August 15, 2023

Comments Regarding the June 16, 2023 Proposed Rule Regarding Revision of Rights-of-Way, Leasing, and Operations for Renewable Energy

Bureau of Land Management

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

U.S. Department of the Interior
Director (630)
Bureau of Land Management
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Attention: 1004–AE78

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The Energy and Wildlife Coalition ("EWAC")[1] submits these comments in response to the Bureau of Land Management's ("BLM") June 16, 2023 notice of proposed rule ("Proposed Rule") to revise portions of the regulations addressing rights-of-way ("ROW"), leasing and operations for renewable energy on BLM lands.[2] BLM notes that the proposed rulemaking would "provide clearer direction for the BLM in processing proposed renewable energy ROW applications on public lands while also supporting the goals of the Energy Act of 2020 and E.O 14008," both of which call for an increase of renewable energy production on public lands.[3]

EWAC commends BLM efforts to provide more flexibility and clarity to increase renewable energy and electric transmission and distribution infrastructure on BLM lands. EWAC supports revisions to the BLM's regulation that improve the leasing process but notes that while some changes will improve and clarify the leasing process for renewable energy, others may create impediments to renewable energy production on federal lands. Below EWAC notes where it supports the proposed changes, makes suggestions to the proposed language, and describes concerns with the proposal based on the experience of its membership.

I. Acreage Rates and Capacity Fees

EWAC's mission focuses on sound environmental policies for federally protected wildlife and closely related natural resources that ensure the continued generation and transmission of reliable and affordable electricity. Therefore, EWAC has not provided detailed commentary on the proposed changes to acreage rates and capacity fees. However, given its importance to the success of increasing renewable energy deployment on federal lands, EWAC members are supportive of changes that would increase opportunities and reduce uncertainty. EWAC urges BLM to consider the comments provided by other renewable energy trade associations to ensure that the improvements and efficiencies BLM seeks to achieve are workable for the industry.

II. Lease Terms

EWAC supports BLM's proposed change to extend maximum renewable energy ROW lease terms to 50 years.[4] A 50-year ROW lease term more accurately reflects the lifespan of renewable energy projects. Having a lease term commensurate with project lifespans is important to reduce uncertainty. Project planning, power production modeling, cost modeling, and financing transactions are better served by a ROW lease term that aligns with the project lifespan. In that same vein, EWAC recommends allowing for an extension period of at least 40-years.

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[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. 39,726 (June 16, 2023) ("Proposed Rule").

[3] Proposed Rule at 39,728.

[4] *Id.* at 39,729.

Relatedly, EWAC supports the BLM's recognition of standalone energy storage as renewable energy infrastructure that can be accommodated separately.[5] This proposed change appropriately captures that battery storage may be developed separately from wind and solar facilities. EWAC also supports BLM's proposal to allow longer maximum terms for energy storage facilities and transmission facilities greater than 100kv.[6] EWAC agrees these changes better align with project lifespans.

III. Right-of-Way Corridors and Designated Leasing Areas

BLM proposes to revise its regulations to provide more detail on what BLM considers when designating new leasing areas for wind and solar development. In doing so, BLM proposes to add certain factors, some of which are taken from the BLM's 2012 Western Solar Plan.

1. "Access to Transmission"

BLM proposes to add "access to transmission" as a factor to be considered when designating ROW corridors and leasing areas.[7] EWAC supports recognition of "access to transmission" as a prioritization factor, however, EWAC cautions that "access" involves more than simply proximity to transmission. Capacity, congestion, and planned upgrades and other capacity improvements can impact transmission availability. BLM should also recognize that some of the same concerns regarding the rapidly changing landscape that led it to exclude "Technical and Economic Suitability" (*see* III(2)(a)) are also applicable here. Given BLM is not in the best position to evaluate some of the considerations that inform transmission access, if BLM chooses to include this factor in any final rule, BLM should make clear that it will incorporate stakeholder input on these considerations.

2. 2012 Western Solar Plan Factors

The 2012 Western Solar Plan included four factors that the BLM used to designate solar energy zones. The BLM proposes to incorporate three of these factors in this proposed rulemaking.

a. "Technical and Economic Suitability"

BLM proposes not to include the "technical and economic suitability" criterion used in the 2012 Western Solar Plan on the basis that "technical and economic criteria have and will change rapidly" and it is not "feasible or appropriate to utilize those criteria for the establishment of designated leasing areas."[8] EWAC supports the exclusion of technical and economic suitability criteria from the prioritization criteria and agrees that the rapidly changing technology and economics for utility-scale renewable energy development weigh in favor of its exclusion.

[5] *Id.*
[6] *Id.*
[7] *Id.* at 39,730.
[8] *Id.*

b. "Environmental, cultural, and other screening"

Among the three factors BLM proposes to include from the 2012 Western Solar Plan, BLM proposes to include "Applying environmental, cultural, and other screening criteria." EWAC understands how these sorts of considerations can impact the suitability of a particular area. However, EWAC cautions careful application of this factor. In EWAC members' experiences, screening tools focused on a small subset of resources tend to result in tools that inappropriately weight certain criteria over others without giving consideration to the bigger picture. For example, a "native grasslands" screening tool is likely to prioritize grasslands without consideration for other critical resource constraints that can affect engineering, routing, layout, and other key components that allow areas to support utility-scale renewable projects. That an area may have notable impacts to a particular resource should not result in automatic conclusion that it is unsuitable for renewable energy development. In addition, screening tools may not have the granularity needed to provide actionable information regarding specific sites. The BLM should be careful to apply this criterion with the bigger picture in mind to avoid unduly weighting one resource.

IV. Prioritization Criteria

EWAC appreciates BLM's consideration and proposed revisions to its prioritization criteria and strongly supports BLM's viewpoint that the criteria should be applied holistically.[9] Although EWAC understands the desire/need to use priority criteria to manage the influx of applications with limited BLM resources, EWAC is concerned that the prioritization criteria are written to allow individual BLM offices significant discretion to impose their views on the importance of any one criterion and allows for the arbitrary prioritization of applications based on non-regulatory factors. This would result in inconsistent application across projects and offices and create significant uncertainty for an applicant. To help alleviate this concern EWAC encourages BLM to provide guidance and training to its offices to apply these criteria consistently. EWAC provides its feedback on specific criteria immediately below.

1. Prioritization

The proposed prioritization criteria are:

(1) Whether the proposed project is located within an area preferred for solar or wind energy development such as designated leasing areas, which include solar energy zones, development focus areas, and renewable energy development zones;

(2) Whether the proposed project is likely to avoid adverse impacts to or conflicts with known resources or uses on or adjacent to public lands and includes specific measures designed to further mitigate impacts or conflicts;

(3) Whether the proposed project is in conformance with the governing BLM land use plans.

(4) Whether the proposed project is consistent with relevant State, Tribal, and local government laws, plans or priorities:

[9] *Id.* at 39,733.

(5) Whether the proposed project incorporates the best management practices set forth in the applicable BLM land use plans and other BLM plans and policies, and,

(6) Any other circumstances or prioritization criteria identified by the BLM in subsequent policy guidance or management direction through land use planning.[10]

Criteria 1 (designated areas and zones) and 3 (land use plans) involve the application of factors that have gone through a rulemaking process consistent with BLM authority. These two criteria can be predictably and consistently applied across field offices.

In contrast, EWAC is concerned that prioritization Criteria 2 (resource conflicts), 4 (Tribes/state/local laws, plans and policies), 5 (other plans and policies), and 6 (other guidance) provide a pathway for BLM to prioritize projects using criteria that have not had stakeholder input. Each of these four factors involves considerations that leave ample room for inconsistent, arbitrary application, and abuse.

- It should be made clearer that Criterion 2 applies where a project does not fall squarely within Criteria 1 and 3. For example, if a project is proposed outside of priority areas, but the project proponent can demonstrate that lands outside of a priority area readily satisfy Criterion 2, then the proposed project should still be eligible for high priority status.

- With respect to Criterion 4, while EWAC understands the value of ensuring federal lands are managed consistent with surrounding lands not under BLM jurisdiction, unintended consequences could result. For example, local governments opposing renewable energy development could develop anti-renewable policies to negatively influence BLM's processing of an application. Criterion 4 should be removed or adjusted to avoid this type of result.

- Criteria 5 and 6 appear to overlap with each other and with Criteria 3 and create the possibility of an application being adversely impacted by policies and best management practices that have not gone through notice and comment rulemaking. These two criteria also should be removed, or BLM should make clear that only those policies, guidance, and best management practice that have gone through proper notice and comment can affect an application's prioritization.

2. Re-prioritization Discretion

BLM also proposes a change to allow BLM to re-prioritize an application based on new information or changes to the application.[11] Any downward changes to prioritization mid-process can have significant impacts on project timing, which could significantly increase uncertainty, project costs, and the viability of the project as a whole. Again, uncertainty is a major impediment to renewable energy deployment on federal lands. EWAC urges caution and suggests that BLM delete this proposed change regarding re-prioritization, but if BLM includes this re-prioritization

[10] *Id.* at 39,757.
[11] *Id.*

discretion in any final rule that it should be invoked only in an exceptional circumstance and the applicant notified as early as possible of the change in prioritization.

3. De-prioritization/Denial Discretion Based on Ongoing Land Use Designation Processes

BLM notes it may deny an application or assign it a lower priority if there is an ongoing land use planning process that may change the compatibility of a land use designation.[12] EWAC is concerned that denying an application or de-prioritizing an applicant prior to any final land use designation amounts to pre-decisional application of pending changes to land use plans. Land use planning processes can take years and, in some cases, may never result in a final change in designation. Moreover, that a particular area has a pending application for renewable energy development should call to question whether a proposed change in designation is warranted. EWAC does not believe retaining discretion in this circumstance is appropriate.

4. Concerns regarding "medium-priority" projects

In EWAC member experiences, the majority of projects are assigned a "medium" priority and languish within the queue, and members find it challenging to advance these projects with BLM. BLM should be clear and consistent in its distinction between priority categories. For example, BLM could identify key project attributes that, if provided by applicants, would qualify as high priority projects. In sum, BLM should make efforts to make the priority categories meaningful and predictable.

V. Discretion to Proceed with Non-Competitive Process

EWAC supports BLM's proposal to retain greater discretion in whether to proceed without a competitive bidding process. EWAC agrees that in many cases, the competitive bidding process is not necessary. Competitive leasing is a major disincentive to renewable energy development on BLM lands, and EWAC feels strongly that the competitive process should not be used in most circumstances. The competitive process adds significant time to the leasing process and discourages development in new areas.[13] Having the flexibility to proceed without the extra process will accelerate renewable energy development on federal lands. EWAC harbors serious concerns regarding the BLM's proposal to retain discretion to pivot to a competitive process where a project has already made significant investments in the application process. The Proposed Rule would allow BLM to pivot to a competitive process up to the point where an applicant has completed a plan of development, enters into a cost recovery agreement, and BLM has published a draft or final National Environmental Policy Act ("NEPA") analysis.[14] For an applicant to advance to that point in the process, which requires a significant investment of time, money, and staff resources, and then learn it would now be subject to a competitive process would be patently unfair. In fact, just the threat of this risk materializing may be enough to undermine the Biden

[12] *Id.* at 39,749.

[13] For example, the financial investment spent by a developer to determine the feasibility of a new area becomes available to its competitors at no cost if the area becomes subject to competitive bid.

[14] *Id.* at 39,745.

administration's goal of increasing use of federal lands for renewable energy. This potential makes BLM land riskier and less attractive.

The BLM has increasingly required applicants to frontload data gathering analysis as part of its NEPA process. If BLM could then turn to a competitive process despite all of that investment, it would be highly problematic. By the time BLM has completed draft NEPA documents, the applicant has invested truly significant time and resources into the application process. Completing all the necessary studies for NEPA alone can cost up to a million dollars. Being at risk of a competitive process at that late of a stage is a significant risk that should not be borne by the applicant. Even converting to a competitive process after an application is complete and prior to NEPA scoping would effectively appropriate a significant amount of the applicant's work product. This proposed approach introduces significant uncertainty and would have the effect of discouraging, rather than encouraging renewable energy development on BLM lands. The discretion to move to a competitive bidding process must be limited only during the project initiation phase and must conclude before significant dollars are invested in a project area. Once an application has been deemed complete and the cost recovery is funded, BLM should no longer have the discretion to proceed with a competitive process.

Further, EWAC suggests that BLM provide specific consideration to "checkerboard" projects that occur on private and public lands. BLM should make clear that its discretion to invoke the competitive process is not available where an applicant's facilities are located on both private and federal lands and the applicant has secured agreements with landowners.

Finally, EWAC suggests that should BLM exercise its discretion to invoke the competitive process, the competitive process should be limited to those that have expressed an interest. Expanding a non-competitive process to an industry-wide competitive-process is unnecessary and will introduce an extra level of uncertainty and complexity that likely would deter renewable energy developers from applying for a lease.

VI. Application Process

The uncertainty surrounding the timing of the application process is a significant barrier to renewable energy development on BLM lands. BLM proposes to include a new subsection § 2803.12(j) stating that an application is complete when an applicant has "met or addressed the requirements of [§ 2803.12] to the satisfaction of the BLM . . . ."[15] EWAC supports the concept of defining a "complete application" but is concerned that the definition of "complete application" remains too vague to be meaningful.

Under § 2803.12(f) BLM retains significant discretion to continue requesting information to support an application at any time in the application process.[16] It is therefore unclear how an applicant can be confident they have satisfied BLM sufficiently to receive a notice of completeness from BLM under subsection (j), and once they have, there should be no basis to receive a notice of deficiency under (f) requesting additional information at any time thereafter. Having a meaningful definition of "complete application" will help establish a milestone for the process that

[15] Proposed Rule at 39,756.
[16] *Id.*

will allow an applicant to have greater certainty in the forward progress of its application. EWAC recommends that BLM more appropriately constrain BLM's ability in subsection (f) to request more information; otherwise proposed subsection (j) does not serve much purpose.

VII. Other Changes and Clarifications

- **Removal of pre-processing public meeting.** EWAC supports removal of the pre-processing public meeting. EWAC agrees that public involvement is an important part of the process. EWAC also agrees that the existing process allows for significant public process even if BLM declines to hold a pre-process public meeting.

- **Compliance with state laws.** EWAC supports clarification that it is not BLM's responsibility (or within its authority) to determine compliance with state laws.

VIII. Conclusion

EWAC supports changes to the BLM's renewable energy ROW, leasing, and operations program that improve the leasing process and foster renewable energy and associated electric infrastructure on BLM's lands. As described above, EWAC recommends revisiting some of its proposed changes and considering how the proposed change may thwart BLM's objectives. EWAC would be pleased to discuss these comments with BLM at its request.

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