

Federal Government Issues Record of Decision Approving Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States

On October 12, 2012, Secretary of the Interior Ken Salazar signed the Record of Decision (ROD) approving the Final Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (Final Solar PEIS).¹ With the signing of the ROD, the Bureau of Land Management (BLM) adopted a comprehensive Solar Energy Program to administer the development of utility-scale solar energy resources on BLM-administered public lands in six southwestern states: Arizona, California, Colorado, Nevada, New Mexico, and Utah. Utility-scale solar energy development is defined as facilities with generating capacities typically 20 megawatts or greater.²

The program's purpose is to identify locations on BLM lands that are most suitable for utility-scale solar energy development. These areas are characterized by excellent solar resources, access to existing or planned transmission, and relatively low impact to biological, cultural, and historic resources. The program also seeks to allow the permitting of future projects on public lands to proceed in a more efficient, standardized, and environmentally responsible manner.

Background

On July 27, 2012, BLM and the U.S. Department of Energy (DOE) announced the availability of the Final Solar PEIS, which the two agencies had prepared as joint lead agencies under the National Environmental Policy Act (NEPA).³

Issuance of the ROD marks the culmination of a process begun by BLM and DOE in May 2008 to address both utility-scale solar energy development on BLM land and DOE programmatic environmental guidance for solar energy projects. The Final Solar PEIS incorporates substantial feedback from interested stakeholders, including industry, conservationists, and sportsmen, as well as tribal, state, and local governments. Prior to the Final Solar PEIS, BLM and DOE released the Draft Solar PEIS in December 2010 and—in response to the more than 80,000 comments received from cooperating agencies and key stakeholders—issued a Supplement to the Draft Solar PEIS in October 2011. Approximately 131,000 comments were received regarding the Supplement, leading to the Final Solar PEIS and ROD.⁴

For additional background information on the Solar PEIS or programmatic EISs generally, please see Latham & Watkins' previous articles on the Solar PEIS: (1) *Client Alert: Federal Government Proposes*

Significant Modifications to the Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (Nov. 3, 2011); and (2) *Clean Energy Law Report: Federal Government Finalizes Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States* (Aug. 10, 2012).⁵

Key Elements of the Final Solar PEIS

The Solar Energy Program attempts to concentrate solar development into an initial set of seventeen Solar Energy Zones (SEZs) located on 285,000 acres of public lands across six southwestern states.⁶ The SEZs will serve as priority areas for utility-scale solar development. The program provides incentives for solar development within these zones, including faster and easier permitting and improved mitigation strategies, as well as economic incentives.⁷ For example, BLM is in the process of and intends through rulemaking to provide a new competitive leasing process for lands within the SEZs.⁸ If fully built out, projects in these established SEZs could produce as much as 23,700 megawatts of solar energy, which is enough to power approximately 7 million American homes.⁹

In addition to the established SEZs, the program outlines a process for the proposal of new and expanded SEZs by industry, the public, and other interested stakeholders. Such efforts are already underway in California, Arizona, Nevada, and Colorado.¹⁰ The program also creates a variance process allowing for development of well-sited projects on approximately 19 million acres outside of the zones.¹¹ At the same time, it excludes some 78.6 million acres from solar energy development. Those areas are considered inappropriate by BLM for solar development based on currently available information.¹² BLM recognizes that the geographic boundaries of the exclusion areas will change over time as new information on resource conditions is developed and as land use plans are revised or amended.¹³ Thus, for example, a new proposal for designated critical habitat or identification of a Traditional Cultural Property could create additional exclusion areas.¹⁴

To ensure the most environmentally responsible development and delivery, the program identifies both programmatic and SEZ-specific design features (best practices) for solar energy development. It also establishes a framework for regional mitigation plans and a strategy for monitoring and adaptive management. For example, the first mitigation pilot for the Dry Lake Solar Energy Zone in Nevada is already underway.¹⁵

Finally, the program recognizes the importance of bringing transmission to the SEZs. BLM is engaged in ongoing transmission planning efforts in support of more detailed system-level analysis of transmission needs. Examples include the Transmission Expansion Planning Policy Committee and the Western Electricity Coordination Council's transmission study.¹⁶

Implications Going Forward

As before, utility-scale solar energy developers and those providing financing for these projects are advised to pay attention to these processes because they impact not only where—but also how easily—solar projects can be sited on public lands. Below are important potential implications of the Final Solar PEIS that will impact solar development in the Western United States.

SEZ Size

One potential issue going forward is the relatively limited size of the seventeen existing SEZs. Although they total nearly 285,000 acres of land, only four of the established SEZs are larger than 10,000 acres in size, and six are smaller than 5,000 acres.¹⁷ This relatively small size has two important implications. First, developers will face stiffer competition for access to increasingly scarce federal lands, as BLM further restricts the public lands available for prioritized utility-scale solar energy development and increases incentives for siting projects within them. Second, developers face a real possibility that a particular solar project may be bigger than an existing SEZ. This will likely make competition all the more fierce for the few SEZs exceeding 10,000 acres, for those interested in developing large-scale projects.

Consequently, the process for identifying new and expanded SEZs, along with the variance process for development outside SEZs, likely will become very significant for future large-scale solar development. Processes that are overly stringent or time-consuming could result in stunting large-scale solar development if and when the existing SEZs are outgrown.

Designation of New or Expanded SEZs

BLM has indicated that establishing a feasible process for identifying new or expanded SEZs represents “an essential element of [BLM’s] overall approach to solar energy development.”¹⁸ New or expanded SEZs will be identified in the context of existing solar market conditions, existing and planned transmission systems, and new or existing state or federal policies affecting utility-scale solar energy development.¹⁹ BLM will assess the need for new or expanded SEZs at least once every five years in each of the six states, and the process to identify new or expanded SEZs will be open and transparent, with opportunities for substantial involvement of multiple stakeholders.²⁰ New or expanded SEZs will be identified at the BLM state- or field-office level, as an individual land use planning effort or as part of an ongoing land use plan revision.²¹ BLM’s goal is to complete the identification of new SEZs and amend applicable land use plans within twelve to eighteen months of initiating such efforts.²²

BLM will use the following four steps when considering whether to identify new or expanded SEZs:

- Assess the demand for new or expanded SEZs;
- Establish technical and economic suitability criteria;
- Apply environmental, cultural, and other screening criteria; and
- Analyze proposed SEZs through a planning and NEPA process.²³

The step-by-step process for designation of new or expanded SEZs is described in more detail in the ROD.²⁴

VariANCES

BLM acknowledges that variances may be needed in the near term because the SEZs may be insufficient to accommodate demand or not have access to adequate transmission.²⁵ BLM will consider right-of-way applications for utility-scale solar energy development in variance areas on a case-by-case basis, based on the following factors: environmental considerations; coordination with appropriate federal, state, and local agencies; and public outreach. It is the applicant’s responsibility to demonstrate to BLM and other coordinating parties that the proposed project in the variance area will avoid, minimize, and/or mitigate sensitive resources.²⁶ The variance process is also described in detail in the ROD.²⁷

Pending Applications

Another potential issue going forward relates to how existing projects will be treated under the program. The ROD states that the program will guide the processing of all new utility-scale solar energy applications on BLM-administered lands. BLM defines “new” applications as any applications filed within proposed SEZs after June 30, 2009, and any applications filed within proposed variance and/or exclusion areas after the publication of the Supplement to the Draft Solar PEIS on October 28, 2011.²⁸ Similarly, BLM defines “pending” as any applications filed within proposed variance and/or exclusion areas before the publication of the Supplement to the Draft Solar PEIS (October 28, 2011), and any applications filed within proposed SEZs before June 30, 2009.²⁹ BLM will process pending solar applications in accordance with land use plan decisions in place prior to amendment by the ROD, as well as policies and procedures currently in place.³⁰

Further, amendments to pending applications are not subject to the decisions adopted by the ROD, so long as they (1) do not change the boundaries of the pending right-of-way applications or (2) are related to avoiding resource or land use conflicts, adapting the project to third-party-owned infrastructure constraints, or using or designating translocation or mitigation lands.³¹ Finally, it would seem that pending applications in exclusion areas—although technically not subject to the ROD—now face a potentially stronger risk of denial or legal challenge, since the BLM has deemed those areas inappropriate for solar development based on currently available information. As noted in the Final Solar PEIS, “Although pending applications will not be subject to any new program elements adopted by the Solar PEIS ROD, the BLM still may decide to deny pending solar applications if there is a supportable, rational basis on other grounds.”³²

Again, the program is limited to utility-scale solar energy development (i.e., projects capable of generating 20 megawatts or more of solar energy), so decisions on new or pending projects with fewer than 20 megawatts would also continue to be made in accordance with existing land use plans, current applicable policy, and individual site-specific NEPA analysis.³³ Similarly, the land use decisions in the ROD are not applicable to supporting infrastructure (such as roads and transmission lines) for large-scale solar energy development; those management decisions will continue to be made in accordance with existing land use plan decisions and current applicable policy and procedures.³⁴

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¹ The ROD is available at http://solareis.anl.gov/documents/docs/Solar_PEIS_ROD.pdf. The Final Solar PEIS is available at <http://solareis.anl.gov/documents/fpeis/index.cfm>.

² ROD at 4.

³ 77 Fed. Reg. 44267 (July 27, 2012).

⁴ ROD at 20-21.

⁵ The blog article and a link to the Client Alert are available at <http://www.cleanenergyreport.com/energy-regulatory/federal-government-finalizes-programmatic-environmental-impact-statement-for-solar-energy-development/>.

⁶ Final Solar PEIS, Table ES.2-3; Department of Interior, "Fact Sheet" on the Final Solar PEIS (Oct. 2012), *available at* <http://www.doi.gov/news/loader.cfm?csModule=security/getfile&pageid=321960> (DOI Fact Sheet).

⁷ See Final Solar PEIS at ES-7 to ES-14, Table ES.2-3; DOI Fact Sheet.

⁸ ROD at 159.

⁹ BLM News Release, "Obama Administration Approves Roadmap for Utility-Scale Solar Energy Development on Public Lands," (Oct. 12, 2012), *available at* http://www.blm.gov/wo/st/en/info/newsroom/2012/october/NR_10_12_2012.html (BLM News Release).

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- ¹⁰ Final Solar PEIS at ES-14; BLM News Release; DOI Fact Sheet.
- ¹¹ Final Solar PEIS at ES-14 to ES-15; BLM News Release; DOI Fact Sheet.
- ¹² BLM News Release; DOI Fact Sheet.
- ¹³ ROD at 37.
- ¹⁴ *Id.* at 37-40 (Table A-2).
- ¹⁵ *Id.* at 165, 167-68; DOI Fact Sheet.
- ¹⁶ ROD at 165-66; DOI Fact Sheet.
- ¹⁷ Final Solar PEIS, Table ES.2-3.
- ¹⁸ Final Solar PEIS at ES-14.
- ¹⁹ *Id.*; ROD at 168.
- ²⁰ ROD at 168.
- ²¹ Final Solar PEIS at ES-14.
- ²² ROD at 168.
- ²³ *Id.*
- ²⁴ *See* ROD at 168-177.
- ²⁵ Final Solar PEIS at ES-14.
- ²⁶ *Id.* at ES-15.
- ²⁷ ROD at 177-190.
- ²⁸ *Id.* at 3-4.
- ²⁹ *Id.* at 5.
- ³⁰ *Id.*
- ³¹ *Id.* at 5, 146-47.
- ³² Final Solar PEIS at 1-13.
- ³³ ROD at 4.
- ³⁴ *Id.*