship between pre-construction activity and post-construction impacts, particularly with respect to bird and bat collisions. Understanding potential conflicts at a site often requires multiple years of pre-construction monitoring to identify potential risk factors based on seasonal use landscape-scale factors that may attract raptors, bats, and other migratory birds.
- Need for site-specific, fine-scaled meteorological data for wind siting, financing, and development. Mapped wind classes alone do not provide data at the scale necessary to entice serious development interest. Wind resources can be much more variable across a geographic area than solar, and developers complete a significant amount of meteorological due diligence to identify wind speeds at various hub heights at different locations to maximize the efficiency and output of facilities.
- Rapidly changing wind technology making lower class wind sites for profitable development.

Collectively these circumstances make identifying effective DLAs for wind difficult and more resource intensive than for solar. (Defenders of Wildlife, Comments on Proposed Competitive Leasing Rule, Dec. 16, 2014)

Recommendation:

To address the need for specific meteorological testing and wildlife monitoring information about preferred wind development areas, we recommend that BLM move

forward to develop DLAs for wind and consider developing new approaches to offering them for a lease.

First, BLM should identify "designated leasing areas" for wind through a land use plan decision. These areas would be "generally relatively large areas that provide highly suitable locations for utility-scale wind development; locations where wind development is economically and technically feasible, where there is good potential for connecting new electricity-generating plants to the transmission distribution system, and where there is generally low resource conflict." They would meet the criteria for DLA in the proposed rule and consistent with all BLM IMs, handbooks, manuals and handbooks. We encourage BLM to continue to work with partner agencies, industry, NGOs, universities and others to improve understanding of avian and bat population status, distribution and use in areas under consideration for wind development.

Second, we encourage BLM to consider new, creative approaches to offering wind-focused DLAs to address the need for site-specific wind data and wildlife monitoring before full leasing.

We support the proposal made by Defenders of Wildlife et al., submitted December 16th, for a two-phase approach to leasing within wind DLAs. In short, this approach would have a first phase in which BLM would hold a competitive offering for short-term leases for site-specific meteorological and other testing and wildlife monitoring within a DLA and a second phase in which the short-term lease holder would be granted, barring any significant new information about wildlife or other conflicts, the preferred right to enter into a non-competitive project proposal and development phase subject to the same terms and conditions proposed in the draft rule for DLAs and other BLM policies. This process would provide incentives for companies to invest in site-specific analyses needed to determine the energy and environmental suitability of sites within a DFA before full leasing is conducted by providing the right-of-first refusal for a development lease.

Until BLM has identified DLAs for wind, the agency could make lands available for ROW grants outside of DLAs in a similar manner, two-step manner.

BLM should also consider modelling leasing within wind DLAs after approaches developed for Master Leasing Plans for oil and gas leasing. The MLP policy is an attempt to ensure that decisions to lease are systematically considered within the context of "natural resource values in the area" while also identifying "resource protection measures and best management practices that may be adopted as lease stipulations in a resource management plan (RMP)."[10] Such a process is notable given its commitment to consider contemporaneous conditions on the ground, while also ensuring that the public is afforded an additional opportunity to participate. These two steps are instrumental in improving leasing decisions by helping to ensure that commitments to lease at a landscape scale level are not initiated until additional considerations and environmental

[10] See http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/BLM_Colorado_Master_Leasing_Plans.html

safeguards regarding suitability are fully considered, and most ideally incorporated when designing and implementing a leasing plan.

Under this approach, BLM would conduct a NEPA analysis of a designated leasing area prior to leasing—but, for example, after site-specific meteorological and wildlife monitoring have been conducted—as a means to ensure that landscape scale level decisions are truly consistent with protecting sensitive areas while affording meaningful opportunities for additional renewable energy development.

VI. Treatment of existing projects and developed areas

The proposed rule does not address whether existing developed areas or projects already undergoing permitting should be treated as DLAs. We believe the rule should be clear that existing wind or solar projects not evaluated through a landscape-scale land use planning effort like the Solar PEIS will not be treated as Designated Leasing Areas unless BLM subjects them to the same process and criteria, including criteria for identifying low conflict areas, as applied to identifying new DLAs.

As we have recommended elsewhere, however, BLM should consider developing incentives, including offsets for rent, to incentivize technological upgrades that increase efficiency of energy production or land use or both within existing renewable energy development areas (whether DFAs or not), especially where such changes results in a smaller footprint, reduced risk of avian collisions, and other environmental benefits.

Recommendation: BLM should not treat existing project areas as DLAs without landscape-scale analysis. The agency should consider development of incentives for encouraging technological improvements that increase efficiency of both energy production and land use.

VII. Mechanisms for mitigation

A. Incorporating mitigation into the identification of DLAs

BLM should include enforceable provisions for mitigation in the agency's grants and leases of rights-of-way. Various efforts are underway to identify mitigation opportunities at a *landscape* level. *See, e.g.*, Secretarial Order No. 3330 (Oct 31, 2013); *A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior* (April 2014); Interim Draft Policy on Regional Mitigation; Manual Section 1794 (June 13, 2013). Regional mitigation, for example, is being considered as part of the Desert Renewable Energy Conservation Plan. Ensuring that proposed mitigation is durable and enforceable is critical to diffusing controversy around proposed development. Right-of-way grants and leases provide BLM a mechanism for implementing regional mitigation successfully. The proposed rule should explicitly provide for mitigation conditions in the grants and leases to be issued.

Including conditions for monitoring and mitigation in right-of-way grants and leases is also critical to addressing the impacts of a solar or wind *project* in a specific area. Such conditions may be necessary to avoid the need for an EIS in designated leasing areas. Enforceable conditions for mitigation are necessary to support a Finding of No Significant Impact if environmental impacts would be significant without such mitigation. CEQ, *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact* (January 14, 2011).

BLM's authority to include mitigation is well-established. Council on Environmental Quality and Department of the Interior regulations implementing NEPA recognize the potential for mitigation to ameliorate impacts of a proposal and require agencies to include in appropriate mitigation measures in their decisions. 40 C.F.R. §1502.14(f); 43 C.F.R. §46.130. CEQ's regulations require that agency decisions that may have significant environmental impact must "state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they are not." 40 C.F.R. §1505.2.

In fact, in many cases, BLM will not be able to meet its legal obligations under existing law without including mitigation conditions in right-of-way grants and leases. The Federal Land Policy and Management Act (FLPMA), for example, requires that BLM manage the public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archeological values. . . ." 43 U.S.C. §1701(a)(8). FLPMA requires BLM to avoid damage to these values where possible. To the extent a proposed solar or wind right-of-way cannot avoid damage to one of these values, FLPMA requires BLM to include enforceable conditions to monitor and mitigate any damage.

Moreover, the National Historic Preservation Act (NHPA) requires BLM to assess and address any adverse effects that its decisions would have on properties that are listed or eligible for listing in the National Register of Historic Places. 16 U.S.C. §470f; 30 C.F.R. §800.6. To the extent a proposed solar or wind right-of-way cannot avoid damage to cultural and historic properties, the NHPA requires BLM to include enforceable conditions to monitor and mitigate any damage.

Recommendations: We make the following recommendations for incorporating mitigation requirements into the identification and leasing of DLAs.

- BLM should revise §2809.12(b) (How will BLM select and prepare parcels) to read: "(b) The BLM and other Federal agencies will conduct necessary studies and site evaluation work (including applicable environmental reviews and public meetings) and publish the availability of a final regional mitigation strategy, before offering lands competitively."

- BLM should further revise §2805.12 to make clear that mitigation requirements are part of the lease terms and conditions by adding a new subsection §2805.12(c)(8) that reads "(8) Comply with all mitigation requirements."

- BLM should revise §2802.11 (How does the BLM designate rights-of-way corridors and designated leasing areas?) to include a new subsection §2802.11(b)(8) that reads: "(8) presence of resources that should be avoided or have been excluded from such development."

Recommendations: We make the following recommendations for incorporating mitigation requirements into the process for ROW grants outside of DLAs.

B. Avoidance

At a minimum, as noted in our recommendations for Application Requirements for FLPMA Grants, BLM should make clear that it will not accept applications outside of DLAs that do not avoid lands that are ROW exclusion areas for renewable energy (wind, solar, or both), are no-surface occupancy areas, are lands used for mitigation or identified in a regional mitigation strategy or plan as priority areas for compensatory mitigation activities, or are other otherwise closed to surface disturbing activities or development.

Recommendation: The rule should include language similar to that required of pipelines and gathering lines (See §2884.10(d)) for wind and solar ROW grant applications in new §2804.10(c)(3) that reads: "Proposal avoids areas where development could cause significant impacts to sensitive resources and values that are the basis for special designations or protections", with conforming changes to subsequent paragraphs.

C. Minimization and compensatory mitigation:

The proposed rule requires that written proposals for applications address "known potential resource conflicts with sensitive resources and values that are the basis for special designations or protections, and includes applicant proposed measures to avoid, minimize, and mitigate such resource conflicts." (§2804.10(c)(1)). Consistent with draft manual Section 1794 (Regional Mitigation), the rule should also be clear that the BLM may evaluate the need for additional mitigation and identify acceptable forms of mitigation in the NEPA document as an alternative to the applicant's proposed action (Draft Manual Section 1794 (Regional Mitigation)).

BLM should also strengthen §2805.12 (What terms and conditions must I comply with?) §2805.12 currently requires that a successful applicant "**(i)** Comply with project-specific terms, conditions, and stipulations, including requirements to:

> **(1)** Restore, revegetate, and curtail erosion or conduct any other rehabilitation measure BLM determines necessary;
> **(2)** Ensure that activities in connection with the grant comply with air and water quality standards or related facility siting standards contained in applicable Federal or state law or regulations;

(3) Control or prevent damage to:

(i) Scenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat;
(ii) Public and private property; and
(iii) Public health and safety;

Recommendation: The BLM should add a new subsection §2805(4) that reads: "(4) Implement all mitigation requirements (including avoidance, minimization, and on-site and off-site compensatory mitigation) BLM or other permitting agency determines necessary."

Recommendation: The rule should clarify that BLM may expressly condition its approval of the right-of-way application on an applicant's commitment to perform or cover the costs of mitigation, both on-site and outside the area of impact and that such mitigation must be durable for the life of the impact. BLM Instruction Memorandum No. 2013-142 and Draft Manual Section 1794 (Regional Mitigation).

Additionally, we concur with Defenders of Wildlife in their comments on "Compensatory Mitigation for DLA Development" and "Compensatory Mitigation for Non-DLA applications", and incorporate those sections herein by reference.

VIII. Ensuring effective public participation

Effective public participation is necessary to defuse controversy that may exist around solar and wind development on the public's lands. Meaningful public participation can help: (1) site such development in suitable places and (2) identify conditions of operation that limit harm. BLM can encourage effective public participation by including a separate section in the rule explaining the specific opportunities for public participation in grants for solar and wind energy outside designated leasing areas and in leases for such development within designated leasing areas. If including such section in the final rule is too cumbersome, BLM should include such section in the rule's preamble.

In addition to explaining clearly the public's role in right of way grants and leases, BLM should add the following improvements to its proposed rule. The rule should build upon the public participation and environmental review included as part of the recent Solar Programmatic Environmental Impact Statement (PEIS). This previous review, however, cannot excuse further review of the impacts of a specific project seeking a right-of-way to operate on the public's lands. The absence of public participation in the review of environmental impacts is even more problematic for decisions to grant a right-of-way outside a designated leasing area than for leasing in a designated area. Yet, the proposed rule makes no provision for public participation in such environmental review. BLM's rule should require that applicants for a right-of-way both inside and outside a designated leasing area provide a Geographic Information System file and map identifying the

proposed right-of-way at a scale that will allow the public to tell whether it affects important ecological or recreational areas.[11]

A. Review within Designated Leasing Areas

Without such review, the public lacks the ability to influence the manner in which the development proceeds. Although the question of "where" may have been decided in designating certain leasing areas, the question of "how" development proceeds has not.[12]

While many impacts may be addressed when decisions are made about appropriate locations for development in an RMP, some impacts cannot be addressed until site-specific approval of a project occurs. Just like a lease for oil and gas, a lease for solar or wind development represents an irretrievable commitment of resources. Through the lease for a right-of-way, a solar or wind company is given the right to develop in a specific location. The National Environmental Policy Act (NEPA) requires a site-specific analysis of the specific project being approved. The public deserves the opportunity to review and comment on the specifics of a solar or wind development on public land. BLM will benefit from such public participation in fulfilling its responsibility to include stipulations in the lease that address how the project will be built and operated.

Recommendation: BLM should provide for public participation and environmental review to supplement programmatic analysis previously completed for designated leasing areas.

B. Review outside Designated Leasing Areas

In areas outside designated leasing areas, neither "where" nor "how" to best develop wind or solar resources has been analyzed. As proposed, the rule fails to identify when this analysis will occur or when the public can review and comment on it. While the rule requires a public hearing, the proposal does not specify what information will be available for review prior to the hearing.

For areas outside designated leasing areas, little if any comparative analysis has occurred to identify the best places within a resource management area to develop. The PEIS for wind identified areas of wind potential, but did not assess where that potential could be developed with the least impact on valued ecological resources, recreation or other commercial interests. State BLM offices should complete the identification of areas suitable for wind development on the lands within their jurisdiction. This analysis could be done through a Resource Management Plan amendment or through a Master Leasing Plan.

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[11] The BLM should also ensure the availability of baseline wildlife survey data and relevant information from cooperating agencies.

[12] As proposed, BLM's rule provides that the agency will prepare necessary studies and site evaluation, but does not specify what criteria will be addressed nor when – if at all – such evaluation will be provided to public for comment. 79 Fed. Reg. 59079 (proposed 43 C.F.R. §2809.12).

For solar development, the rule should include a presumption against a right-of-way outside designated leasing areas. In the solar PEIS, BLM engaged in the challenging task of identifying the best places for solar development and memorialized these places in designated leasing areas through resource management plan amendments. Having made such critical decisions, BLM should steer development to these designated areas. Explicitly requiring an Environmental Impact Statement (EIS) for any project outside designated leasing areas will help accomplish this.[13] Such a requirement will provide meaningful time and cost savings to developers within a designated leasing area where significant environmental review has already occurred.

Recommendation: BLM should require preparation of an EIS, providing public participation and more in-depth environmental review as part of the agency's consideration of granting rights-of-way outside designated leasing areas.

IX. General clarity in the language of the rule

Whether in the wording of the preamble or the proposed rule itself, there are areas that warrant clarification as to minimize confusion and possible conflict for future wind and solar projects on BLM lands. We recommend that the BLM address these issues in the final rule as follows:

1. Clarify when a POD is required

The preamble to the rule states that under §2804.10(b), PODs would always be required for authorizations for solar or wind energy development, transmission with a capacity of 100 kv or more, or any pipeline 10 inches. However, in the section for terms and conditions applicable to wind and solar grants in the proposed rule (§2805.12(a)(8)), the rule states that a developer must ensure that you construct, operate, maintain and terminate the facilities on the lands in the right-of-way in a manner consistent with the grant or lease, including the approved POD, *if one was required*.

Recommendation: BLM should clarify that a POD is required on all solar and wind developments in this section of the rule.

Thank you for the opportunity to provide input on this important effort. Please accept and fully consider our views, and do not hesitate to contact us with questions.

[13] The requirement for an EIS outside designated leasing areas will also provide an incentive for state BLM offices to complete decisions identifying suitable areas for wind development.