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December 16, 2014  
Director (630) Bureau of Land Management  
U.S. Department of the Interior  
1849 C St. NW., Room 2134LM  
Washington, DC 20240  
Attn: 1004-AE24  
Via [www.regulations.gov](http://www.regulations.gov) (Docket ID BLM-2014-0002).

Re: Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections (79 Fed Reg 59022)

Mr. Brady:

On behalf of Defenders of Wildlife, the Sierra Club, and the National Parks Conservation Association please accept and fully consider these comments regarding the Bureau of Land Management's (the Bureau or BLM) Proposed Rule on Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections, Docket No. 1004-AE24 / 79 Fed. Reg. 59,022 – 59,085 (September 30, 2014) ("Proposed Rule"). The recommendations provided in our comments below will help ensure that this rule will effectively "facilitate responsible solar and wind energy development" through the "use of preferred areas for solar and wind energy development" that avoid and minimize impacts on wildlife and other natural resources. 79 Fed Reg. 59,022.

The public lands under the jurisdiction of the BLM are home to some of the most unique and sensitive resources in the United States, including some of the best habitat and corridors for imperiled wildlife species. These lands also offer substantial solar and wind resources to generate clean, renewable energy. As the Department of the Interior (the Department) moves forward with advancing the President's goal of permitting 20,000 megawatts of renewable energy on our public lands by 2020, the Department and BLM should continue to advance policies that embrace a landscape-scale approach to effectively direct development to locations on the public lands that reduce the likelihood of conflict between renewable energy development and conservation objectives.

Critical to a successful landscape approach is ensuring that renewable energy project planning and development is informed by the energy development and conservation goals and objectives for a particular landscape. Adopting a landscape approach allows public land agencies, energy developers, and other stakeholders to identify upfront strategies to: (1) avoid development in priority areas including crucial wildlife habitats and corridors; (2) direct development to, and incentivize development in, areas with excellent renewable energy resources and the lowest possible conflicts with conservation values; (3) minimize impacts on-site through project-specific best management practices; and (4) when

remaining unavoidable impacts warrant mitigation, off-set impacts with effective and durable off-site, compensatory mitigation that advances specific and measurable conservation goals for the identified landscape by protecting, restoring and improving management of priority areas.

The proposed regulatory amendments provide a foundation for implementing a landscape-scale approach to affirmatively direct development to lands most suitable for wind and solar development “based on a high potential for energy development and lesser resource impacts.” 79 Fed. Reg. 59,034. This approach is consistent with direction in the Federal Land Policy and Management Act (FLPMA) that the BLM make management decisions based on “a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and non-renewable resources.”<sup>1</sup>

#### I. Definition of a Designated Leasing Areas

In an effort to “facilitate responsible solar and wind energy development and to receive fair market value for such development” the BLM’s proposed rule looks to “promote the use of preferred areas for solar and wind energy development and establish competitive processes, terms, and conditions (including rental and bonding requirements) for solar and wind energy development rights-of-way both inside and outside these preferred areas.” 79 Fed. Reg. 59,022. These preferred areas would be called “designated leasing areas” (DLA).

The proposed rule’s definition of DLA is inconsistent throughout the document. We have provided several examples of this inconsistency below:

79 Fed Reg. 59,024: “The proposed 43 CFR 2801.5 would define ‘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.” [emphasis added]

79 Fed. Reg. 59,030: Section IV General Discussion defines “ ‘designated leasing area’ as a parcel of land with specific boundaries identified by the BLM land use planning process as being a preferred location for solar or wind energy development that must be leased competitively.” The section goes on to read “[s]imilar to right-of-way corridors, designated leasing areas would be identified as appropriate area for development while minimizing cultural and environmental impacts through avoidance, minimization, and compensatory mitigation.” [emphasis added]

79 Fed. Reg. 59,032: Section IV. General Discussion, Section-by-Section Analysis for Part 2800, the following definition is provided: “‘Designated leasing area’ is a new term that means a parcel of land which specific boundaries identified by the BLM’s land use plan process as being an area (e.g., SEZ) established, conducted through a landscape-scale

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<sup>1</sup> 43 CFR § 1601(i).

approach, for the leasing of public lands for solar or wind energy development via a competitive offer.”

79 Fed. Reg. 59,034: “The BLM would identify designated leasing areas as preferred areas for solar or wind energy development, based on a high potential for energy development and lesser resource impacts.”

79 Fed. Reg. 59,065: The proposed regulatory text for 2801.5 provides the following definition of a DLA: “a parcel of land with specific boundaries identified by the BLM land use planning process as being a preferred location for solar or wind energy development that must be leased competitively.”

The BLM should utilize one consistent definition that ensures that DLAs represent areas of “lesser resource impacts” for solar and wind energy development projects. In addition, we recommend that BLM provide a definition for the term “preferred location” in the regulatory text. This addition would provide clarity with respect to the areas where we want to devote BLM resources and direct renewable energy through financial and other incentives.

We recommend the BLM utilize the following proposed definitions for DLAs and Preferred Locations respectively:

43 CFR 2801.5 would define “‘designated leasing area’ as a parcel or several contiguous parcels of land with specific boundaries identified by the BLM land-use planning process as being a Preferred Location for solar or wind energy development where a competitive process must be undertaken.”

43 CFR 2801.5 would define a “‘Preferred Location’ as a least conflict area identified through a landscape-scale approach that represents high potential value for wind or solar energy development and avoids, minimizes, and effectively compensates impacts on cultural and environmental resources.”

A. Application to existing Solar and Wind policies

a. The Leasing Rule Must be Consistent with Solar Energy Program

The concept of preferred locations for development is consistent with the zone-based approach adopted in the BLMs Western Solar Energy Program, and in the preamble, the BLM asserts that “designation of SEZs...provides the foundation for initiating a Bureau-motion competitive process for offering lands for solar energy development within the SEZs.” 79 Fed. Reg. 59,022.

In October 2012, the BLM finalized more than four years of work to establish a coherent set of policies governing large-scale solar energy development on the public lands when it signed a Record of Decision

(ROD) formally establishing a new western solar plan.<sup>2</sup> The ROD describes the Interior Department's decisions regarding utility-scale solar energy development on BLM-administered lands in six southwestern states. The ROD documents the BLM's decisions, which consist of land use plan amendments that establish the foundation for a comprehensive Solar Energy Program. In addition, although the BLM had existing guidance for solar energy, the ROD also describes updated and revised BLM policies and procedures related to solar energy development on public lands.

The ROD states, "[t]hese policies and procedures provide internal administrative guidance to the BLM regarding the processing of Right of Way (ROW) applications for utility-scale solar energy projects."<sup>3</sup> The proposed action and alternatives, including both land use decisions and policies, were evaluated through the preparation of the *Final Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States* (Solar PEIS).

It is incumbent on the BLM to ensure that the proposed regulatory changes support the policies adopted in the Solar PEIS and Record of Decision. In particular, to ensure consistency with the Solar Energy Program, the rule should establish a framework that ensures:

- Solar Energy Zone development is prioritized over applications on variance lands;
- Regional Mitigation Strategies for solar DLAs should be completed prior to an offer of competitive interest; and
- All future utility-scale solar energy development must be in conformance with the exclusions adopted through the ROD (see Tables A-1 and A-2) and the associated land use plan amendments.

#### b. Uncertain Application to Wind Energy Development

As noted in the proposed rule, wind energy is not currently using the same approach as solar, though "similar efforts could be initiated by the BLM for designated wind development areas that may be identified in the future." 79 Fed. Reg. 59,022.

First, BLM should provide more clarity regarding the general framework it will employ when identifying DLAs for wind development. The Wind PEIS' primary objective was to identify lands to be excluded from land development and provides no analysis to support the designation of preferred locations for wind development that would be suitable for DLAs. Furthermore, the Wind PEIS explicitly states that "[n]one of the proposed amendments [to the 52 BLM land use plans assessed in the PEIS] address designation of lands for competitive ROW bidding processes."<sup>4</sup>

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<sup>2</sup>U.S. Dep't of the Interior Bureau of Land Management, *Approved Resource Management Plan Amendments/Record of Decision (ROD) for Solar Energy Development in Six Southwestern States* (October 2012) [herein ROD]

<sup>3</sup> ROD at 1.

<sup>4</sup> U.S. Dep't of the Interior Bureau of Land Management, *Final Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States*, ES 3 (Volume 1) (June 2005).

In addition, the preamble and proposed regulatory text fails to reference the U.S Fish and Wildlife Service's (FWS) land-based Wind Energy Guidelines (WEG).<sup>5</sup> FWS' WEG is a valuable tool that provides useful guidance for siting and operating wind energy facilities to avoid and minimize wind wildlife conflict. It is the result of a collaborative effort among FWS, developers, conservation organizations, and third party scientists. The tiered approach adopted in the WEG provides a scientifically-based decision framework for collecting information in increasing detail to evaluate risk and make siting and operational decisions. As such, we recommend that any framework for identifying DLAs incorporate the WEG's approach for identifying low wind-wildlife conflict areas.

## B. Features of DLAs

### a. Criteria For Identifying DLAs

No details are provided in the draft regulation about what criteria will be used to identify a designated leasing area. The draft directs the reader to Section 2802.11 for factors the BLM will consider when determining which lands may be suitable for right-of-way corridors or designated leasing areas: "The BLM may determine locations and boundaries of right-of-way corridors or designated leasing areas during the land use planning process" 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 geology, hydrology, meteorology, soil, or land forms." 43 CFR 2802.11(a) & (b)(3).

For utility-scale solar, the BLM adopted the following criteria for solar energy zones: "SEZs should be relatively large areas that provide highly suitable locations for utility-scale solar development: locations where solar 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."<sup>6</sup>

For wind energy development on the public lands, no such criterion is established and often data is not available at the appropriate scale. While we support the concept of directed development for wind, we believe it will be difficult for BLM to adequately identify preferred areas for wind development that will garner adequate interest from developers under a framework similar to BLM's Solar Energy Program. Avoiding and minimizing wildlife impacts from wind has been particularly challenging because we do not have a good understanding of the relationship between pre-construction activity and post-construction impacts, particularly with respect to bird and bat collisions. In addition, as demonstrated by FWS' land-based WEG, 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. Impacts to avian species can vary intensely over a relatively small geographic area, making it difficult to identify broad swaths of land as low-impact.

### b. Tailored DLA strategy for wind energy development

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<sup>5</sup> U.S. Fish & Wildlife Service, *Land-Based Wind Energy Guidelines* (March 23, 2012) (available at [http://www.fws.gov/windenergy/docs/WEG\\_final.pdf](http://www.fws.gov/windenergy/docs/WEG_final.pdf)).

<sup>6</sup> Solar PEIS at ES-7.

We encourage BLM to think thoughtfully about what DLAs may mean for wind and how this may differ from “solar zones.” Wind is a very different technology than solar and most wind development currently occurs on private lands. Siting wind turbines is a very site-specific endeavor. Development typically occurs based on a two-step process. Wind developers first conduct intensive site testing before committing to develop a project. 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. As such, viable project areas are identified based on fine-scaled meteorological data; mapped wind classes alone do not provide data, and therefore, the scale necessary to entice serious development interest. Hence, unless BLM gathers this detailed information (which can be incredibly costly and time-consuming), we question whether a DLA auction would be successful under the proposed framework.

Additionally, wind technology is rapidly changing, opening up lower class wind sites for profitable development. Collectively these circumstances make identifying DLAs for wind incredibly difficult and resource intensive at this time.

Accordingly, we believe BLM needs an innovative and tailored solution for directing and incentivizing least-conflict wind development. We believe that the leasing rule should adopt a different strategy for wind development in DLAs to accommodate for the siting differences and provide wind developers with adequate incentives for least conflict development.

Specifically, we recommend that BLM retain the discretion to structure the DLA-leasing process for wind in accordance with the two-phased wind development approach discussed above. Phase I would consist of a competitive leasing process only for the authorization to conduct short-term site-specific testing in DLAs—rather than auctioning the actual lease for development. Under the proposed regulation, these ROWs would be generally consistent with those contemplated under proposed 2806.68 “Rent for Wind Energy development testing grant(s).” Note this competitive process would only be mandatory for testing grants or leases within areas that meet the definition of DLAs, and as such, must have been identified through the land use planning process as Preferred Locations for wind development using a landscape approach.

The successful bidder in the Phase I competitive process would then be granted a ROW to pursue site specific testing. This ROW would specify the areas for site testing, include certain conditions and provisions for acceptable testing practices, and limit the length of the testing period. The ROW should also include a requirement for the proponent to conduct site specific wildlife and other on-the ground natural resource surveys concurrently with wind testing to facilitate future environmental review should the developer want to eventually proceed to the second phase. This is very important as sensitive avian species may require long surveys to determine site use.

The bonus bid paid in the competitive auction for the permit to conduct such site-specific testing should generally be proportional to the probability of identifying sufficient low-conflict wind resources at the site. If the probability of commercial resource discovery is high, we anticipate that the bonus payment

will be high based on market demand. The project proponent would also be subject to a ROW rental fee commensurate with the nature and level of use during the testing period.

The second phase would relate to the lease for the actual project development. It would begin after the site-specific testing is completed, should the developer be interested in pursuing wind energy development on the site based on the results of the Phase I testing. During Phase II, the developer would make the results of their site testing, and environmental resource assessments publicly available in exchange for a *preferred right* to enter into a lease. Note that this preferred right would not guarantee lease issuance. Prior to authorizing any project development at the site, BLM would complete an environmental analysis of the proposed project's potential impacts based on the site specific environmental assessments completed by the developer and other best available science in compliance with the National Environmental Policy Act ("NEPA").<sup>7</sup> Hence, BLM should retain discretion to deny a lease under this approach should the natural resource studies indicate site specific impacts are greater than anticipated. We believe this discretion is incredibly important given the site specific data needed to assess potential wind-wildlife risk as described above.

This preferred right could take many forms. It could represent a non-competitive right of first refusal. It could also represent a discount for the bonus bid to compensate the developer for the costs incurred during the site testing phase should BLM want to initiate a second competitive process for the long-term development lease. However, if site specific data confirms that the area represents a Preferred Location for wind development, the developer would qualify for a lease which includes terms and conditions consistent with those contemplated for DLAs in the proposed rule. Again, this opportunity would only be available for parcels previously designated as DLAs through a land management process. The developer would also still be required to complete robust pre-construction surveys consistent with FWS' WEG and Eagle Conservations Plan Guidance and other guidance and policy documents as applicable.

Note that our proposed approach still requires BLM to identify upfront preferred areas for wind development based on landscape scale assessments prior to offering site testing permits competitively. Accordingly, BLM will need to invest in new tools and assessments to ensure that it can appropriately identify these potential areas. To this end, we encourage BLM to continue investing in wind wildlife research and its state planning efforts. In addition, BLM should invest in the collaborative efforts of other agencies such as FWS and Department of Energy to improve our understanding of wind-wildlife conflicts and identify preferred landscape features for least conflict wind development.

#### c. Distinguishing a DLA from a Non-DLA

The BLM provides no details on what characteristics distinguish a DLA from a non-DLA. It is our understanding that the BLM does not intend for DLAs to be a standalone designation, but a catch all phrase for designations of lands made through a variety of planning efforts (*e.g.*, Desert Renewable Energy Conservation Plan, Development Focus Areas; Solar Energy Program, Solar Energy Zones). If this is in fact the case, the final rule should make clear that DLAs are not, in and of themselves, designations for competitive leasing.

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<sup>7</sup> 42 U.S.C. § 4321 *et seq.*

If BLM is adopting a catch-all approach, there is a significant need for established criteria to clarify what planning designations are eligible for DLA incentives (discussed below). In the absence of additional criteria about what distinguishes a DLA from a non-DLA, there is little clarity what will qualify as a DLA. While we acknowledge that designations may take on different names, the BLM needs to ensure that DLAs do not simply perpetuate project by project development and that appropriate sideboards are established so that the rule facilitates, and does not undermine, a directed development approach. Guiding development to lands of least conflict should be better for wildlife, energy developers, utilities, and investors because it offers a more efficient way to get environmentally-sustainable renewable energy on line and greater certainty for all involved. It also helps ensure that new transmission corridors and lines are directed to facilitate renewable energy development in least conflict areas and that a regional approach to mitigation can be implemented. Developing a set of criteria can promote consistency in DLAs across states and regions, while providing some degree of flexibility.

In particular, we recommend the BLM use the following factors when identifying DLAs:

1. Generation should be developed either on already-disturbed land or in areas of lower biological value, and conflict with both biological resources should be minimized.
2. Areas identified for generation should have high-quality solar and/or wind energy resources.
3. Generation should be sited close to existing transmission and in areas which could be accessed with minimal upgrades or improvements.
4. Generation should, to the maximum extent possible, be aggregated to avoid transmission sprawl, reduce cost, and reduce disturbance across the planning area. This principle aims to minimize disturbance to valuable biological, cultural, recreation, and visual areas.

d. Prioritization of DLAs over Non-DLAs

As currently drafted, the proposed rule lacks any information about whether, and how, the BLM will prioritize review of DLA leases over non-DLA applications. We strongly urge the BLM to include language in the rule clarifying its intent to prioritize and direct agency resources toward DLA leases, ahead of non-DLA applications. Prioritization of DLAs over non-DLAs is consistent with the policies adopted in the solar energy program (see, e.g. ROD at 177 (“ROW applications in variance areas will be deemed a lower priority for processing than applications in SEZs”)).

To carry out the intent of directing development to DLAs, it is important the BLM direct organizational capacity and resources to DLAs. We recommend that 2809.10, General Provisions for the Competitive Process for Leasing Public Lands for Solar and Wind Energy Development Inside Designated Leasing Areas, be modified to include a subpart explicitly stating that the BLM will prioritize NEPA analysis and application processing for leases inside of DLAs ahead of grant applications on non-DLA lands.

C. Incentives for DLAs



Critical to carrying out the intent of facilitating responsible solar and wind energy development is providing the appropriate incentives. To encourage development interest in DLAs, “the proposed rule also includes provisions to provide incentives for leases within [these areas].” 79 Fed. Reg. 59,022-59,023. We support the use of incentives for applications inside DLAs, including: variable bonus bid offsets; discounted nomination fee; longer phase-in periods and 30 year fixed term leases.

a. Variable Offsets

One proposed incentive is the use of “variable offsets” within a DLA under proposed 2809.16. “A successful bidder for lands inside a designated leasing area may qualify for variable offsets totaling up to 20 percent of the total bid” as “an incentive for development inside designated leasing areas and benefits to the general public” including “better resource protection, more efficient use of the public lands, and an increased likelihood of project development.” 79 Fed. Reg. 59,030. The variable offsets are offered to promote “thoughtful and reasonable development based on known environmental factors and impacts of different technologies.” 79 Fed. Reg. 59,052. We strongly support proposed offsets that account for wildlife and other biological conflicts, including offsets for preferred solar or wind energy technologies that “would efficiently use public lands for reduce impacts to identified resources.” *Id.* In addition to the already identified factors, we recommend the following be added as potential variable offsets:

- A draft Bird and Bat Conservation Strategy for the project site;
- A commitment to a specific ROW lease condition to obtain a Bald and Golden Eagle Protection Act Permit;
- A plan to employ best available operational minimization strategies; and
- An agreement to: (1) conduct monitoring and research consistent with the land-based WEG and Eagle Conservation Plan Guidance, (2) provide this monitoring data to the public to facilitate greater understanding of the wildlife impacts, and (3) implement avoidance measures to avoid impacts.

b. Fixed Bonding Amounts

As an incentive for DLAs, the BLM proposes fixed bonding amounts within DLAs, as described in IV, General Discussion. BLM’s proposed standard bond amount for energy development would be \$10,000/acre for solar and \$20,000/authorized turbine for wind. 79 Fed. Reg. 59,030. These fixed bonding amounts are purportedly based on BLM’s review and assessment of the decommissioning costs associated with a handful of existing projects. However, the results of BLM’s analysis for solar ranged from between \$10,000-\$18,000/acre and ranged between \$22,000-\$60,000/turbine for wind. As such, we are perplexed as to why BLM chose standard bonding amounts that are at the lower range or even below the lower range of its cost analysis. While we appreciate the benefit the BLM is looking to bestow upon developers in DLAs, given the relative newness of the technologies we are concerned this approach does not adequately account for changed or unforeseen circumstances. The incentive should be the certainty associated with a fixed amount, not in the issuance of insufficient bonding

requirements. We recommend the BLM reevaluate these standard amounts and identify a range more commensurate with actual costs of decommissioning.

c. Compensatory Mitigation for DLA Development

BLM should identify more explicit procedural and substantive requirements with respect to mitigation. Section III, General Comments, identifies concerns raised about the ability of the BLM to mitigate impacts to resources under a competitive leasing process. In response, the BLM clarifies that “all grants and leases for solar and wind energy right-of-way authorizations would be expected to implement best management practices and mitigation as identified within the ROD for the Wind [PEIS] or Solar [PEIS]” and that “any additional site-specific NEPA requirements associated with an individual project could result in the identification of further mitigation measures, if applicable.” 79 Fed. Reg. 59,026. These actions alone are not sufficient.

Various efforts are underway to identify mitigation opportunities at a landscape level.<sup>8</sup> Regional mitigation, for example, is also being considered as part of the Desert Renewable Energy Conservation Plan. The BLM is in the process of finalizing its Offsite Mitigation Manual, which we expect will provide guidance to the BLM on how to (1) develop Regional Mitigation Strategies, (2) incorporate regional mitigation into the land use planning process, and (3) identify and implement appropriate mitigation measures for particular land-use authorizations. Implementing a regional approach to mitigation for the public lands is necessary if the BLM is to strike the “careful balance between the development and protection of the public lands that the BLM is charged with overseeing.” 79 Fed. Reg. 59,027. As such, BLM should include a procedural requirement in the proposed regulation that a regional mitigation strategy must be finalized before the initiation of a competitive leasing process. This approach also benefits project proponents with enhanced certainty regarding compensatory mitigation costs.

Specifically, we recommend that BLM revise 2809.12(b) as follows (changes indicated in red):

“2809.12 How will BLM select and prepare parcels?...**(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.**”

Substantively, it is important that these regional mitigation strategies are based on sound science and are linked to conservation objectives for the planning region in a transparent manner. Ultimately, BLM must be able to demonstrate that impacts are truly unavoidable, compensatory actions appropriately mitigate residual impacts, and the net effect is at a minimum no net loss, and preferably a conservation gain to the resource of concern.

In addition, we must stress that we do not support incentivizing development in DLAs through mitigation discount factors. It is critical that compensatory mitigation costs are sufficient to fully offset

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<sup>8</sup> See, e.g., Secretarial Order No. 3330 (Oct 31, 2013); Dep’t of Interior, *A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior* (April 2014).

impacts of development regardless of whether in DLAs or outside of them. The incentives in DLAs should arise from the existence of a clear regional mitigation strategy, quick approval of mitigation requirements and certainty for associated cost. Furthermore a discount factor is unnecessary since mitigation costs should be naturally less costly for DLA development regardless of any artificially imposed discount factors due to the least-conflict characteristics of the site itself.

BLM should also clarify how and when compensatory mitigation costs pursuant to the regional mitigation strategy will be paid. The proposed leasing rule indicates that when determining the minimum bid, the authorized officer may consider values that include *inter alia* "other environmental and mitigation costs of the parcel." 79 Fed. Reg. 59,038. However, it is unclear whether this statement is referencing a factor for consideration when BLM establishes the minimum bid (similar to BLM's consideration of projected future lease payments when establishing the minimum bid) or whether the actual payment of mitigation costs will be embedded into the minimum bid. If it's the latter, BLM must ensure that it is explicit on this point to ensure those costs are accounted for and diverted to real on – the-ground compensatory mitigation activities rather than the US Treasury.

#### V. Prioritization for Non-DLA Applications

First and foremost, we must reiterate our comments above that this rule should provide robust incentives to direct development to DLAs over non-DLAs where applicable. However, we acknowledge that development may still be appropriate in certain low-conflict sites that have not yet been designated as DLAs. However, we expect that since new DLAs have and will be designated through multiple avenues, and the amount of land in question is finite, these locations will be limited and the exception, rather than the rule.

To ensure responsible, thoughtful development outside of DLAs, we support BLM's general intent in the proposed rule to provide incentives to direct development to least-conflict sites for projects proposed outside a DLA. While this intent is clearly stated throughout the preamble, we have concerns that the regulation itself falls short of realizing this intent. As described further below, there are several components of the proposed regulation which should be refined and expanded to ensure that the final regulation sufficiently directs development away from sites with the potential for high resource conflict.

The proposed rule's primary method of incentivizing lower-conflict development outside of DLAs is through the codification of categories of screening criteria for prioritizing and processing such applications. Specifically, the proposed rule identifies three categories of screening criteria – high, medium and low priority. The preamble indicates that "[p]rioritizing applications would focus the BLM's efforts on those applications that are likely to have lesser resource conflicts before those with potentially greater impacts." 79 Fed. Reg. 59,028. This in turn is anticipated to incentivize development in lesser conflict areas due to shorter permit review and greater predictability.

While we support BLM's objective to focus its efforts, and in turn incentivize low-conflict projects, the proposed screening criteria must be refined and expanded to better capture wildlife and other natural resource conflicts. Sufficiently comprehensive and clear screening criteria are necessary to ensure adequate consideration of potential conflict with important natural resources, consistency across field

offices and robust transparency for stakeholders and developers. In addition, comprehensive screening criteria are valuable for providing adequate certainty for developers wishing to pursue permitting incentives through objective guideposts that direct them to least conflict project sites. These screening criteria are a critical part of providing clarity to applicants regarding how they can maximize the likelihood of timely permit approval through low-conflict alternatives. Experience has demonstrated that early identification of potential impacts to sensitive wildlands and wildlife habitat associated with proposed renewable energy projects affords the opportunity to focus on avoiding, minimizing and mitigating project impacts, and therefore the greatest likelihood for successful completion. Significant resource limitations at federal and state agencies responsible for reviewing projects strengthen the case for such an approach.

However, the proposed screening criteria lack sufficient detail for objective categorization and also fail to capture several wildlife risk factors – particularly for avian and bat risk. Moreover, we have concerns that many of the screening criteria and their respective categories are not entirely consistent with BLM's Western Solar Energy Program and IM 2011-061. The Interior Department, BLM and other agencies continue to make great scientific strides in the development of sophisticated landscape scale assessments and geospatial mapping. Our recommended changes below were developed to more fully incorporate best available science and current policy into the screening criteria.

Below we have provided recommended revisions and additions to the proposed high, medium and low screening criteria under §2804.35 to facilitate low-conflict development and improve transparency and certainty. We have also added a fourth “exclusion” category to BLM's framework. We believe adding such a category is incredibly valuable to ensure consistency with the Western Solar Energy Program. In addition, we believe this fourth category also provides additional transparency to applicants where applications will be denied due to a finding of incompatible use. We also urge BLM to broaden the applicability of the exclusion criteria employed in the Solar Energy Program for wind development as well. We believe these exclusion criteria represent high resource conflict areas for wind energy development as well and thus should be applied to both types of development.

Note, we have also added several criteria to ensure that state wildlife and conservation priorities are fully incorporated into BLM's application review. BLM should make it clear to applicants that existing federal and state requirements for obtaining permits for survey and removal of protected species of plants and animals apply. This is particularly relevant in California because of the presence of federal and state threatened and endangered species and a variety of fully protected species under the California Fish and Game Code.

In addition to our recommended changes to the screening criteria themselves, BLM should provide regulatory text to clarify that where a project application meets screening criteria for more than one category, the lowest priority category will govern. For example, a site that is designated as VRM Class IV (a high priority screening criteria), and no surface occupancy for oil and gas development (a low priority screening criteria), should be categorized as “low priority.” We recommend that BLM revise § 2804.35 as follows to incorporate this recommendation (proposed changes in red text):

“The BLM will prioritize your application by placing it into one of **four** categories and may re-categorize your application based on new information received through surveys, public meetings, or other data collection, or after any changes to the application. The BLM will categorize your application based on the following screening criteria; **where an application meets screening criteria for more than one category, the lowest priority category will govern.**”

Our recommended changes to BLM’s proposed screening criteria for the four categories appear in the left column while the rationale for any changes or additions appears in the right column. Note, for easy comparison any recommended changes to BLM’s proposed rule’s screening criteria appear in red.

Proposed screening Criteria for high-priority applications:	Rationale for proposed change
<p>(1) <del>Lands specifically identified for solar or wind energy development, other than designated leasing areas;</del></p>	<p>We recommend that BLM delete this as a screening criteria from the high priority application category due to its lack of specificity and potential broad application. It is unclear what this criteria encompasses and the criteria could be reasonably interpreted to mean variance lands identified under the solar PEIS or lands that were not excluded from wind energy development pursuant to the wind PEIS. However, these variance and non-excluded lands have been subject to various levels of conflict screening and upon further review, some of these sites may be found to have a medium or high potential for conflict. For example, BLM recently denied a variance land application in the Silurian Valley when it was determined that a solar energy development would “would not be in the public interest after undergoing a rigorous review process in accordance with the BLM’s Western Solar Plan.”<sup>9</sup>. BLM determined that “impacts to the Silurian Valley, a largely undisturbed valley that supports wildlife, an important piece of the Old Spanish National Historic Trail, and recreational and scenic values, had too great of an impact on the resources.”</p> <p>Hence, this screening criteria, as currently written, could send a misleading message to developers and encourage them to invest heavily in sites where development may not be appropriate. This would frustrate BLM’s intent to develop a clear, consistent and transparent framework.</p>

<sup>9</sup> <http://www.blm.gov/ca/st/en/info/newsroom/2014/november/siluranvalley.html>

(2) Previously disturbed sites or areas adjacent to previously disturbed or developed sites;	No Change
(3) Lands currently designated as Visual Resource Management Class IV;	No Change
(4) Lands identified as suitable for disposal in BLM land use plans.	No Change
(5) Repowering existing wind or solar development ROWs	The Department of Energy predicts that repowering will be a major focus for developers over the next decade – particularly for wind development. Repowering initiatives should be considered as an important factor for identifying high priority applications since these efforts typically provide increased generation output, result in minimal additional land disturbance, and in some cases can reduce wildlife impacts from baseline conditions.
(6) Lands adjacent to designated transmission corridors.	This criteria is consistent with BLM’s IM 2011-061 and we recommend that BLM codify it in this rule.
(7) Locations that minimize construction of new roads and/or transmission lines.	This criteria is consistent with BLM’s IM 2011-061 and we recommend that BLM codify it in this rule.
(8) For wind development, lands that meet criteria for “low probability of significant adverse impacts” under FWS’ Land-Based Wind Energy Guidelines.	FWS’ land based Wind Energy Guidelines (WEG) is a valuable tool that provides a broad overview of wildlife conservation for siting and operating wind energy facilities. It is the result of a collaborative effort among FWS’ developers and third party scientists. The tiered approach provides a decision framework for collecting information in increasing detail to evaluate risk and make siting and operational decisions. Under the Guidelines, after the appropriate level of review, projects with a low probability of significant adverse impacts are generally considered appropriate for development. Given the importance of these guidelines and their acceptance by a diverse range of stakeholders including USFWS and developers, we encourage BLM to incorporate the WEG into the screening criteria. Furthermore, as described herein, adherence to such guidelines will also facilitate the application review process with respect to interagency coordination and compliance with wildlife laws and regulations.
(9) Wind energy development that is compatible with other non-conservation land-uses, including minerals extraction, livestock grazing, and recreational use.	This addition is consistent with the Wind PEIS which indicates that “[t]o the extent possible, wind energy projects shall be developed in a manner that will

	not prevent other land uses, including minerals extraction, livestock grazing, recreational use, and other ROW uses. <sup>10</sup>
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Screening Criteria for medium priority applications	Rationale for proposed change
(1) BLM special management areas that provide for limited development, including recreation sites and facilities;	No change
<del>(2) Areas where a project may adversely affect conservation lands, to include lands with wilderness characteristics that have been identified in an updated wilderness characteristics inventory;</del>	We recommend that this screening criteria be moved to the low priority category consistent with the framework in the Solar PEIS and BLM's Restoration Design Energy Project (RDEP). These conservation lands generally have characteristics that increase the probability of wildlife conflict.
<del>(3) Right-of-way avoidance areas;</del>	This criteria was moved to the exclusion category consistent with the Solar PEIS.
(4) Areas where project development may adversely affect resources and properties listed nationally such as the National Register of Historic Places, National Natural Landmarks, or National Historic Landmarks;	No change
<del>(5) Sensitive habitat areas, including important eagle use areas, priority sage grouse habitat, riparian areas, or areas of importance for Federal or State sensitive species;</del>	We recommend that this screening criteria be moved to the low priority category to ensure consistency with BLM and other FWS and Department policies as described below. Sensitive habitat areas generally have characteristics that increase the probability of wildlife conflict and developing these areas will likely impact species of concern.
(6) Lands currently designated as Visual Resource Management Class III;	No change.
(7) Department of Defense operating areas with land use or operational conflicts; or	No change.
(8) Projects with proposed groundwater uses within groundwater basins that have been allocated by state water resource agencies.	No change.

Screening Criteria for low priority applications	Rationale for proposed change
(1) Lands near or adjacent to lands designated by Congress, the President, or the Secretary for the protection of sensitive viewsheds, resources, and values (e.g., units of the National Park System, Fish and Wildlife Service Refuge System,	No change

<sup>10</sup> Wind PEIS at 2-7.

some National Forest System units, and the BLM National Landscape Conservation System), which may be adversely affected by development;	
(2) Lands near or adjacent to Wild, Scenic, and Recreational Rivers and river segments determined suitable for Wild or Scenic River status, if project development may have significant adverse effects on sensitive viewsheds, resources, and values;	No change
<del>(3) Designated critical habitat for federally threatened or endangered species, if project development is likely to result in the destruction or adverse modification of that critical habitat;</del>	This criteria was moved to the new exclusion category consistent with identified exclusions under BLM's Solar Energy Program.
(4) Lands currently designated as Visual Resource Management Class I or Class II;	No Change
<del>(5) Right-of-way exclusion areas;</del>	This criteria was moved to the new exclusion category consistent with identified exclusions under BLM's Solar Energy Program.
(6) Lands currently designated as no surface occupancy for oil and gas development in BLM land use plans.	No change
<del>(7) Areas where a project may adversely affect conservation lands, Research Natural Areas, and lands with wilderness characteristics that have been identified in an updated wilderness characteristics inventory;</del>	We recommend that this criteria be moved from the medium priority category to the low priority category consistent with the Solar PEIS and RDEP. These lands generally have characteristics that increase the probability of wildlife conflict.
(8) Sensitive habitat areas including, but not limited to: <ul style="list-style-type: none"> <li>• Areas identified by state wildlife agencies as of high importance to species of greatest conservation need, in accordance with State Wildlife Action Plans and areas scored as priority 1 and 2 in the Western Governor's Crucial Habitat Assessment Tool (CHAT).</li> <li>• Important eagle use areas</li> <li>• For wind development, areas near or adjacent to bat hibernacula</li> <li>• For wind development, Key Raptor Areas<sup>11</sup> shown to support high raptor use</li> </ul>	We recommend that this screening criteria be modified and moved from the medium category to the low priority category to better incorporate BLM, FWS, and state priorities and policies. Our rationale for particular additions are as follows: <ul style="list-style-type: none"> <li>• State Wildlife Action Plans and the Western Governor's Crucial Habitat Assessment Tool (CHAT) provide important information regarding crucial wildlife habitat and corridors across the west. As such, we recommend that BLM ensure that these valuable information sources are appropriately utilized when evaluating and</li> </ul>

<sup>11</sup> We note that key raptor areas (KRAs) were defined in Olendorff and Kochert (1992), Raptor Habitat Management on Public Lands: a Strategy for the Future, as areas that include: areas with unusually high nesting populations, important raptor migration points, winter concentrations areas, or areas where consideration of raptors is a key issue in resource management or activity plans. The authors recommended maintaining an inventory of the Key Raptor Areas, to be updated every 5 years and used to inform management decisions. It is unclear whether BLM is maintaining this inventory and making the geospatial available West-wide. We recommend that the agency do so in order to comply with its inventory and management responsibilities under FLPMA, and to ensure the best available data for the management of raptors, many of which are BLM Special Status Species and may be particularly vulnerable to wind development.



<ul style="list-style-type: none"> <li>• Areas near or adjacent to microphyll woodlands.</li> <li>• Audubon Important Bird Areas</li> </ul>	<p>prioritizing wind and solar applications on public lands. Lands scored as priority 1 and 2 generally correspond with important habitat that should be conserved and restricted from commercial development.</p> <ul style="list-style-type: none"> <li>• Important eagle use areas: under FWS' Eagle Conservation Plan Guidance, important eagle use areas are categorized as high risk sites for eagles. For consistency purposes, we recommend that BLM identify these areas as low priority in the final Leasing rule.</li> <li>• Key Raptor areas: Similar to important eagle use areas, these are important areas for raptor use and concentration and believe such areas increase the potential for avian conflict from wind development.</li> <li>• Microphyll woodlands: Microphyll woodlands are of special importance to wildlife and are known to yield a high diversity. This habitat provides shelter and forage for all types of desert wildlife, and as such, should be considered a low priority for wind and solar development.</li> <li>• Audubon Important Bird Areas: The Important Bird Areas Program by Audubon is an effort to identify and conserve areas that are vital to birds and other biodiversity.<sup>12</sup> Given their significant importance, we urge BLM to discourage development in such areas by categorizing them as a low application priority.</li> </ul>
<p>(9) Mapped migratory corridors and avian migratory stopovers.</p>	<p>This addition is consistent with existing FWS policies for assessing conflict for wind and solar energy development. For example, FWS' Eagle Conservation Plan Guidance for Land-based Wind Energy asserts that mapped migratory corridors and avian migratory stopover sites "provide important foraging areas for eagles during migration...[and] the presence of a migration corridor or stopover site on or near a proposed wind development project could increase the probability of encounters between eagles and wind turbines."<sup>13</sup> The presence of migratory corridors and stopover sites could also</p>

<sup>12</sup> Audubon, Important Bird Areas Program, <http://web4.audubon.org/bird/iba/> (last visited 12/1/2014).

<sup>13</sup> U.S. Fish and Wildlife Service, *Eagle Conservation Plan Guidance Module 1-Land-based Wind Energy*, 12 (version 2) (April 2013).

	<p>increase potential for avian conflicts for solar development.</p> <p>While significant uncertainty remains regarding the causes of reported avian mortalities at solar facilities, an April 2014 FWS report concluded that solar photovoltaic plants and concentrating solar trough plants may pose a specific hazard for water birds who mistake the reflective panels for a large body of water.<sup>14</sup></p>
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Screening Criteria for Exclusion Category	Rationale for proposed change
<p>Areas that are excluded from solar or wind development based on land use plan designations, and other applicable law and policies, including but not limited to:</p> <ul style="list-style-type: none"> <li>• Right-of-way exclusion and avoidance areas;</li> <li>• Areas of Critical Environmental Concern designated for wildlife or important habitat conservation,</li> <li>• Lands acquired or donated for conservation purposes;</li> <li>• Lands identified and withdrawn for compensatory mitigation purposes under a regional mitigation strategy, species translocation program, or other similar mitigation plan or program;</li> <li>• All lands identified for exclusion either under the Solar Energy Program or the Wind PEIS.</li> <li>• Lands for which a previous renewable energy development application has been denied based on an incompatible use finding and the current project proponent fails to provide significant new information showing a substantially reduced risk of such conflict.</li> <li>• Designated Sage grouse Priority Habitat.</li> </ul>	<p>In addition, we recommend that BLM identify a fourth exclusion category to incorporate factors that will warrant an incompatible use finding for solar or wind development. This category will put project proponents on notice that applications falling under this category will be denied. Again, clarity, consistency and transparency are important components for an effective and efficient permitting program. It is important that BLM resources are not wasted on reviewing projects where an application denial is imminent.</p> <p>We ask that BLM be judicious in devoting agency resources to a site where a renewable energy development project has previously been denied due to identified resource conflicts. We find it to be an impractical use of agency resources for BLM to continually review applications for areas already deemed unsuitable for wind or solar development. As such, BLM should reject applications in these areas unless the proponent can show significant new information showing that their plan of development have significantly lesser impacts on important environmental and cultural resources.</p>

<sup>14</sup> *Avian Mortality at Solar Energy Facilities in Southern California: A Preliminary Analysis*, Rebecca A. Kagan, Tabitha C. Viner, Pepper W. Trail, and Edgard O. Espinoza National Fish and Wildlife Forensics Laboratory (April 7, 2014).

## VI. Pre-Application Process for Non-DLA Applications

### a. Information Required to Categorize Applications

We are pleased to see BLM codify its pre-application and screening approach to projects outside DLAs. BLM will need site-specific information from the applicant in order to appropriately categorize and prioritize projects. §2804.10(c)(1) specifies that the BLM will accept a non-DLA ROW grant application only if “[t]he written proposal addresses known potential resource conflicts with sensitive resources and values that are the basis for special designations or protections, and includes applicant proposed and proven measures to avoid, minimize, and mitigate such resource conflicts.” We support the inclusion of this requirement early on in the application process for non-DLA lands. For this pre-application process to be effective, BLM must ensure the information required pursuant to §2804.10(c)(1) is consistent with the screening criteria and adequately supports BLM’s thorough evaluation and determination of the appropriate application priority category. Accordingly, BLM should provide additional detail on the type of information that will be required by the applicant pursuant to §2804.10(c)(1). This is necessary to provide developers adequate guidance regarding the type and detail of information that BLM expects in a ROW application. BLM should tailor these requirements to facilitate an expeditious priority category determination for application processing.

We encourage BLM to adopt the tiered risk analysis in FWS’ Land-Based WEG as the standard for the level of pre-construction due-diligence necessary for applications. This tiered approach provides a decision framework for collecting information in increasing detail based on risk to make siting and operational decisions. The level of information collected varies based on site-specific characteristics relevant to potential risk for adverse ecological effects. While the land-based WEG was developed specifically for wind development, we believe much of the approach can also be incorporated when evaluating applications for solar development.

### b. Procedures for Prioritization of Applications

We believe more clarity is also necessary regarding the operationalization of the proposed rule’s application prioritization concept. Proposed §2804.25(d)(ii) indicates that BLM will “[a]pply screening criteria to prioritize processing applications with lesser resource conflict priority over applications with greater resource conflicts.” However this regulatory text leaves several unanswered questions. For example, how will staff’s time be allocated within field staff among projects based on priority and time of submission? Will staff working on a medium conflict priority project completely shift focus if a high priority application is submitted? Will staff or work load be shifted across different field offices if certain field offices have a disproportionate number of high priority applications as compared to others, which may have more medium or low-priority applications? How will other important non-renewable energy BLM projects be prioritized against processing low or medium-priority applications?

This added clarity is important to provide assurance to developers and other stakeholders that their efforts and investments in low-conflict projects will be rewarded adequately with appropriate staff attention and permit efficiencies. This is particularly important in a time of increasing agency demands

and decreasing budgets. Without this assurance, we fear that the rule will fall short of providing the incentives needed to direct development to lower conflict locations.

c. Early and Robust Public Stakeholder Participation

We must stress the importance of public stakeholder engagement during the pre-application process. Adequate public transparency and opportunity for stakeholder participation is an important component of facilitating low-conflict development. As BLM acknowledges in the preamble, “most solar and wind energy development projects are large scale projects that draw a high level of public interest” and it is important that the public is involved early in the process. 79 Fed. Reg. 59,037. As such, we support the rule’s requirement that BLM will hold a public meeting in the area affected by the potential right of way for all solar and wind applications. See proposed §2804.25(d)(2)(i).

The timing of this public meeting is critical and should occur before the Plan of Development has been finalized to incorporate stakeholder concerns early in the process when modifications are least costly and burdensome. Moreover, BLM must release enough site- and project-specific information at this public meeting to facilitate a meaningful dialogue. This includes information such as proposed technology, turbine or solar panel installation locations, and the results of preconstruction monitoring data.

We also urge BLM to hold a written comment period after the public meeting to allow stakeholders to provide written comments on the proposed application and to respond to new information presented in the public meeting. Specifically, these written comments could help BLM evaluate the proposed priority category for the application, recommendations on site location, and specific recommendations for avoidance and minimization measures (e.g., micro-siting turbines, technology, curtailment, etc.).

Lastly, we strongly encourage the agency to include non-governmental stakeholders including environmental and conservation organizations in pre-application meetings.

d. Early and Effective Interagency Coordination

We support the proposed regulation’s requirement under §2804.10(b)(1)&(2) for mandatory pre-application meetings with BLM, and other Federal, State, tribal and local governments to facilitate coordination. These meetings provide the opportunity for BLM and other governmental agencies to identify potential environmental impacts and wildlife conflicts on the front end before significant investment has been made in project development. These meetings should be structured carefully to ensure that participating agencies are given the project information necessary such that they can meaningfully assist BLM with their evaluation of whether the application should be denied based on the proposed screening criteria pursuant to §2804.25(d)(2)(iii).

It is imperative that these pre-application meetings facilitate adequate engagement FWS as well as state, local, and tribal fish and wildlife agencies. This is particularly important for projects that may adversely affect protected species such as federally endangered or threatened species, bald and golden eagles, migratory birds, and certain candidate species. In many instances, early engagement with these

agencies will provide additional scientific information to help BLM appropriately categorize applications and provide recommendations for reducing conflict. This early collaboration should also provide early notice to project proponents regarding the need for any FWS authorization such as incidental take statements or permits under the Endangered Species Act or the Bald and Golden Eagle Protection Act. These meetings should also include discussions regarding opportunities for BLM and FWS to synchronize environmental review and leverage resources.

e. Denial Authority

It is important that the proposed rule provide sufficient authority and procedures to efficiently and expeditiously deny applications that have a high potential for resource conflict as early as possible. This ensures that BLM focuses its limited capacity on projects with a higher probability of success and provides developers the early guidance they need regarding viable projects. Dragging out an application process that will ultimately end in a permit denial is a waste of time and money for BLM, developers, and interested stakeholders. Accordingly, we support proposed §2804.25(d)(2) which asserts that after evaluating the application based on the “information provided by the applicant and the input of Federal, State, and local government agencies, tribes, and comments received in pre-application meetings held under § 2804.10(b) and the public meeting held under §2804.25(d)(2)(i), the BLM will either deny [the] application or continue processing it.”

While we support this early application triage, we urge BLM to provide more clarity and transparency regarding what projects will warrant a denial at this point versus further processing with respect to resource conflicts. The proposed §2804.26(a)(7) simply provides a general “catch all” for high resource conflicts by allowing BLM to deny an application when its evaluation of the application made under §2804.25(d)(2)(iii) [the screening criteria evaluation] provides a basis for denial.” However, this vague language provides little clarity for applicants and stakeholders since the screening criteria are designed primarily to establish application priority and do not set any clear lines with respect to when an application warrants denial.

Providing additional clarity on projects warranting early denial is also an important reason why we have recommended an additional fourth exclusion category described above. We also recommend that BLM employ a rebuttable presumption that all applications in the low-priority category warrant denial unless there is a sufficient rationale showing that the proposed development does not represent an incompatible use given resource values and potential conflict.

f. Due Diligence time constraints

In the preamble, the BLM explicitly requested comment regarding:

“establishing in the final rule a provision that would limit the time for applicants to begin conducting necessary resource studies. The deadline could be specific, for example 1 year after the BLM accepts an application. Alternatively, a time limitation could be stated in more general terms that would provide for greater flexibility on a case-by-case basis. Under this proposal, the failure to begin conducting such studies in

the specified time frame could result in the BLM's denial of an application unless the BLM had previously agreed to a longer period of time at the request of the applicant." 79 Fed. Reg. 59,037-59,038.

We believe that such a time limit is prudent for inclusion in the final rule given how many projects have lagged in the application queue without any serious progress. While we don't have any specific recommendation for a precise deadline, BLM should strongly consider the typical time necessary to complete site surveys for species. Many of these surveys are seasonally dependent (e.g., eagles and desert tortoise). Also, retaining and finalizing assessment scope with qualified/permitted biologists can take time and sometimes future iterative site specific studies are necessary to refine conclusions pursuant to FWS' land-based WEG. Typically, developers need 2-3 years to adequately complete these studies so any time limit must accommodate this environmental resource study period.

g. Compensatory Mitigation for Non-DLA applications

BLM should include enforceable provisions for mitigation in the agency's grants for rights-of-way. In many cases, BLM will not be able to meet its obligations under existing law without including mitigation conditions in right-of-ways. FLPMA 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.

We share BLM's desire for a comprehensive advance landscape-scale mitigation approach to public land use as reflected by BLM's efforts with respect to the development of its offsite regional mitigation manual. With this in mind, we strongly recommend BLM complete its regional mitigation strategies prior to processing non-DLA applications. In places where a an overarching regional development and mitigation strategy is not yet in place, we urge BLM to continue working towards the development of these strategies outside of the DLA context and embed this framework into the application approval process. In certain circumstances, BLM may even be able to integrate mitigation for DLAs and non-DLAs into one broader regional mitigation strategy.

However, we realize that certain applications for non-DLAs may be in regions where a regional mitigation strategy is not yet available. As such, BLM needs to develop a clear mitigation framework for projects in non-DLAs to ensure that these ROWs adhere to BLM's statutory obligations and are consistent with land management conservation goals and objectives. We ask BLM to proceed cautiously and define consistent mitigation principles and standards for project approval. Without clear standard mitigation criteria, mitigation decisions can appear to be ad-hoc rather than consistent and predictable, giving rise to concern that some decisions may be heavily influenced by political or other inappropriate considerations. Accordingly, we recommend that BLM adopt clear standards for mitigation that incorporate the following concepts:

- Achieve a net positive conservation gain through employing the full mitigation hierarchy (avoidance, minimization and compensatory mitigation).
- Integrate existing mitigation programs and processes where applicable. This may include established regional mitigation strategies, and other established mitigation programs (e.g., state mitigation program, mitigation banks, habitat exchanges, etc.).
- Use a landscape-scale approach to inform mitigation consistent with the Department's Landscape Scale Mitigation Strategy: The mitigation hierarchy should be applied based on conservation objectives in land use plans derived by a landscape scale approach. Compensatory mitigation should be sited in locations that have been identified to most likely successfully and fully compensate losses to resources.
- Ensure that mitigation is durable: Compensatory mitigation actions must be supported by management, legal, and financial assurances that ensure that the compensatory mitigation benefits will be effective and in place for the duration of the associated development impacts.
- Compensatory mitigation actions should have a reasonable probability of success and the associated benefits must be measurable based upon reliable, repeatable, and quantitative science-based methods.
- Ensure that compensatory mitigation is additional: Actions proposed as compensatory mitigation should provide benefits beyond those that would be achieved if the mitigation actions had not taken place and should exceed what is otherwise required by federal, state, and local regulations.
- Ensure transparency, and adequate stakeholder engagement.
- Ensure consistency with state requirements: Compensatory mitigation must be sufficient to satisfy state requirements, especially in California where impacts to listed species, rare natural communities and waters of the state need to be fully mitigated. This should be made clear so that applicants are fully aware of the full array of potential compensatory mitigation requirements.

#### VI. Terminology – “lease” versus “grant”

BLM's should modify its use of the terms “lease” and “grant” in the proposed regulation to provide clarity regarding the distinction between the two terms and reduce confusion. The proposed rule differentiates the types of rights-of ways granted to renewable energy projects depending on whether the site is within or outside of a DLA. The preamble asserts that “BLM intends to differentiate the solar and wind energy development rights-of-way issued inside a designated leasing area under new subpart 2809 as leases, which would be a type of grant with specific requirements.” 79 Fed. Reg. 59022 (emphasis added).

While the preamble defines a lease as “a type of grant”, it frequently uses the term lease as a type of right of way (ROW) which is distinct and apart from grants throughout the proposed rule (i.e., “§ 2807.21 May I assign or make other changes to my grant or lease?” (emphasis added)). However, in certain sections, the regulation also refers to a “grant” as an umbrella term to encompass both “non lease grants” and “lease grants” (i.e., “Note, the term ‘grant’ is used when referencing section 2803.10

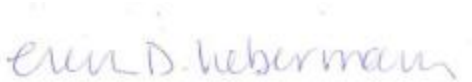
above and in paragraph 2809.11(c). This is because throughout this part, including section 2803.10, the term grant includes all right-of-way authorizations, including leases.” ).

To remedy this confusion, we ask BLM to adopt a consistent framework for these terms that consistently differentiates them. The easiest approach would be to consistently refer to the term ROW lease as a property instrument that is distinct and apart 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.

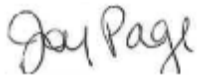
## VII. Conclusion

Thank you for your thorough consideration of these important comments. Please contact us if we can provide more information.

Sincerely,



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