

September 29, 2023

ELECTRONIC SUBMISSION

U.S. Bureau of Land Management
Attn: Draft Solar EIS
1849 C Street NW
Washington, DC 20240

Docket No. BLM_HQ_FRN_MO4500177363

Re: Draft Programmatic Environmental Impact Statement for Utility-Scale Solar Energy Development, DOI-BLM-HQ-3000-2023-0001-RMP-EIS

To Whom It May Concern:

On January 19, 2024, the Bureau of Land Management of the U.S. Department of Interior (“BLM”) published a notice of availability for the Draft Programmatic Environmental Impact Statement for Utility-Scale Solar Energy Development (“DEIS”). The DEIS, together with follow-on Resource Management Plan amendments, would update the Approved Resource Management Plan Amendments and Record of Decision for Solar Energy Development in Six Southwestern States (the “2012 Solar PEIS”). The BLM claims that it is undertaking this programmatic evaluation to assess the potential environmental, cultural, and economic impacts of modifying its current solar energy program and expanding to 11 western states of the BLM planning area.

I served as associate director for regulatory reform at CEQ from 2017 to 2019. In that role I was one of the principal drafters of the One Federal Decision policy and the 2020 revision to CEQ’s Regulation of the National Environmental Policy Act (“2020 CEQ Regulations” and “NEPA” respectively). I was and remain committed to permitting reform and improvements in the NEPA process for all infrastructure sectors critical that are critical for Americans, from transportation to fossil energy to renewable energy. I support renewable energy development to the extent that it enhances energy abundance, reliability, and affordability, and am against subsidies generally.

I also recognize that increased deployment of renewable energy is a national policy priority of the Biden Administration, and I believe that that transparency and accountability are inviolable obligations of public service. I respectfully submit these comments because I believe (1) that the Updated Plan represents an across-the-board victory of parochial anti-development

constituencies over national policy priorities, which is emblematic of a grave disfunction at the heart of the NEPA process; and (2) that BLM's presentation of the Updated Plan to the public as fostering solar development, when in fact it will do the opposite, is a violation of the public trust and will in the end contribute to a national energy crisis.

I. The Road to BLM's Updated Solar Plan

With renewable energy subsidies a major part of Congress's response to the 2008 world financial crisis, federal agencies of the Obama era soon found themselves facing a bumper crop of renewable energy project applications. As it became clear that the new project applications would run into the same permitting bottleneck that had existed for years prior, the Obama administration began exploring ways to speed up the process. One result of these efforts was the 2012 Solar PEIS and the related Resource Management Plan amendments.¹ The 2012 Solar PEIS was designed in part to meet the requirements of Secretarial Order 3285A1 (Secretary of the Interior 2010) regarding the identification and prioritization of specific locations best suited for utility scale solar energy development on public lands.

The six states—California, Arizona, New Mexico, Nevada, Utah and Colorado— were chosen because they contain the vast majority of the highest-capacity-factor land for solar energy in the U.S., and because the great majority of that land is managed by a single agency, namely BLM. Within that vast land area, the 2012 Solar PEIS identified 17 “Solar Energy Zones” designated as high-priority areas for utility-scale solar energy development; “variance areas” outside of SEZs where solar development could be approved under certain circumstances; “high potential resources conflict areas,” where solar development would pose a high potential conflict with natural, cultural, or visual resources; and 32 categories of land excluded from solar development.

The SEZs generally turned out to be “in the middle of nowhere” and far from the nearest transmission interconnection; consequently, SEZs have seen relatively few permit applications in the decade since. Most permit applications have been for development in “variance areas” nearer to existing or planned transmission routings. Not surprisingly, these also tend to be nearer major population centers, where the cultural and other resource conflicts generate greatest local opposition. The 2012 Solar PEIS failed to live up to its promise. Solar capacity permitting continued to increase from year to year, but at nowhere near the rate that would be required to achieve the emissions targets of the Paris Agreement.

The effort to streamline permitting and environmental review of infrastructure projects, including renewable energy infrastructure, got a major boost in 2017 when President Trump embraced infrastructure modernization as a national priority. Under his leadership, an array of deregulatory efforts was aimed at reducing environmental permitting burdens, delays, and uncertainties. The “One Federal Decision” policy aimed to streamline the environmental review and permitting process for major infrastructure projects.² It required agencies to review and revise their permitting procedures as directed by the White House Council on Environmental Quality (CEQ),

¹ U.S. Department of Interior, Bureau of Land Management and U.S. Department of Energy, <https://solareis.anl.gov/>. While the proposed Solar Energy Program will further the BLM's ability to meet the goals of E.O. 13212 and the Energy Policy Act of 2005, it also has been

² Executive Order 13807 (Aug. 15, 2017).

which oversees implementation of NEPA, and required CEQ to review and if necessary, revise its NEPA Regulations.

On July 16, 2020, the Trump administration published a significant revision of the CEQ Regulation, the first time since 1978 that there has been a significant revision to the Regulation.³ The revision implemented page and time-limits on the NEPA process, clarified key terms, made the process more inclusive of stakeholder views, and sought to make the process more predictable for agencies and project proponents.

The changes were meant to benefit virtually all stakeholders, including taxpayers, agencies, project proponents, local residents, renewable energy producers, and environmental advocacy groups. However, resistance from vested interests proved effective; the Biden administration repealed many of the changes⁴ and has proposed to repeal more.⁵

The U.S. Congress has tended so far to see infrastructure challenges as a matter of inadequate funding rather than inadequate regulation. Since the start of the Biden administration in January 2021, two key fiscal initiatives have sought to accelerate infrastructure deployment, including clean infrastructure supporting a net-zero transition: The Infrastructure Investment and Jobs Act (IIJA) of 2021, which appropriated \$1.2 trillion, and the Inflation Reduction Act (IRA) of 2022, which appropriated an amount that could eventually exceed \$1.2 trillion, according to Goldman Sachs.⁶

Stakeholders interested in infrastructure development across the political spectrum, including proponents of both clean energy and fossil energy, continued to call for sweeping reforms to America's system of permitting and environmental reviews.⁷ Their calls were finally heeded, at least in part, in the bipartisan agreement to raise the national debt ceiling in the midst of a looming government shut down in June 2023.

As part of the compromise to raise the “debt ceiling” of the U.S. government, significant reforms were finally enacted on June 3, 2023.⁸ The most significant of those changes is a set of amendments to NEPA itself—the first time in its history that NEPA has been significantly amended. The inclusion of permitting reforms in the debt ceiling legislation was a significant step towards addressing the inefficient systems that have hindered infrastructure development in the United States. The amendments to the NEPA aim to streamline the process by focusing on the

³ Council on Environmental Quality, “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” 85 Fed. Reg. 43,304.

⁴ Council on Environmental Quality, “National Environmental Policy Act Implementing Regulations Revisions”, 87 Fed. Reg. 23,453 (April 20, 2022).

⁵ Council on Environmental Quality, “National Environmental Policy Act Implementing Regulations Revisions Phase 2”, 88 Fed. Reg. 49,924 (July 31, 2023).

⁶ Wall Street Journal, “The Real Cost of the Inflation Reduction Act Subsidies: \$1.2 Trillion,” (March 24, 2023), <https://www.wsj.com/articles/inflation-reduction-act-subsidies-cost-goldman-sachs-report-5623cd29>.

⁷ See, e.g., Rayan Sud and Sanjay Patnaik, “How does permitting for clean infrastructure work?” Brookings Institution (September 8, 2022), <https://www.brookings.edu/research/how-does-permitting-for-clean-energy-infrastructure-work/>; Sen. Shelley Moore Capito, Sen. John Barrasso, “Genuine permitting reform is long overdue,” West Virginia News (April 11, 2023), https://www.wvnews.com/prestoncountyjournal/opinion/genuine-permitting-reform-is-long-overdue/article_14ac0450-d7c9-11ed-866f-7b06bddcab68.htm.

⁸ Fiscal Responsibility Act, Pub. L. 118-5 (June 3, 2023).

lead agency, establishing a reasonably foreseeable standard for impacts, and limiting the alternatives that must be considered. Empowering the lead agency, implementing time limits, and allowing project proponents to draft their own Environmental Impact Statements (EISs) further expedite the process. These reforms offer a promising framework for balancing environmental stewardship with the need for modern infrastructure.

On January 19, 2024, BLM published the proposed Updated Solar Plan. The Plan adds five states of the Pacific Northwest to the six southwestern states of the original 2012 Solar PEIS: Oregon, Idaho, Wyoming, Washington, and Montana. The new Plan describes five alternatives in addition to the “no action” alternative, which would preserve the current plan. The new alternatives range from permissive (Alternative 1) with about 55 million acres available for solar development, to restrictive (Alternative 5) with just 8.4 million acres available for solar development. BLM’s preferred alternative (Alternative 3) would restrict the area available for solar development by excluding areas (1) where there are significant resource conflicts, (2) greater than 10 percent grade (slope) and (3) more than 10 miles from existing and planned transmission lines. The preferred alternative would leave about 22 million acres for solar project development.⁹

II. The Updated Western Solar Plan Would Squarely Undermine the Goal of Renewable Energy Deployment

One of the most promising avenues for addressing the excessive burdens, delays, and uncertainties of the permitting and environmental review process is the programmatic NEPA review, particularly the programmatic environmental impact statement (PEIS).¹⁰ The PEIS allows national policy to develop and guide the deployment of infrastructure across whole sectors and regions, while giving due regard to local voices who often oppose anything in their backyard and often wield a veto.

The ideal PEIS would establish priority areas where resource conflicts are similar and can be mitigated with similar strategies. The PEIS can provide for expedited, uniform permitting for relevant projects, which can then rely on Environmental Assessments (rather than full-blown EISs).

Unfortunately, the Updated Plan goes in the other direction. After categorically excluding resource-sensitive areas, areas with slopes greater than 10 percent, and areas more than 10 miles from transmission lines, the 22 million left available for solar project development under BLM’s Preferred Alternative reduces by *more than half* the 48 million acres available for solar project development under the 2012 Solar PEIS.¹¹

⁹ Updated Solar Plan, Table ES-1, https://eplanning.blm.gov/public_projects/2022371/200538533/20102762/251002762/2023%20Draft%20Solar%20PEIS%20Volume%201%201-10-2024_508compliant.pdf.

¹⁰ Outside the U.S., these are known as Strategic Environmental Assessments, and are widely used as part of regional and infrastructure planning.

¹¹ Updated Solar Plan, Table ES-2.

Even that acreage is only nominal, however, because a series of “unmapped exclusions” will in practice further reduce the amount of land available for development. These exclusions would either apply definitively, or send the project into a Resource Management Plan amendment process that would complicate and delay the permitting process to a prohibitive degree for most projects, effectively ending such projects.¹²

The most prominent example of these unmapped exclusions relate to areas that are within the range of endangered and threatened species under the Endangered Species Act. Currently, energy development in such areas is allowed, provided that agencies engage in “Section 7 consultation” to avoid, minimize, and mitigation any impacts. Under the Updated Plan, however, all such habitat would be categorically off limits as soon as it is discovered that the land is occupied by a listed species. Any potential impacts to endangered species habitat that are discovered in the course of site surveys (usually after millions of dollars have already been expended on the project application), could no longer be addressed through the normal Section 7 procedure, but would instead kill the project entirely.

The permitting risk, already prohibitive for many new projects, could put whole states beyond the reach of all but the most hearty developers. The mapped solar energy areas under the Updated Solar Plan overlaps substantially with the range of multiple listed species.¹³ This exclusion alone would eliminate virtually all new solar development in Utah, Nevada and Arizona, which lead the nation in potential solar capacity per acre.¹⁴

Another blanket exclusion would apply to land with greater than 10 percent slope. This is another a nearly inexplicable exclusion given that solar capacity increases with elevation, which should make mountains prime solar development areas.¹⁵

BLM’s preferred alternative also excludes areas further than 10 miles from an existing or planned high-voltage transmission lines. It makes sense to expedite permitting for project close to transmission lines, but it makes little sense to automatically exclude projects beyond an arbitrary 10-mile band altogether. The largest projects may have to be sited further away because of resource conflicts, and economies of scale may make the longer “gen-ties” (the transmission lines that connect a power plant to the nearest high voltage lines) economical for those larger projects, while also allowing greater sums to be invested in mitigation.

Far from streamlining permitting for projects on the nominal fraction of BLM land that would remain available for solar project development, the Updated Plan imposes onerous permitting requirements. These include some 600 mandatory design elements. These are perhaps the most arbitrary and self-defeating elements of the Updated Plan. BLM proposes a blanket prohibition

¹² Updated Solar Plan, p. ES-9.

¹³ Cf. Updated Solar Plan, Figure ES-3, p. ES-14, and Clancy, N.G., Draper, J.P., Wolf, J.M. et al. Protecting endangered species in the USA requires both public and private land conservation. *Sci Rep* 10, 11925 (2020). <https://doi.org/10.1038/s41598-020-68780-y>.

¹⁴ For U.S. capacity factors by state, see, U.S. Energy Information Administration, “Southwestern states have better solar resources and higher solar PV capacity factors,” *Today in Energy*, June 12, 2019, <https://www.eia.gov/todayinenergy/detail.php?id=39832>.

¹⁵ Kahl, Annelen, et al. “The bright side of PV production in snow-covered mountains.” *Proceedings of the National Academy of Sciences*, vol 116, no. 4, 2019, pp.1162-1167, <https://doi.org/10.1073/pnas.1720808116>.

on grading, which is indispensable for access roads, utility-scale batteries, transmission poles, and construction staging. The Update Solar Plan prohibits development with 200 feet of ephemeral rivulets and requires 75% residual vegetation. These requirements will be impossible to meet economically for many projects, and even where possible would significantly multiply the amount of land required per unit of electricity, thus defeating both the benefit of high-capacity factors in the Western States and the goal of conservation. There is little indication that BLM considered cost or feasibility in developing these criteria, or took developer views into account.

Most surprising, given the permitting challenges have bedeviled scores of solar project applications in BLM land, the Updated Solar Plan does not address any major problem that years of experience have revealed in the permitting process for solar and other energy projects on BLM land. On the contrary, it makes the permitting challenges even worse for existing projects applications, which are not “grandfathered” in any respect. Many solar project applications already in process will have to start over, and many of those will prefer to cut their losses. Many projects applications have been pending for years, have already negotiated operational and power-purchase agreements of various kinds, and would be bankrupted by having to start over.

This demonstrates a problem with heavily regulated sectors, which is that officials feel all too free to “move the goalposts” with little concern for the enormous losses they are causing developers and investors, and little understanding that these are social losses that impact everybody.

Conclusion

Despite my ambivalence towards solar energy, and my increasing skepticism that it can ever fully substitute for reliable sources of nuclear and fossil power, I am dismayed by how anti-solar BLM’s Updated Solar Plan seems.

For Americans to avoid a prolonged period of energy scarcity in the decade ahead will require a significant expansion in baseload generation from nuclear and fossil sources. With the EPA’s new power plant rules about to be finalized, and the resulting and potentially devastating curtailments of fossil sources of baseload generation, American society will soon need every MW of electricity it can get, from every available source.

Energy scarcity is looming on the horizon. Yet it is clear that the Biden administration is not taking the problem of overall energy supply seriously. It also has not taken the problem of inefficient permitting and environmental review seriously. The costs, delays, and uncertainties of the NEPA process hurt everyone. They constitute the most important obstacle standing in the way of President Biden’s climate goals and are depriving American families and communities of the modern infrastructure they need and deserve. The Updated Solar Plan is being promoted as a partial solution, but after a careful review it is quite obvious the Plan will only make many of those problems worse.

I urge BLM to take the issue of energy supply and efficient permitting more seriously, before it’s too late.

Thank you for your consideration of these comments.

Respectfully submitted,

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* These comments represent my views and not necessarily those of Florida International University or the Heritage Foundation