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Comments regarding:

Bureau of Land Management, Proposed New Regulations Regarding Conservation and Landscape Health, 43 CFR Parts 1600 and 6100

Submitted by:

Energy and Wildlife Action Coalition

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The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the Bureau of Land Management's ("BLM") April 3, 2023 notice of proposed new regulations, Conservation and Landscape Health ("Proposed Rule").[2] BLM's stated purpose in proposing the new rules is to prioritize the health and resilience of ecosystems across the public lands managed by BLM.[3] BLM has characterized the Proposed Rule as promoting conservation of public lands. In practice, it would advance two concepts: reclamation of degraded public lands and preservation of yet-to-be-identified "intact landscapes."

EWAC supports the general concept of establishing conservation as a defined use of public lands managed by BLM, although the existing criteria for identifying Areas of Critical Environmental Concern (ACECs) already recognize conservation values. However, a number of aspects of the proposed rule are concerning, starting with whether this new set of policies will support or deter the advancement of renewable energy generation and electric transmission infrastructure on public lands.

EWAC generally favors the concept of leasing public lands for conservation purposes, as this would provide another vehicle for mitigating impacts of project development. However, several improvements should be made to the leasing provisions of the Proposed Rule. Implementation of conservation leasing also will have to be carefully managed to avoid unintended consequences. For example, conservation leasing could be abused to try to thwart needed resource development.

BLM's Proposed Rule also would require public land preservation, closing lands to other uses based solely on the criteria that an area is "intact." This is not conservation, which is best understood as the management of human impacts on the environment, rather than the elimination of human impacts as BLM now envisions. The Proposed Rule's narrow conception of conservation sets up unnecessary conflicts with existing and future public land uses.

The agency has identified the existing and future stresses that climate change places on public lands as one of the justifications for preserving "intact" public lands. However, the continued expansion of renewable energy production on public lands also is a necessary response to the threat of climate change, as recognized by Congress and this Administration. The Energy Act of 2020 directs the Secretary of the Interior to "seek to issue permits that, in total, authorize production of not less than 25 gigawatts of electricity from wind, solar, and geothermal energy projects by not later than 2025, through management of public lands and administration of Federal laws."[4] President Biden also has issued Executive Order 14008,[5] which directed the Secretary to

[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

[2] 88 Fed. Reg. 19583 (April 3, 2023).

[3] *Id*.

[4] Energy Act of 2020 (P.L. 116-260, Division Z), Sec. 3104.

[5] E.O. 14008, *Tackling the Climate Crisis at Home and Abroad,* 86 Fed. Reg. 7619 (Feb. 1, 2021).

"review siting and permitting processes on public lands" with a goal of increasing "renewable energy production on those lands . . . while ensuring robust protection for our lands, waters, and biodiversity and creating good jobs."

BLM has not provided an assessment as to how the Proposed Rule, and in particular the priority it would place on preserving certain lands, would affect its ability to fulfill these existing mandates to foster renewable energy development on public lands. BLM also has not identified where it believes "intact" landscapes are located. The Proposed Rule's direction to close these areas to other uses, without identifying where they are, is likely to set up future conflicts, the nature and scale of which are unknown because the impact of the rule has not been disclosed by BLM. EWAC's members are concerned that this lack of information regarding areas that are to be preserved under the Proposed Rule risks undercutting some of the Department's leading efforts to promote renewable energy development.

More broadly, BLM's Proposed Rule suffers from the absence of detailed factual assessment or analysis. For example, the preamble for the Proposed Rule asserts that public lands are broadly degraded, but does not back up that sweeping characterization with any data.[6] EWAC is aware that some commenters are calling for BLM to prepare and Environmental Impact Statement for the Proposed Rule. If BLM were to do so, that would be an appropriate vehicle for providing the substantive analysis and support that is missing from the existing proposal.

EWAC's members also have a related concern that actual consequences on the ground from a number of the elements of the Proposed Rule cannot be known today because those details have been deferred to future Resource Management Plan revisions. This has the effect of delegating key decisions to district and regional offices, which may not be sympathetic to renewable energy development, even though the expansion of renewable development on public lands is a national priority. EWAC's members have a similar concern regarding the proposed broadening of the criteria for ACECs and the delegation of decisions regarding ACECs to BLM's field offices.

Finally, EWAC's members are concerned that the application of Rangeland Health guidelines to all lands and programs has not been fully considered. Similarly, the requirement that land use decision be made using "high-quality information" could have unintended consequences.

1. EWAC supports restoration as a land management objective and the concept of conservation leasing.

EWAC supports identifying the restoration of public lands as a management objective. It is appropriate for BLM to use its land management planning processes and land use decisions to foster restoration of areas of the public lands that have been degraded by human uses, as well as natural events like wildfires. The restoration prioritization and planning processes that would be established by the Proposed Rule[7] should provide a needed focus to these efforts.

[6] See 88 Fed Reg. at 19585.
[7] Proposed §§ 6102.3-1 and 6102.3-2

EWAC is concerned about the use of land health standards as a tool for prioritizing "landscapes" for restoration and for measuring success of restoration efforts.[8] As discussed below, the existing land health guidelines developed for grazing are a poor fit for arid regions of the West. They also are not relevant to a number of other land uses, including renewable energy development, in that they do not measure or evaluate the impacts of renewable development on the public lands.

EWAC also noted that the Proposed Rule calls for revisiting restoration priorities every five years.[9] Conditions on the ground are unlikely to change that quickly. The agency's resources would be better served by revisiting its analysis far less frequently.

The Proposed Rule would establish a new conservation leasing program as a means of promoting conservation of public lands through active or passive restoration, enhancement of the public lands, and mitigation.[10] This concept presents a potential public-private partnership that could help advance meaningful restoration work.

Missing from the Proposed Rule are any criteria for BLM field offices to apply in deciding whether to grant a conservation lease. The Proposed Rule states only that leasing decisions will be "solely at the discretion of the authorized officer."[11] The absence of decisional criteria is a critical lapse that invites poor decisions and mischief, including by those who would seek conservation leases.

Before a conservation lease is granted, BLM should consider what uses would be foreclosed by the conservation lease[12] and whether the proposed location is better suited to other uses. Given the national priority that has been placed on renewable energy development on public lands, lands that are suitable for renewable energy development generally should not be considered for conservation leases.

While unclear, it also appears that conservation leases would be allowed for "preservation" of public lands.[13] This is tantamount to allowing private parties to implement ACECs, outside of the otherwise applicable public process, and should not be allowed.

EWAC does agree with the proposal that a lease for mitigation purposes be issued for "a term commensurate with the impact it is mitigating," with a five-year review to confirm continuing consistency with lease terms.[14] The potential for a lease term longer than ten years is particularly helpful for renewable energy and transmission infrastructure projects, as it would allow coordination with the term of federal rights-of-way for those projects, or with project life for those located on private lands. We also understand that the five-year review is not a re-opener, just confirmation of compliance with lease terms.

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[8] *See* proposed §§6102.3-1(a)(1) and 6102-3-2(a)(1).
[9] Proposed §6102.3-1(a).
[10] Proposed §6102.4(a)(1).
[11] Proposed §6102.4(d).
[12] *See* proposed §6102.4(a)(4), which would prohibit other uses in areas subject to a conservation lease.
[13] *See* proposed §6102.4(a)(3)(i).
[14] Proposed §6102.4(a)(3)(ii).

The bonding provisions of the Proposed Rule[15] should be revised to make it clear that the bonding obligation is limited to the estimated cost of reclaiming disturbance by the lease holder. Where the purpose of the lease is to carry out restoration of a previously disturbed area, bonding should not be required for the full cost of the planned reclamation – just enough to assure that the leaseholder does not leave the land in worse condition than it was before. Otherwise, the bond would amount to a performance guarantee on any planned reclamation work. Exacting the larger bond needed to provide such a guarantee would discourage parties from taking on more ambitious reclamation efforts.

2. The Proposed Rule's emphasis on preservation of "intact" landscapes conflicts with BLM's Multiple Use/Sustained Yield Mandate

BLM manages approximately 245 million acres of public lands in the United States, which amount to about one-tenth of the country, under the direction provided by the Federal Land Policy Management Act ("FLPMA").[16] That statute requires BLM to "manage public lands under principles of multiple use and sustained yield," except where "public land has been dedicated to specific uses according to any other provisions of law."[17] The preservation focus of the Proposed Rule conflicts with FLPMA's mandate that public lands that are not dedicated to specific uses remain available for multiple use.

The central touchpoint for the Proposed Rule is its proposed definition of "conservation" as "protecting or restoring natural habitats and ecological functions."[18] The Proposed Rule would further define "protection" as "conservation by preserving the existence of resources while keeping resources safe from degradation, damage, or destruction."[19] BLM's preamble explains that "'protection' and 'restoration' together constitute conservation."[20]

Defining "conservation" as "protection," and in turn defining "protection" as "preservation," inappropriately shifts the focus of the Proposed Rule away from BLM's multiple use mandate. BLM also has not established a connection between preserving lands against use and its stated goal of making landscapes more resilient to the impacts of multiple use.

BLM's preamble emphasizes that ecosystems must be resilient, by which the agency means capable of absorbing and recovering from the effects of disturbance and environmental change, if they are to support multiple use and sustained yield of renewable resources.[21] BLM asserts that the Proposed Rule is designed to ensure that the nation's public lands continue to provide renewable and nonrenewable resources, as well as wildlife habitat, protected water supplies, and landscapes that resist and recover from drought, wildfire, and other disturbances.[22]

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[15] Proposed §6102.4-2.
[16] 43 U.S.C. §§ 1701, et seq.
[17] 43 U.S.C. § 1732(a).
[18] Proposed §6101.4.
[19] *Id*.
[20] 88 Fed. Reg. at 19588.
[21] 88 Fed. Reg. at 19585.
[22] *Id*.

But BLM's preamble makes a leap from discussion of the resilience needed to sustain the delivery of resources to an assertion that maintaining the remaining intact, native landscapes is central to maintaining ecosystem resilience.[23] The preamble fails to explain how preserving these areas contributes to BLM's ability to achieve multiple use and sustained yield management across the landscape; how foreclosing use of some areas will facilitate use of other areas. It also fails to provide any data or analysis to support these assertions.

Fundamentally, this emphasis on preserving "intact" landscapes is not "conservation" as that term has been understood for more than 100 years. Since the birth of the environmental movement, conservation has been understood to mean the proper use of nature, while preservation has sought the protection of nature from use. As the Interior Department itself has recognized, BLM's mission continues to be guided by Gifford Pinchot's definition of conservation as the "wise use of the earth and its resources for the lasting good," meaning the sustainable use of the land's resources.[24] Pinchot's conservation theory is distinctly different from the preservation philosophy of John Muir, who believed that human actions could harm our nation's landscapes and so should be avoided.[25] Conservation has always emphasized regulating or controlling human use, while preservation seeks to eliminate human impact. The Proposed Rule's firm shift to Muir's approach, and away from the Pinchot philosophy embedded in FLPMA, is demonstrated by the one study that BLM has referenced the preamble, *A Multiscale Index of Landscape Intactness for the Western States,*[26] which assigns its highest scores to areas that have experienced little or no anthropogenic influence.[27]

Preserving public lands and closing them to other uses simply because they meet the Proposed Rule's broad definition of "intact" is not the same as balancing competing uses of the land to assure sustained yield over time. It also is not using some land for less than all of its resources, or "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources,"[28] as FLPMA requires. It is simply preventing future human use of areas solely because they do not currently show signs of human impact.

As BLM notes, its proposed definition of "conservation" is the foundational concept for the proposed regulation.[29] Having started with an overly restrictive concept of conservation, the proposed rule would lead to management decisions that foreclose what should be permissible uses of the public lands. Proposed sections 6102.1 and 6102.2, which would redirect management of public lands toward the preservation of "intact landscapes," are not consistent with FLPMA and should not be adopted in their current form. Conservation, in the context of BLM's multiple use and sustained yield mandate and its obligation to prevent unnecessary and undue degradation of the public lands, is better understood as preventing the wasteful use of a resource, not preserving

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[23] *Id.*
[24] Gifford Pinchot: A Legacy of Conservation.
[25] *Id.*
[26] 88 Fed. Reg. 19585, n.1.
[27] Landscape Intactness Index for the Western United States
[28] 43 U.S.C. § 1702(c).
[29] 88 Fed. Reg. at 19588.

resources against use. Multiple use management includes protecting some areas and resources, but preservation by itself is not conservation.

3. BLM has not adequately developed its proposal for protecting "intact landscapes"

As just noted, proposed sections 6102.1 and 6102.2 effectively direct the outcome of future resource management plan revisions. They would require that "intact" areas be managed for conservation,[30] meaning that they would be preserved. Before directing that "intact" areas be preserved, BLM should determine and analyze several pieces of information, which are missing from the Proposed Rule:

(a) Where these "intact" landscapes are located, and how large an area they encompass;

(b) What services these lands provide, and what contributions they make to ecosystem resilience; and

(c) What impact preserving these areas would have on BLM's ability to provide other resources from the public lands, including future renewable energy development.

It may be that BLM intends this information to be developed during future revisions to the affected resource management plans. If so, it has set the process precisely backwards, since this Proposed Rule dictates the management of "intact" landscapes regardless of the answers to these questions. Any land use planning decisions should involve consideration of the different uses that lands may be well-suited to provide, as well as the need or demand for those uses and the relative supply of lands available to provide those uses. BLM can then make a proper multiple use, sustained yield analysis and land use decision regarding management of those lands. The Proposed Rule would improperly dictate the outcome before that analysis has been completed.

4. BLM should reconsider the broad application of rangeland health guidelines

Proposed Subpart 6103 would require BLM to manage all of its lands to meet certain standards of land health, which were developed for use in managing grazing on rangelands. BLM has not explained how those guidelines are relevant to the evaluation of the suitability of a site for renewable energy development, or for other uses of the public lands. Existing guidelines do not evaluate impacts associated with renewable energy development, nor provide BLM with a tool to evaluate how renewable development would change the condition of the land. Rangeland health standards also do not provide relevant management criteria for the more arid regions of the West, where there is substantial interest in renewable energy development.

Proposed section 6103.1-1 would require BLM's authorized officers to apply land health standards and guidelines "across all lands and program areas." At best, these standards and guidelines are irrelevant to BLM decisions regarding rights of way for renewable energy projects or transmission lines. At worst, reference to those standards could lead BLM to deny a right-of-way application due to land conditions that have no connection to renewable development.

[30] Proposed §6102.1(a)(1) & (2) & (b), 6102.2(a)

If a site is not currently meeting land health guidelines, would that mean it is a suitable site for renewable energy development? Conversely, if a site is currently meeting all land health guidelines, would that mean it is not a suitable site for renewable energy development? Nothing in the Proposed Rule or the preamble provides guidance on these questions. Nor is it apparent that answers to those questions could be readily ascertained. BLM should reconsider the idea of applying land health guidelines across all program areas.

Finally, if some new reliance on land health guidelines is implemented, then decisions regarding siting for renewable energy projects should not be delayed while new data are collected regarding the "land health" of a site. The Proposed Rule directs authorized officers to prepare new land health assessments in connection with decisionmaking.[31] The Proposed Rule also sets data standards for assessments.[32] Right-of-way applicants should not be required to collect data for BLM to complete such assessments, nor to wait for decisions while BLM collects such data.

5. The Proposed Rule lowers the bar for ACECs and delegates too much authority for their designation

The current practice of designating ACECs requires a showing of relevance and importance at a regional or state level.[33] The resource being protected must "have substantial significance," which "generally requires more than local significance."[34] The Proposed Rule eliminates the requirement for more than local significance, providing instead that ACECs may simply be of local importance.[35] This, combined with putting local field offices in charge of designating ACECs, makes it far more likely that local interests will supersede national interests. This is of particular concern for renewable energy development, as local sentiments may inspire the creation of new ACECs in an attempt to block renewable energy projects.

Under the current rule, decisions regarding ACECs are made at the State level.[36] Proposed ACECs are published in the Federal Register and are subject to public comments and participation.[37] The Proposed Rule would task Field Managers with identifying potential ACECs during planning processes, and considering interim management changes when ACECs are nominated outside of the planning process.[38] The role of the State Director would be reduced, and the Director's authority to modify or remove ACEC designations would be sharply delimited.[39] BLM has not offered any justification for delegating so much responsibility for ACECs to the field level, or for limiting the State Director's ability to modify the field office's determinations. These changes have the potential to substantially expand the use of ACECs, in ways that have not been analyzed or discussed by BLM.

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[31] Proposed §6103.1-2(a).
[32] Proposed §6103.2.
[33] 43 CFR 1610.7-2(a).
[34] 43 C.F.R. §1610.7-2(a)(2).
[35] Proposed §1610.7-2(d).
[36] 43 CFR 1610.7-2(b)
[37] Id.
[38] Proposed amendments to §1610.7-2.
[39] Proposed §1610.7-2(j).

Conclusion

EWAC supports the development of a conservation leasing program for public lands, if the changes to the program discussed above are incorporated. EWAC has concerns regarding the other elements of the Proposed Rule, which would depart from FLPMA's multiple use, sustained yield mandate. Particularly troubling is the lack of analysis as to how this rule would change the management of the public lands.

As a nation, we have directed that the development of renewable energy on public lands be given priority. Due to the absence of supporting analysis, BLM cannot say what impact this rule would have on renewable development. However, it is apparent from the language of the Proposed Rule itself that – other than the proposed conservation leasing program – nothing in this Proposed Rule would foster the development of renewable energy and the transmission needed to bring clean power to market.

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