April 18, 2024

Comments regarding:

Draft Programmatic Environmental Impact Statement for Utility-Scale Solar Energy Development

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") Notice of Availability of the Draft Programmatic Environmental Impact Statement for Utility-Scale Solar Energy Development ("Draft PEIS") and Notice of Public Meetings, published on January 19, 2024.[2] Through its Draft PEIS, BLM evaluates alternatives for updating the agency's Western Solar Plan, adopted in October 2012, and potential amendments to BLM resource management plans ("RMPs") regarding identification of public lands available for or excluded from application for utility-scale solar energy development in certain western states. BLM's stated purpose for the Draft PEIS is to improve BLM's utility-scale solar energy planning in response to changes in national renewable energy priorities and technology upgrades. EWAC provides these comments based upon the knowledge and experience of its membership.

In general, EWAC is concerned that the changes included in the Draft PEIS are at cross purposes with BLM's stated purpose to "support national climate priorities and renewable energy deployment goals for public lands" and "to respond to estimated renewable energy development demand over the next 20 or more years."[3] As noted in the Draft PEIS,[4] 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."[5] BLM developed the Draft PEIS in response to Executive Order 14008, titled "Tackling the Climate Crisis at Home and Abroad,"[6] which ordered the Secretary to "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." EWAC agrees that expanding renewable energy production on public lands is a necessary component of the national effort to increase our reliance on electricity that is generated from renewable sources. Solar energy production is an essential element in fighting the effects of climate change, but the Draft PEIS contains several elements common to all action alternatives that would further deter rather than support solar energy deployment on federal lands in direct contrast to BLM's stated purpose and need.

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[1] EWAC is a national trade association 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] *Notice of Availability of the Draft Programmatic Environmental Impact Statement for Utility-Scale Solar Energy Development and Notice of Public Meetings*, 89 Fed. Reg. 3687 (Jan. 19, 2024), available at: https://www.federalregister.gov/documents/2024/01/19/2024-00730/notice-of-availability-of-the-draft-programmatic-environmental-impact-statement-for-utility-scale.

[3] Draft PEIS, Abstract.

[4] *Id*. at ES-3.

[5] Energy Act of 2020, Sec. 3104.

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

I. The Draft PEIS Analyzes an Inadequate Range of Alternatives

The expanded exclusion criteria and mandatory design features are both overbroad and unworkable for project developers, and combined with the elimination of the variance process, would effectively preclude meaningful solar energy development on public lands. Given that the Draft PEIS action alternatives' expanded exclusion criteria and design features would apply to five additional states, each of the action alternatives would result in drastically reduced acreages of public lands available for solar application, beyond that disclosed in the Draft PEIS. As a result, the Draft PEIS misleads the public and the development community with respect to the availability of public lands for solar development and greatly underestimates the true impacts of the action alternatives, which are required to be disclosed under the National Environmental Policy Act ("NEPA").

In light of the above, EWAC's strong recommendation is for BLM to significantly modify Action Alternative 3 by incorporating the recommendations below and those of similarly aligned industry groups to truly promote solar energy development on public lands. However, if BLM is unwilling to make these critical and necessary changes, then EWAC recommends that BLM select the No Action Alternative. To help ensure that whatever final programmatic environmental impacts statement ("PEIS") BLM prepares accomplishes BLM's stated objectives, below EWAC provides specific details regarding its concerns that render all action alternatives problematic, with proposed fixes to enhance their feasibility. As noted above, EWAC recommends that BLM either make the necessary adjustments to Action Alternative 3 to make that alternative truly workable for solar energy development or analyze additional alternatives that would increase the total potentially available acreage, streamline project-level reviews, and include more flexible design features. Otherwise, EWAC recommends BLM choose the No Action Alternative as its preferred alternative in the final PEIS.

II. Current Restrictive Exclusion Criteria Should Not Apply to Additional States

All five action alternatives evaluated in the Draft PEIS would expand the Western Solar Plan to include BLM-administered lands in five additional states: Idaho, Montana, Oregon, Washington, and Wyoming. And while this action seemingly would increase the overall potential development acreage, in reality the percentage of acreage provided by the addition of these five states, particularly in light of their overall geographic size, is inadequate. Any expansion of the Western Solar Plan should only occur in conjunction with a reduction of applicable exclusion criteria (as outlined below). Otherwise, preempting consideration of the siting of solar energy projects and related infrastructure on large swaths of additional western states based only on high-level screening criteria, would have the compounding effect of even further reducing the amount of available lands in the plan area and directly contradict our nation's renewable energy objectives. So, unless and until BLM revisits its restrictive, resource-based criteria, it should not expand the Western Solar Plan to include additional public lands in western states.

III. BLM Should Reconsider its Approach to Design Features

The Draft PEIS action alternatives would amend existing land use plans to update the programmatic design features required to avoid, minimize, and/or mitigate adverse impacts of

utility-scale solar projects on public lands.[7] EWAC has identified a number of concerns regarding the feasibility of the proposed design features, and offers recommendations to make implementation of design features more workable for developers. In general EWAC finds the design features to be overly broad and prescriptive and, as a result, they diminish the efficacy of the Draft PEIS.

The lengthy list of design features included in Appendix B is aspirational and idealistic while ignoring practical implementation considerations. The purpose of a programmatic set of design features should be to improve efficiency of processing solar applications. The current list, however, would likely result in significant delays due to confusion concerning how to implement these measures, as well as the additional technical studies required, which may not even be project-applicable. In light of this, EWAC strongly recommends that BLM amend and pare-down its list of design features. EWAC provides its recommendations on some of these features below.

A. Design Features Requiring Avoidance of Occupied "Special Status Species" Habitat are Unworkable

Included in the proposed design features applicable to all action alternatives is a requirement for developers to site project facilities, infrastructure, and activities outside of occupied habitats and corridors of special status animal and plant species to the maximum extent practicable.[8] In addition, the design features require projects to avoid habitats and surface water or groundwater uses that affect habitats occupied by special status species.[9] These proposed design features do not sufficiently define what constitutes special status species habitat or how the standard "maximum extent practicable," a term stemming from the Endangered Species Act's ("ESA") statutory text and which is inappropriate to use under these circumstances, can be readily applied in this context. As written, these design features are vulnerable to unpredictable and inconsistent application. But, even if clarifications were offered, these features would essentially prohibit solar development on federal lands, as the number of special status species is extremely large,[10] and would result in virtually all projects overlapping with suitable habitat that could be occupied by special status species. For these reasons, EWAC strongly suggests that BLM eliminate these design features in any final PEIS.

B. Selection of Design Features Should be Project-Specific

EWAC notes that the design features proposed in the Draft PEIS are prescriptive, compulsory, and generally applicable to all projects in all areas. These programmatic design features present obstacles to development that significantly restrict solar application on public lands. To make this element of the Draft PEIS conducive to solar development, selection of design features should instead be performance-based and specifically tailored to each individual project and location. Developers should be given an opportunity to determine, in conjunction with the

[7] The extensive list of design features applicable under all action alternatives is set forth in Draft PEIS Appendix B. Draft PEIS at Appendix B.
[8] *Id*. at 5-77, B-33 to B-34.
[9] *Id*. at 5-77, B-35.
[10] Special status species include species listed as threatened or endangered under the ESA, species proposed for listing or candidates for listing under the ESA, delisted species throughout the post-delisting monitoring period, and BLM-designated sensitive species. Draft PEIS at 4-35 to 4-36.

local BLM Field Office, which design features are actually applicable and feasible for a specific project, and they should only be required to implement the selected design features to the extent practicable. Additionally, EWAC recommends that BLM carefully review its vast list of design features and provide in the final PEIS an index of which features are potentially applicable to projects in each state, or alternatively, each local BLM Field Office, to streamline individual project reviews. Rather than broadscale application of all design features to all projects whether the feature is needed or not, providing a list of potential design feature options that could address a particular impact that actually needs to be addressed, would be far more productive and beneficial for solar development. This approach would allow developers to avoid unnecessary barriers to project development and would encourage rather than inhibit solar energy production, supporting national renewable energy goals.

C. Changes in Technology will Quickly Render Design Features Obsolete

Another reason why a programmatic approach to design features is problematic is because future changes in solar technology and data collection will impact the feasibility and practicality of the design features over time.[11] In fact, BLM cited changing technology as one of the primary reasons for updating the Draft PEIS. EWAC agrees that solar technology is a rapidly changing industry, and, in a few years' time, several of the design features based on presently known information will likely become obsolete. Therefore, if BLM's final PEIS retains the current list of compulsory and rigidly applied design features, periodic re-evaluations of such design features would be necessary to address technological advancements and changes in available data.

D. Mandatory and Overbroad Design Features Will Waste Agency Resources

Developers are not the only entities that would experience direct negative effects due to the Draft PEIS's rigid, programmatic approach to design features. EWAC predicts that agency staff will have difficulty implementing several of the design features that may be too idealistic to address concrete resource concerns.[12] Additionally, implementation of the extensive and strict list of design features will result in unnecessary waste of agency resources during each project's individual NEPA review. If each project is required to implement every design feature listed in the Draft PEIS, regardless of the project's size or location, and regardless of whether a particular design feature is appropriate or feasible for that project, then the NEPA review document analyzing the impacts of a particular project will be required to assess impacts of numerous design features which are clearly inapplicable. As a result, the NEPA lead agencies will be required to expend significant time and resources preparing those analyses, thereby delaying an already lengthy environmental review process and preventing efficient processing of solar applications. If, instead,

[11] Examples of design features which will likely become obsolete due to technological advancements include ER-C-6v and -7v (adjusting technology for underlying soils and vegetation; analyzing different panel types) and ER-C-9w (covering potential nesting surfaces with mesh netting).

[12] *See, e.g.*, EJ-G-8 (community benefit and good neighbor agreements), EJ-G-11 (establish vocational programs), EJ-C-1 (procure from companies with environmentally-just mining practices), HMW-D-1 (recycle all components of the system), S-G-1 (develop community monitoring programs), TI-G-4 (manage tribal resources holistically to mitigate damage to landscape as a whole), TI-G-5 (manage noise that could affect wildlife behavior and gathering of tribally important plant resources), TI-G-20 (require bond coverage for expenses tied to tribal resources), VR-G-6 (offer organized tours and create simulations for public presentations), VR-C-3gg (use screening to reduce glint and glare).

the design features were identified as potentially applicable, as recommended above, rather than mandatory, it should be sufficient to provide a short narrative explanation as to why certain design features had been identified as inapplicable to a project.

E. Impacts of Design Features Are Not Properly Analyzed

The Draft PEIS fails to analyze the impacts of the extensive list of design features. For instance, design features ER-G-4sss and ER-C-5sss require compensatory mitigation, and yet the Draft PEIS does not analyze the impacts associated with such requirements, nor does it present a framework outlining how they would be accomplished. While the Draft PEIS impacts analysis does for some resources demonstrate a need for potential mitigation measures as design features, it does not demonstrate such a need for all design features listed in Appendix B, many of which are unnecessarily burdensome and restrictive, resulting in a *de facto* exclusion of solar development on public lands.

F. Design Features Requiring Both Mitigation and Restoration Overstep BLM's Authority

The Draft PEIS includes several design features requiring project proponents to implement restoration in addition to providing compensatory mitigation (e.g., ER-G-4sss, ER-G-5sss, SDLW-G-8, VR-C-7gg, ER-G-4g, ER-G-8g, ER-C-3v, ER-C-25w, ER-C-7dt, ER-C-15dt, ER-C-16dt, ER-O-1sss, etc.). EWAC cautions BLM to consider whether design features requiring both mitigation and restoration exceed BLM's authority under the Federal Land Policy and Management Act ("FLPMA") and its implementing regulations. FLPMA 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."[13] It also directs BLM to manage public lands in a way that prevents unnecessary and undue degradation ("UUD").[14] Inherent in the UUD standard and the multiple use concept is that it is acceptable for some uses of the public lands to reduce the ability of those lands to support other kinds of uses. This is inconsistent with requiring compensatory mitigation as a condition of the agency's approval of solar applications. Nor does FLPMA require project proponents to restore or otherwise improve the condition of solar application lands. Thus, EWAC believes the proposed design features requiring mitigation and restoration could run afoul of both the major questions doctrine and the principle of separation of powers.[15]

EWAC recognizes that under current judicial precedent, if a statute is ambiguous or contains gaps in reasoning, then the implementing agency (here, BLM) is granted wide deference in its statutory interpretation.[16] In such circumstances, the agency's interpretation need only be reasonable to be considered a "permissible construction of the statute."[17] However, even if it is a reasonable construction of FLPMA to suggest it authorizes compensatory mitigation, it cannot be read to authorize BLM to require restoration of conditions on the public lands not associated with

[13] 43 U.S.C. § 1732(a).
[14] *Id*. § 1732(b).
[15] *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-08 (2022) (requiring agencies to point to "clear congressional authorization" when claiming a regulation is based in statute).
[16] *See Chevron v. U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (applying the two-pronged test).
[17] *Id.* at 843.

the proposed project. Further, two cases currently pending before the Supreme Court of the United States could potentially eliminate or significantly curtail the present understanding of deference,[18] which could put these design features in legal peril should anyone challenge the PEIS upon finalization. With these considerations in mind, in any final PEIS, EWAC encourages BLM to require design features that are not based on a merely permissible interpretation of the FLPMA, but rather reflect the most accurate and reasonable interpretation of the statutory language and legislative intent. BLM's assertion of authority to require both mitigation and restoration is not a reasonable interpretation of the statutory language. In light of BLM's lack of statutory or regulatory authority to require both mitigation and restoration in the context of solar application approvals, EWAC recommends that BLM exclude any design features requiring mitigation and restoration from any final PEIS.

IV. BLM Should Narrow and Reconsider its Proposed Exclusion Criteria

Blanket exclusion criteria are not consistent with the scale of new energy development needed to achieve our national renewable energy objectives. BLM should form a reasoned decision based upon site-specific data in order to allow solar applications for sites that may have some resource or technology-based conflicts, rather than completely foreclosing any consideration of sites based simply upon the potential existence of a conflict. To meet its multiple use mandate while advancing national renewable energy objectives, BLM must be significantly more selective with its exclusion criteria.

A. BLM should Not Apply All Twenty-One Resource-Based Exclusion Criteria to Every Project

Flatly excluding areas based upon sweeping resource-based criteria unnecessarily eliminates many promising sites from consideration and is more stringent than BLM's criteria for prioritizing solar applications set forth in 43 C.F.R. § 2804.35. BLM should take this opportunity to limit its exclusion criteria and instead address potential resource-based conflicts through reliance on the project-specific review requirements of existing laws designed to protect those resources (i.e., NEPA, ESA, National Historic Preservation Act ("NHPA")) or through variance criteria (see Section V below). BLM should not automatically foreclose sites based solely on the possibility of tension between resource values. Resolution of that tension is the essence of multiple use management, which is the core of BLM's mission. Existing laws and procedures provide mechanisms for evaluating the potential resource conflicts and making a reasoned decision as to whether a project should proceed, and if so, as to appropriate conditions, modifications, or mitigation. In addition, BLM should not rely on agency staff resource concerns as justification for applying blanket exclusion criteria, which results in the rejection of otherwise-suitable projects.

Instead of applying all twenty-one resource-based exclusion criteria listed in Table ES-3 to every project, EWAC suggests that BLM consider either reducing the number of blanket exclusion criteria that must be applied to each project, or applying a smaller selection of exclusion criteria to each project based on the project's location (i.e., the state, region, or local BLM Field Office). Appropriately paring down exclusion criteria to only exclude areas that are unusually

[18] *Loper Bright Enterprises v. Raimondo*, Case No. 21-5166 (D. C. Cir. Aug. 12, 2022); *Relentless, Inc. v. Department of Commerce*, Case No. 21-1886 (1st Cir. Mar. 16, 2023).

environmentally sensitive in a particular region or state, and allowing the NEPA process to evaluate suitability of individual projects on the remaining land areas, will be critical to BLM's success in achieving the objectives of the Draft PEIS.

B. BLM Should Reconsider Excluding Critical Habitat and Occupied ESA-Listed Species Habitat

Any final PEIS should not include Draft PEIS Criterion 2, which excludes all designated and proposed critical habitat, and all areas of "[k]nown occupied habitat for ESA-listed species, based on current available information or surveys of project areas."[19] Instead, BLM should rely on the ESA section 7 consultation process to assess whether a proposed project would actually result in the destruction or adverse modification of critical habitat, or jeopardize the continued existence of listed species, and defer to relevant agency guidelines and management plans that have been established for listed species and have gone through public notice and comment. While EWAC understands that BLM's proposal to exclude those areas that may trigger review under ESA section 7 is intended to help streamline solar development, this approach is counterproductive to BLM's stated goals. Solar development would be better supported by maximizing available areas and letting the ESA section 7 process address ESA-protected species.

1. Exclusion of all designated and proposed critical habitat.

Section 7 of the ESA provides a clear and well-established process for BLM to consult with the U.S. Fish and Wildlife Service ("Service") as to whether a proposed project would destroy or adversely modify critical habitat. Additionally, unlike this exclusion criterion, BLM's application priority rule contemplates project-specific consideration, rather than the broader exclusion of all critical habitat, by assigning a low processing priority to solar applications if the project's impacts on critical habitat will result in destruction or adverse modification of critical habitat).[20] While EWAC appreciates that BLM may be attempting to streamline reviews by removing such areas from consideration, the result of this action may be that significant acreage will be unnecessarily removed from development consideration where impacts would have been *de minimis*, thereby negating any perceived value of the purported "streamlining." Instead, BLM should rely on the reasoned outcome of that consultation process, rather than adopt a blanket exclusion of all areas that could trigger an ESA consultation.

In the past, BLM has pointed to the greater agency staff resources needed to evaluate sites that have potential resource conflicts as justification for this and other exclusion criteria. However, the actual burden on BLM staff may not be that great where, for example, the Service is responsible for preparing an ESA biological opinion. Thus, BLM should not rely on its staffing levels as a reason for categorically rejecting otherwise suitable projects, especially in the context of section 7 consultations.

2. Exclusion of occupied ESA-listed species habitat.

EWAC strongly recommends that BLM reconsider its proposal to expand the scope of its existing criterion, which presently only excludes areas of designated and proposed critical

[19] Draft PEIS at ES-17.
[20] 43 C.F.R. § 2804.35(c)(3).

habitat,[21] to also exclude areas of known occupied habitat for ESA-listed species.[22] This is inappropriately expansive, overly limiting, and goes beyond the ESA's protections. For example, it is possible that known, occupied habitat can be modified for solar energy development without rising to the level of take. Moreover, applying the proposed expansion of the criterion would be problematic because areas of occupied habitat are only partially mapped and updated surveys are needed to more accurately identify occupied habitat to determine whether this exclusion criterion would apply, further delaying solar energy development. EWAC recommends BLM remove this criterion.

C. BLM Should Reconsider Excluding All BLM-Identified Greater Sage-Grouse Habitat

The exclusion for all greater sage-grouse habitat (Draft PEIS Criterion 6) is another instance where the exclusion criteria are overbroad. BLM should consider removing this criterion, which applies a blanket exclusion of all greater sage-grouse habitat, as identified in applicable land use plans.[23] This criterion, currently applicable in three states, would be particularly inappropriate should BLM choose any of the action alternatives, which would expand the Western Solar Plan to additional western states with large areas of greater sage-grouse habitat. Rather than foreclose any consideration of sites that may contain some areas of sage-grouse habitat, BLM should be prepared to evaluate potential impacts at the project-level. BLM's variance factors (currently applicable under the existing Western Solar Plan, but proposed to be removed in the Draft PEIS's action alternatives) already include specific criteria for avoidance of sage-grouse leks and priority habitat, and for compensatory mitigation for impacts to sage-grouse habitat. Additionally, BLM has already published greater sage-grouse RMPs to provide for the conservation of the species on BLM-managed lands in California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming, to which BLM should defer to address sage grouse-specific impacts.

D. BLM Should Reconsider Excluding All Areas Where RMPs Would Have to be Amended to Accommodate a Project

Over the last fifteen years, BLM has approved rights-of-way ("ROWs") for renewable energy projects, as well as transmission line ROWs, that required RMP amendments. Particularly common have been localized changes to visual resource management ("VRM") classifications, but changes to ROW exclusion and avoidance areas and other RMP conditions have also been amended. Now BLM proposes to exclude all lands classified in applicable land use plans as VRM Class I or II (and, in Utah and portions of Arizona and Colorado, Class III), ROW exclusion areas, and ROW avoidance areas (to the extent the purpose of the ROW avoidance is incompatible with solar energy development).[24] EWAC suggests that BLM either remove or narrow these criteria, as they are already accounted for in BLM's application priority rule.[25]

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[21] BLM Solar PEIS Record of Decision (Oct. 2012) at Table A-2, Exclusions under BLM's Solar Energy Program, Criterion 4.
[22] Draft PEIS at ES-17.
[23] *Id*.
[24] *Id*.
[25] 43 C.F.R. § 2804.35(c)(5) [exclusion areas], (b)(3) [avoidance areas], (c)(4) [VRM Class I or Class II areas].

E. BLM Should Reconsider Criteria that Automatically Exclude Lands with Features Subject to Protection Under the NHPA

EWAC recommends that BLM either remove or narrow criteria that simply exclude lands with features subject to protection under the NHPA without consideration of the project's actual effects on those resources. To that end, BLM should reconsider Draft PEIS Criterion 16, which excludes lands located within the boundaries of properties listed on the National Register of Historic Places ("NRHP") and any additional lands outside their boundaries identified for protection through an applicable land use plan.[26] BLM should likewise reconsider Draft PEIS Criterion 17, which excludes traditional cultural properties ("TCPs") and tribal sacred sites as identified through consultation with tribes, and as recognized by BLM or which are the subject of a Memorandum of Understanding between BLM and one or more tribes.[27] The NHPA provides a structured process for evaluation of any potential impacts, including consultation with affected tribes and states, and in many cases for resolution of those impacts. Additionally, under BLM's rule for prioritizing renewable energy ROW applications, a project that may adversely affect NRHP-listed properties or resources is still assigned a medium priority.[28] While EWAC understands that BLM's proposal to exclude those areas that may trigger review under the NHPA is intended to help streamline solar development, this approach is counterproductive to BLM's stated goals. Solar development would be better supported by maximizing available areas and letting the NHPA process address circumstances where NHPA-protected resources are present.

F. BLM Should Not Exclude All Recreational Facilities and Special Recreation Management Areas

BLM should reconsider or narrow Draft PEIS Criterion 4, which automatically excludes developed recreational facilities and all Special Recreation Management Areas identified in applicable land use plans.[29] EWAC recommends that BLM revise this criterion to only exclude such areas on a case-by-case basis, as there are some areas where the existence of recreational facilities can be compatible with utility-scale solar development.

G. BLM Should Reconsider Excluding Big Game Migratory Corridors

BLM should similarly reconsider Draft PEIS Criterion 9, which excludes all big game migratory corridors and winter ranges identified in applicable land use plans to the extent the land use plan decision prohibits utility-scale solar energy development.[30] Likewise, BLM should reconsider Draft PEIS Appendix H, Section H.3, which includes a proposed requirement for developers to undergo an additional screening process with BLM concerning big game datasets not currently identified in applicable land use plans.[31]

EWAC recognizes the importance of protecting big game migration corridors and winter ranges. However, because big game migratory corridor data is currently lacking and migratory

[26] Draft PEIS at ES-18.
[27] *Id*.
[28] 43 C.F.R. § 2804.35(b)(3).
[29] Draft PEIS at ES-17.
[30] *Id*.
[31] *Id*. at H-5.

corridors are therefore largely unmapped, this criterion presents practical concerns regarding implementation.

Under the Draft PEIS action alternatives, once such data is gathered, and migratory corridors are mapped, those areas will then be automatically excluded from solar application. Thus, under the Draft PEIS action alternatives, the blanket exclusion of areas that are currently unmapped creates uncertainty surrounding what federal lands will be available for development because developers will not be able to identify which areas are excluded. Additionally, as an unintended consequence, this criterion may disincentivize industry efforts to conduct studies to identify best management practices for placement of solar facilities and fencing in migratory corridors. In light of these considerations, the goals of this criterion are best addressed at the project-level and not applied as a blanket criterion.

H. The Final PEIS Should Not Include Any Technology-Based Exclusion Criteria

In the Draft PEIS, BLM has proposed removing the existing 6.5 kWh/m^2/day solar insolation threshold criterion, but has retained a modified version of the 5% slope threshold criterion (proposing to increase the slope threshold from 5 to 10%).[32] EWAC supports BLM's proposed removal of the solar insolation criterion and its rejection of the current 5% slope threshold, as these existing thresholds reflect BLM's understanding of the capabilities of solar energy technology in 2012, and do not reflect the current state of solar technology.

With respect to BLM's proposed modification to the slope criterion, EWAC recommends that BLM instead remove this criterion entirely. In general, BLM must anticipate that any such technology-based criteria will rapidly become outdated due to forthcoming advancements in technology, at which point they unnecessarily limit the range of sites available for solar energy development, and therefore, should be avoided in any future PEIS or RMP updates. Any slope-related exclusion criteria should be based on the existence of unstable areas (i.e., landslides, slumps, and areas exhibiting soil creep), not current industry technological feasibility. However, if BLM chooses to retain a technology-based slope criterion in the final PEIS, EWAC agrees that the proposed 10% threshold is more appropriate than the current 5% threshold.

V. BLM Should Reconsider Eliminating the Variance Process

Under the No Action Alternative, the Western Solar Plan encourages development in Solar Energy Zones ("SEZs") totaling approximately 285,000 acres, but also allows solar energy development on an additional 19 million acres through completion of a "variance" process for projects within "variance areas." Not surprisingly, given the relatively small size of the SEZs, and the fact that variance areas often are simply better locations for solar energy projects than any SEZs that may be available in the same region, the majority of solar developments that BLM has authorized during the last ten-plus years have been in variance areas, not SEZs. In effect, the exceptions swallowed the rule and diminished the efficacy of the Western Solar Plan.

In the Draft PEIS, under all action alternatives, BLM has proposed eliminating the current variance process entirely. Instead, under all action alternatives, solar development in areas

[32] *Id*. at 1-10.

identified as excluded from solar application (i.e., the vast majority of BLM-administered lands) would require a land use plan amendment as opposed to a variance application. This proposed change presents significant obstacles to project developers, as obtaining a land use plan amendment is more difficult, time-consuming, and cost prohibitive than obtaining a variance, causing major project delays or precluding development altogether. Further, due to uncertainties regarding which areas are actually excluded as a result of the unmapped exclusion areas, it is impossible for project proponents to identify which areas would require a land use plan amendment. Thus, BLM's proposed solution worsens rather than improves the situation. Without the variance process, insufficient lands will be available for solar energy production to meet the nation's renewable energy targets to address the urgent climate crisis. The variance process should therefore be retained, but in a way that reduces the number of projects requiring a variance. EWAC's comments on the design features and exclusion criteria above are intended to help provide examples where BLM could revise the Draft PEIS to improve this outcome. If, however, BLM chooses to include the proposed elimination of the variance process in the final PEIS, BLM should at least clarify that solar development on lands outside of exclusion areas will not require a land use plan amendment.

VI. Additional Concerns and Recommendations

A. Uncertainty Regarding Pending Projects

The Draft PEIS does not indicate how existing facilities or projects already in process would be treated under the Draft PEIS's action alternatives. Compromising the ability of existing or in-process projects to move forward would demonstrably impact the climate crisis. Given the additional exclusion criteria and design features proposed under all action alternatives, it is critical for the final PEIS to include a concrete explanation of whether and how existing projects will be handled under the action alternatives. In particular, EWAC recommends that BLM clarify in any final PEIS that projects for which an SF-299 application have already been submitted prior to the final PEIS, will be able to proceed independently of the final PEIS.

B. Action Alternative 3's Ten-Mile Transmission Proximity Criterion is Arbitrary and Unsubstantiated

BLM's preferred alternative, Action Alternative 3, would exclude lands located more than ten miles away (on both sides) from existing and planned transmission lines with capacities of 100 kV or greater, or more than ten miles away from the centerline of most Section 368 energy corridors.[33] Under this alternative, BLM could only consider a ROW application for a proposed solar energy development not within ten miles of transmission if an amendment to the applicable local land use plan is obtained.[34] EWAC notes that BLM has not provided support for its choice of the ten-mile proximity metric. Further, there is no guarantee that a project located within ten miles of existing transmission line infrastructure will have access to that infrastructure, or that such infrastructure will have the load capacity required to support the project. In that regard, by assuming that projects can connect to transmission lines within the arbitrary ten-mile metric, the Draft PEIS creates the false perception that more areas are available for solar development than

[33] Draft PEIS at ES-9.
[34] *Id*.

what can actually be accommodated on the transmission systems, artificially inflating available acreages. EWAC also notes that use of any transmission-proximity metric would limit development based on BLM's current understanding of technological feasibility and costs, which may, and likely will, change considerably in the coming years. Therefore, EWAC recommends that BLM reconsider including this exclusion criterion in its preferred alternative in the final PEIS.

D. BLM Provides No Concrete Plan for Use of Monitoring Data

In Draft PEIS Section 2.1.1.8, *Monitoring and Adaptive Management*, BLM indicates its intention to collect monitoring data to provide a better understanding of land conditions, guide adaptive management strategies, and inform decision-making.[35] Several design features also require data collection.[36] However, BLM does not specify a plan for how it will holistically consider such data, and provides no basis for how they would benefit the agency, project, or resources. Unless and until BLM more specifically identifies how it intends to use monitoring data, BLM should not ask developers to provide such data. Collection of monitoring data is costly, and BLM should not add requirements that add cost without a clear purpose.

E. BLM Should Define "Agreements" in Draft PEIS Criterion 5

In Draft PEIS Criterion 5, BLM has proposed excluding "[a]ll areas where the BLM has agreements with [the Service] and/or state agency partners and other entities to manage sensitive species habitat in a manner that would preclude solar energy development, including habitat protection and other recommendations in conservation agreements/strategies."[37] To improve clarity, EWAC encourages BLM to clarify the meaning of the term "agreements" as used in this sentence. For instance, if BLM means to refer to Cooperative Management Agreements ("CMAs"), then this criterion should specifically reference CMAs.

F. Climate Change Considerations

Given the increasing urgency of addressing climate change, the Draft PEIS should integrate climate considerations and goals more prominently throughout the document.

G. The Draft PEIS Lacks Sufficient Mapping Data

The Draft PEIS's proposed exclusion areas are not adequately mapped, with many exclusion areas lacking maps entirely, causing uncertainty for developers.[38] With respect to exclusion areas for which BLM has provided maps in the Draft PEIS, the maps are not sufficiently detailed to allow the public to understand what is driving BLM's identification of exclusion areas. For instance, in regard to Draft PEIS Exclusion Criterion 17, given that the excluded tribal interest areas are only partially mapped,[39] developers would be unable to discern whether such exclusion

[35] *Id*. at 2-25.
[36] *See, e.g.*, N-G-1, -2, and -3 (measure existing background ambient sound levels and conduct noise analysis), HMW-C-7 (survey sites for non-intrusive unexploded ordnances within twenty miles of Department of Defense facilities), WR-G-1h (conduct hydrologic studies), WR-G-7h (quantify regional climate), WR-G-1I (prepare water availability assessment).
[37] Draft PEIS at 2-25.
[38] *See id*. at 2-21 to 2-23.
[39] *Id*. at 2-23.

areas exist within a proposed project area. Further, EWAC is concerned that project opponents may rely on the vagueness of the unmapped exclusion areas as a strategy for opposing projects. In addition, it is unclear how the Draft PEIS would help our nation meet its renewable energy objectives if BLM is unable to identify and map the extensive constraints applicable to solar development. To avoid these issues, defined exclusion areas should be mapped in any final PEIS and not left for future interpretation or *de facto* exclusion.

VII. Conclusion

While significant renewable energy development has occurred on public lands administered by BLM over the last two decades, Congress has directed the Department of the Interior ("DOI") to increase the pace.[40] The President also has directed DOI to review siting and permitting processes with a goal of increasing renewable energy production to meet the nation's urgent climate initiatives.[41] The Draft PEIS, as proposed, fails to advance these objectives.

As noted above, when preparing the final PEIS, BLM should significantly narrow its exclusion criteria. The ESA, NHPA, and other federal laws provide meaningful protection for the resources that the proposed exclusion criteria are meant to serve. These laws also provide mechanisms for more fine-grained evaluation of the tension between different potential uses of the public lands and provide pathways for resolving those potential conflicts. BLM should remain open to using the tools provided by existing laws to resolve the potential resource conflicts and advance its multiple use mandate.

Likewise, BLM should reconsider its programmatic approach to design features. Instead of requiring universal implementation of all design features for every project, BLM should apply a selection of design features based on the project's location in a particular state or region.

The Draft PEIS action alternatives' excessive exclusion criteria and unworkable design features, combined with BLM's proposed elimination of the variance process, will impede solar development on BLM-managed lands. To ensure our nation meets its renewable energy goals, EWAC recommends that BLM either appropriately revise Action Alternative 3, as proposed above, or default to the No Action Alternative in the final PEIS. BLM's preferred alternative in any final PEIS should increase the total available acreage for solar application, streamline project-level reviews, and reduce the number of design features and allow for greater flexibility in the application of those remaining features. In the event that BLM does not appropriately modify Action Alternative 3, EWAC recommends that BLM choose the No Action Alternative as its preferred alternative.

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[40] *See* Energy Act of 2020, Sec. 3104.
[41] E.O. 14008.

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