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# Federal Government Proposes Significant Modifications to the *Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States*

On October 27, 2011, the Bureau of Land Management (BLM) and the US Department of Energy (DOE) made available the much anticipated targeted Supplement to the *Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States* (Draft Supplement).[1] The Draft Supplement modifies the alternatives currently under consideration for utility-scale solar development on the public lands and, if adopted, could have the practical effect of dramatically reducing the amount of federal land available for solar energy development in the western United States. The federal agencies are currently taking comments on the proposed modifications though January 26, 2012. Solar developers and finance partners will want to review the new proposals carefully and participate actively in this process, particularly where the proposals may eliminate or significantly complicate development on currently available sites.

"Utility-scale solar energy developers and those providing financing for such projects are advised to pay attention to this process because it will impact not only where — but also how easily — solar projects can be sited on public lands."

## Background: NEPA, PEISs and the Draft Solar PEIS

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to prepare an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment,"[2] including the adoption of agency "programs" in the renewable development area. These "programmatic" evaluations — known as Programmatic Environmental Impact Statements (PEIS) — serve multiple purposes, including to provide high-level and regional environmental analysis, identify consistent mitigation measures to avoid, minimize, or mitigate the adverse impacts of projects and provide opportunities to tier site-specific analyses for individual projects, which in turn can help to streamline the environmental review and permitting process. As such, PEISs can provide valuable tools for project developers and save them time, money and other valuable resources, for instance, by eliminating the need for each developer to reinvent the wheel on certain types of larger-scale analyses.

While the federal government has developed multiple renewable energy PEISs for wind, geothermal and other resources,[3] the trend line between these documents suggests a strong interest and progression by the federal government and others in using the PEIS and land use planning

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process to identify environmentally sensitive areas and preferred areas for development (e.g., those with the highest renewable energy potential and the fewest environmental and resource conflicts). The goal of this approach is to streamline the project approval process and at least theoretically minimize potential opposition to site-specific projects. The Draft Solar PEIS took a strong step in that direction by specifically identifying proposed solar energy zones (SEZ).[4]

## How the Supplement Changes the Draft Solar PEIS

The Draft Supplement takes a bold new step toward merging the PEIS process with Federal Land Policy and Management Act (FLPMA) land use planning by expanding the proposed exclusion areas and more actively steering potential project development to designated areas by offering potential incentives and the use of a proposed variance process to develop outside of SEZs. In the Draft Solar PEIS, BLM initially identified and analyzed 24 proposed SEZs on public lands in the six western states considered most suitable for environmentally sound, utility-scale solar energy production. Under the solar energy development program preferred alternative described in the Draft Solar PEIS, approximately 677,000 acres of land in identified SEZs would have been prioritized for development, while approximately 22 million acres would have generally remained open for development.[5]

The Draft Supplement proposes to modify BLM's preferred alternative for the solar energy program in ways that will substantially impact utility-scale solar project developers and those providing financing for those undertakings. Namely, BLM has eliminated certain SEZs entirely from further consideration and reduced the size of other SEZs. The result is that BLM has lowered the total number of SEZs from 24 to 17, and restricted the acreage of federal lands available for utility-scale solar development within identified SEZs from approximately 677,000 acres to roughly 285,000 acres.[6] This change is significant because as of August 15, 2011, there were 79 pending applications for utility-scale solar projects on 685,000 acres of federal land,[7] only approximately 85,000 acres of which appear to overlap with the revised SEZs outlined in the Draft Supplement.[8] The Draft Supplement also proposes to increase the number and variety of specific categories of land that are known or believed to be unsuitable for utility-scale solar development (i.e., so-called "exclusion" areas), further restricting project proponents' access to federal lands.

Even as it reduces the public lands available for prioritized solar energy development, BLM proposes a variety of activities to steer future utility-scale development to the SEZs. For instance, BLM is considering economic incentives for solar energy development in SEZs. Among the incentives being considered, BLM may institute lower megawatt (MW) capacity fees or adopt a longer phase-in period for rental payments for projects proposed in SEZs. BLM may also establish a fixed MW capacity fee rental payment for the life of the authorization, require a limited base acreage rental payment, or restructure the bonding requirements for projects proposed in SEZs. Finally, BLM may issue a 30-year fixed term lease with a fixed rental fee for projects in SEZs, ultimately reducing uncertainty for operators. Other proposed incentives are also outlined in the Draft Supplement.[9]

The reduced number and size of SEZs and the increased incentives for development in them will create greater competition among developers to site utility-scale solar projects on public lands. Perhaps in an attempt to mitigate that pressure, the Draft Supplement outlines a process for identifying new SEZs based on solar market conditions, existing and planned

transmission systems, and new state or federal policies affecting the level and location of utility-scale solar energy development.[10] However, under the current proposal, BLM would only commit to assessing the need for new or expanded SEZs every five years, leaving project developers interested in those areas with some uncertainty (e.g., about whether the new SEZ will be approved, whether a variance should be sought contemporaneously, etc.).

BLM's proposed variance process, by which responsible utility-scale energy development can take place outside of SEZs and exclusion areas, may provide a more promising pressure release. BLM notes, however, that the amount of land in variance areas will likely be reduced by the time the agencies present the Final Solar PEIS if new exclusion areas are identified, as is expected. BLM will consider variance requests on a case-by-case basis. Factors BLM proposes to consider before granting a right-of-way in a variance area include:

- The financial and technical capability of the applicant;
- The availability of a SEZ served by transmission in the same state as the applicant's proposal;
- Documentation (if any) that the proposed project will be located in an area identified as suitable for solar energy development by another related process;
- Documentation that the proposed project will be located in an area with low resource value and where minimal conflict with adjacent lands is likely; and
- Special circumstances such as an expansion or repowering of an existing project or unique federal–nonfederal partnership.

## Who is Affected

First, under the current proposals, utility-scale solar development is defined as any project capable of generating 20 MW or more of solar energy. Thus, the program would apply only to projects of this size. BLM has indicated that decisions on projects generating fewer than 20 MW would continue to be made in accordance with existing land use plan decisions, current applicable policy and individual site-specific NEPA analyses. That said, once land use plans are amended to include exclusion zones and other requirements set forth in the Solar PEIS Record of Decision (ROD), unless small projects are expressly grandfathered in, it seems that those prohibitions will become part of the underlying fabric of the BLM planning area.

Second, BLM proposes to continue processing "pending" solar applications — those applications on file with BLM before publication of the Draft Supplement, including applications for lands within proposed SEZs filed before June 30, 2009 — consistent with its existing regulations and policies. Pending applications on the Department of the Interior's "high priority" list would also continue to be given priority processing as long as the applicant continues to meet BLM's due diligence requirements. Pending applications on lands proposed as exclusion areas for utility-scale solar energy development in the Final Solar PEIS, however, are likely to be denied, making it critical to understand where those areas are.[11]

All new applications will be subject to the ROD for the Solar PEIS, the associated land use plan amendments, and the variance process if located in a variance area. BLM considers "new" any application filed within proposed SEZs after June 30, 2009, and *any* application filed after the publication of the Draft Supplement on October 28, 2011. These projects would be considered new even if they are no longer in a proposed SEZ according to the Draft Supplement.

Additionally, BLM will recognize all previously approved solar projects even after it signs the ROD for the Solar PEIS.

## Implications Going Forward

Utility-scale solar energy developers and those providing financing for such projects are advised to pay attention to this process because it will impact not only where — but also how easily — solar projects can be sited on public lands. The first step for project developers is to evaluate where their proposed projects are vis-à-vis the revised SEZs and exclusion areas outlined in the Draft Supplement. As BLM further restricts the public lands available for prioritized utility-scale solar energy development and increases economic and other incentives for siting projects in SEZs, developers will face stiffer competition for access to increasingly scarce federal lands.

BLM has already initiated efforts to identify new SEZs in California, Arizona, Nevada and Colorado, and anticipates identifying new or expanded SEZs in the remaining states in the near future.[12] BLM welcomes industry to participate in these efforts to identify new SEZs, and project proponents are strongly advised to remain engaged in these processes.

**Endnotes**

1 76 Fed. Reg. 66958 (October 28, 2011). The Supplement is also available at: http://www.gpo.gov/fdsys/pkg/FR-2011-10-28/pdf/2011-27874.pdf.

2 42 U.S.C. § 4332(2)(C).

3 The Federal government has now issued final PEISs for wind development, geothermal development, energy corridors, and alternative energy on the Outer Continental Shelf. *See* Bureau of Land Mgmt., U.S. Dep't of the Interior, *Final Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States* (2005) (Wind PEIS), *available at* http://windeis.anl.gov/documents/fpeis/index.cfm.; Minerals Mgmt. Serv., U.S. Dep't of the Interior, *Final Programmatic Environmental Impact Statement for Alternative Energy Development and Production and Alternative Use of Facilities on the Outer Continental Shelf* (2007), *available at* http://ocsenergy.anl.gov/eis/guide/index.cfm; U.S. Dep't of Energy, *Final Programmatic Environmental Impact Statement, Designation of Energy Corridors on Federal Land in the 11 Western States* (DOE/EIS-0386) (2008) (West-Wide Energy Corridor PEIS), *available at* http://corridoreis.anl.gov/documents/fpeis/index.cfm; Bureau of Land Mgmt., U.S. Dep't of the Interior, and U.S. Forest Serv., U.S. Dep't of Agric., *Final Programmatic Environmental Impact Statement for Geothermal Leasing in the Western United States* (2008) (Geothermal PEIS), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/geothermal_eis/final_programmatic.Par.95063.File.dat/Geothermal_PEIS_final.pdf.

4 The *Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States* (Draft Solar PEIS) was issued on December 17, 2010, and identified areas in which utility-scale solar projects proposed to be located in Arizona, California, Colorado, Nevada, New Mexico, and Utah would benefit from expedited permitting and other preferential treatment. The federal government received more than 80,500 public comments on the proposal. In addition to the BLM issues discussed herein, as part of this process, DOE proposes to further integrate environmental considerations into its analysis and selection of programmatic environmental guidance for solar projects.

5 Another alternative (called the SEZ Alternative) would have limited development to within the then-identified 677,000 acres of SEZs. This alternative has also been modified in the Draft Supplement; under the modifications, BLM would restrict utility-scale solar energy development applications to the now-proposed 285,000 acres of SEZs only, and designate all other lands as exclusion areas for utility-scale solar energy development.

6 Draft Supplement at 2-18.

7 *Id*. at A-1.

8 Juliet Eilperin, *Interior picks zones for solar projects*, Wash. Post, Oct. 28, 2011, at A-6.

9 Other incentives being considered by BLM include enhanced tiering opportunities through the use of regional mitigation concepts and greater cumulative impact assessments in the Solar PEIS, a more detailed evaluation of transmission needs and facilitated permitting for developers willing to build transmission to SEZs, additional federal staffing, and the promise of Washington, DC level decision making on site-specific projects to avoid administrative litigation before the Interior Board of Land Appeals.

[10] The BLM has also indicated that it will establish a competitive process for offering public lands for solar and wind development through a federal rulemaking process. Currently, BLM is planning to publish an Advanced Notice of Proposed Rulemaking in November 2011, and BLM intends to have a Proposed Rule available for public comment prior to the release of the Solar PEIS ROD (targeting late spring 2012).

[11] The Draft Supplement at 1-11 states: "Pending applications on lands proposed as exclusion areas for utility-scale solar energy development in the Final Solar PEIS are likely candidates for denial. Upon issuance of the Solar PEIS ROD, the BLM may deny pending applications to the extent such applications overlap with exclusion areas identified in the ROD for the protection of ecological, cultural, visual, or other specified resource values."

[12] Draft Supplement at 2-28.

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