

**Public Lands Foundation**

**Comments**

**Rights-of-Way, Leasing and Operations for Renewable Energy Proposed Rule**

**Attention: 1004-AE-78**

Submitted to [www.regulations.gov](http://www.regulations.gov)

These comments are submitted by the Public Lands Foundation (PLF) in response to a request from the Bureau of Land Management (BLM) for review of a Proposed Rule on Rights-of-Way, Leasing and Operations for Renewable Energy under the Federal Land Policy and Management Act (FLPMA) and the 43 CFR Part 2800 regulations. The Proposed Rule was published in the Federal Register on June 16, 2023, and comments were required to be submitted to the BLM no later than August 15, 2023.

**Summary of Proposed Rule**

The Proposed Rule would amend existing right-of-way (ROW) regulations to facilitate responsible solar and wind energy development on public lands managed by the BLM. The Proposed Rule would adjust acreage rents and capacity fees for solar and wind energy ROW authorizations, provide the BLM with more flexibility in processing applications for solar and wind energy development inside designated leasing areas, and update criteria on prioritizing solar and wind energy ROW applications. The Proposed Rule would implement the authority granted to the Secretary of the Interior in the Energy Act of 2020 to “reduce acreage rental rates and capacity fees, or both, for existing and new wind and solar energy authorizations” to promote the greatest use of wind and solar energy resources on federal lands. The Proposed Rule would also make public lands available to solar and wind energy applications inside of designated leasing areas without first holding a competitive lease offer.

The PLF is an organization composed mostly of retired individuals who dedicated all, or a significant portion, of their working lives to public service with the BLM. For that reason, the organization has access to considerable experience and expertise in the application of FLPMA to the public lands. The Proposed Rule is a clear instance where the PLF can offer a unique review and comments based on extensive technical expertise and experience. Like most major rulemakings, the current public comment period is sure to draw arguments seeking to advance various interests. Our comments aim to avoid those tendencies, relying instead on the accumulated and combined experience of our members in the management of the public lands. The comments that follow emphasize the land management expertise we can offer relating to the Proposed Rule.

## **Summary of PLF Comments**

The PLF provided comments to the BLM in February 2022 on proposed guidance to be included in the BLM 2800 Manual to update and reduce acreage rental rates and capacity fees for solar and wind energy ROW authorizations consistent with the provisions of the Energy Act of 2020. The PLF continues to support the provisions of Section 504(g) of FLPMA that requires the holder of a right-of-way to pay “fair market value” for the use of the public lands. However, we acknowledge the provisions of the Energy Act of 2020 that provides the Secretary of the Interior, as delegated to the BLM, with authority to reduce acreage rental rates and megawatt capacity fees if, among other things, the Secretary determines “that a reduced rental rate or capacity fee is necessary to promote the greatest use of wind and solar energy resources.” Section 504(g) of FLPMA also provides authority to the Secretary to grant, issue, or renew rights-of-way at “reduced charges” where the holder of the right-of-way provides a “valuable benefit to the public or to the programs of the Secretary.” The BLM clearly has the authority under both FLPMA and the Energy Act of 2020 to adjust or reduce the rental rates and capacity fees for wind and solar energy right-of-way authorizations on the public lands.

The PLF supported the findings of the BLM as outlined in the Draft 2800 Manual Section 2806.60(A) that “these adjustments are necessary to promote the greatest use of wind and solar energy resources.” Those previous changes and those changes now included in this Proposed Rule will help the BLM meet the goals outlined by Congress in the Energy Act of 2020 to permit 25 gigawatts of renewable energy production on the public lands by 2025 and support a clean energy future, but also ensure a reasonable and fair return to the public for the use of public lands. These proposed changes are also consistent with Section 207 of Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, that required the Secretary to review renewable energy siting and permitting processes on the public lands and identify steps to increase renewable energy production on the public lands.

The following additional comments are provided in response to the current request for review of the Proposed Rule:

1. There is immense value in continuing to support the responsible development of renewable energy resources on the public lands and providing financial incentives where necessary, consistent with the provisions of the Energy Act of 2020. Increased renewable energy development has many benefits, however, it is not without its own impacts and challenges, and poorly sited projects can threaten other important natural resource values, wildlife habitat, and cultural resources on the public lands. It may be more appropriate to site some renewable energy projects on non-federal lands than to provide financial incentives for projects on public lands that have potential resource conflicts and impacts. The PLF recommends that the BLM consider opportunities to limit financial incentives to only those lands that the BLM has identified through land use planning efforts as designated leasing areas or preferred development areas.

2. The PLF recommends the BLM limit the initial term of solar and wind energy authorizations to a 30-year term, with the authority to extend and renew the authorization by 10-year intervals. This would be consistent with the typical 20-year terms of power purchase agreements.
3. The PLF recommends that the BLM retain the provision in the existing regulations that requires a pre-processing public meeting for solar and wind energy ROW applications submitted outside of designated leasing areas.
4. The PLF supports the revisions to Section 2804.35 of the regulations to clarify the purpose of prioritizing solar and wind energy ROW applications to better allocate BLM resources for processing applications that have the greatest potential for approval and development.
5. The PLF supports the use of the NASS land value data to determine minimum annual acreage rents with an annual adjustment fixed at 3 percent or solar and wind energy ROW authorizations on the public lands. The PLF also supports the use of a 100 percent encumbrance factor for determining acreage rents for solar energy authorizations and a 5 percent encumbrance factor for determining acreage rents for wind energy authorizations.
6. The PLF recommends that the Proposed Rule be revised to include provisions for capacity fee reductions, not to exceed a total of 50 percent of the capacity fee from both the MWh rate reduction and the Buy American reduction, for a period of 10 years from publication of the Final Rule. Any extension of these reductions would require publication of a new Rule. The PLF also recommends that the rate of return used in determining the overall capacity fee be recalculated using a 30-year average rate of return for 10-year Treasury Bond rates. Additional project specific reductions, including the use of energy storage, union labor agreements, project siting and sizing, or meeting renewable energy portfolio standards should not be added to the Proposed Rule.
7. The PLF supports the use of the ROW linear rent schedule for determining the rent for energy storage facilities that are not part of a solar or wind energy development facility. However, the BLM should use a 100 percent encumbrance factor for the energy storage facility in determining the acreage rent for the ROW authorization.
8. The PLF supports the option of making public lands inside of designated leasing areas available for non-competitive leasing by application. However, the regulations should require the BLM to provide public notice of a non-competitive lease application within a designated leasing area before proceeding ahead with processing of the non-competitive lease application.
9. The PLF supports the inclusion of additional language in the Proposed Rule regarding variable bonus bid offsets for “progressive steps toward” development, however, the PLF

does not support the addition of Buy American or “use of union labor” to the specific variable bonus bid offset provisions of Section 2809.16 of the regulations.

## **Introduction**

The Proposed Rule sets forth changes to the BLM’s renewable energy and ROW programs related to two main topics. The first topic relates to the reduction of rents and fees for solar and wind energy ROW authorizations on the public lands, pursuant to the authority under the Energy Act of 2020. The second topic relates to making public lands available for solar and wind energy development inside of designated leasing areas without first holding a competitive lease offer. The BLM completed a Programmatic EIS for wind energy development on the public lands in 2005, amended 52 land use plans, and established policies and best management practices for the permitting of wind energy projects on the public lands. The BLM completed a Programmatic EIS for solar energy development in 2012, amended 89 land use plans, and established 17 Solar Energy Zones on some 285,000 acres of public land with high solar potential in six southwestern states as the preferred location for solar energy development. This solar energy Programmatic EIS is currently being updated to address the siting of solar energy development on public lands across all the western states. The BLM has also designated some 388,000 acres of public land in southern California as development focus areas for solar and wind energy development and an additional 40,000 acres as potentially available for development through the 2016 Desert Renewable Energy Conservation Plan (DRECP). The BLM also identified over 192,000 acres of preferred development locations for solar energy development in Arizona through the 2017 Restoration Design Energy Project.

There is immense value in continuing to support the responsible development of renewable energy resources on the public lands and providing financial incentives where necessary, consistent with the provisions of the Energy Act of 2020. Increased renewable energy development has many benefits, however, it is not without its own impacts and challenges, and poorly sited projects can threaten other important natural resource values, wildlife habitat, and cultural resources on the public lands. It may be more appropriate to site some renewable energy projects on non-federal lands than to provide financial incentives for projects on public lands that have potential resource conflicts and impacts. The priority should be placed on providing incentives for the siting of solar and wind energy projects on those public lands that have been designated or identified as preferred development areas through BLM land use planning efforts.

### *Comments*

The PLF recommends that the BLM consider opportunities to limit financial incentives to only those lands that the BLM has identified through land use planning efforts as designated leasing areas or preferred development areas.

## **Term for a Grant or Lease (Section 2801.9)**

The Proposed Rule would extend the term for solar and wind energy ROW authorizations from a maximum term of 30 years to a term of 50 years. The BLM believes that a 50-year term is a reasonable term for large infrastructure ROW projects, considering the cost of the facility, its useful life, and the public purpose it serves. However, the BLM requested comments on whether other alternatives for maximum terms for solar and wind energy authorizations would be more appropriate, including potentially continuing the existing 30-year maximum term; a maximum term longer than 50 years; no regulatory limitation to the term; extending the initial term by 10-year intervals with updated power purchase agreements; or reducing the initial term of the authorization.

#### *Comments*

The PLF recommends the BLM limit the initial term of solar and wind energy authorizations to a 30-year term, with the authority to extend and renew the authorization by 10-year intervals. This would be consistent with the typical 20-year terms of power purchase agreements. A 50-year term for a BLM solar and wind energy ROW authorization would not be consistent with the general terms of a power purchase agreement. A 30-year term, with the right of renewal, would provide for an appropriate time for negotiation of a power purchase agreement, construction and development of a solar and wind energy project, and construction of a transmission connection. Renewal of the ROW authorization would provide for the upgrade of solar and wind energy facilities and the update of power purchase agreements.

#### **Processing Applications (Section 2804.25)**

The Proposed Rule would remove a provision in the existing regulations that requires a pre-processing public meeting prior to the BLM processing an application for a solar or wind energy ROW application outside of a designated leasing area. However, the Proposed Rule would leave in place a provision that would allow for such a meeting to occur at the BLM's discretion. The requirement for a pre-processing public meeting was part of the Smart from the Start effort that BLM initiated to screen applications and solicit early public input on applications that were submitted outside of areas that had been determined through the land use planning process to be the preferred locations for solar and wind energy development projects. This facilitated an early review and public input process before BLM initiated a formal NEPA review process for these applications. Designated leasing areas are still the preferred locations for the siting of solar and wind energy development projects and it would appear that soliciting public input and holding a pre-processing public meeting for applications outside of designated leasing areas would provide some public benefit and streamline the later NEPA review process.

#### *Comments*

The PLF recommends that the BLM retain the provision in the existing regulations that requires a pre-processing public meeting for solar and wind energy ROW applications submitted outside of designated leasing areas.

### **Prioritizing Applications (Section 2804.35)**

The Proposed Rule would clarify the factors that BLM uses to prioritize solar and wind energy ROW applications in a manner that would help facilitate environmentally responsible development proposals and ensure that BLM workloads are directed appropriately. The Proposed Rule would provide discretion to the BLM as to how best to apply the factors to prioritizing the processing of solar and wind energy applications, taking into account the multiple considerations that are relevant to each area and office managing public lands. These factors would consider 1) whether the proposed project is located within a preferred development area or designated leasing area, 2) whether the proposed development avoids adverse impacts to or conflicts with known resources or uses and includes specific measures to mitigate those impacts, 3) whether the proposed project is in conformance with existing BLM land use plans or would require an amendment or revision to the plan, 4) whether the proposed project is consistent with relevant State, local, or Tribal plans or priorities, 5) whether the proposed project incorporates best management practices, and 6) other criteria identified by BLM policy guidance and land use planning. The BLM requested comments on whether additional factors, such as co-location with energy storage facilities or other existing energy facilities, or proximity to transmission infrastructure facilities should also be a consideration.

#### *Comments*

The PLF supports the revisions to Section 2804.35 of the regulations to clarify the purpose of prioritizing solar and wind energy ROW applications to better allocate BLM resources for processing applications that have the greatest potential for approval and development. The PLF would recommend that the proximity to transmission infrastructure facilities be added to the list of factors that have a significant effect on the potential for approval and development of solar and wind energy projects on the public lands.

### **Solar and Wind Energy Rents and Fees (Section 2806.50 and 2806.52)**

#### *Acreage Rent*

The Proposed Rule would require solar and wind energy ROW holders to pay in advance either an annual acreage rent or a capacity fee for generation facilities on the public lands. The BLM would calculate the acreage rent for solar and wind energy ROW authorizations based on per acre values for pastureland from the National Agricultural Statistics Service (NASS) Cash Rents Survey, with an annual fixed adjustment factor of 3 percent. The acreage rent would be the minimum rent paid to the BLM once a ROW grant or lease is issued, whether or not energy is generated on the ROW in a given year. The Proposed Rule would apply a 100 percent encumbrance factor for calculating the acreage rent for solar energy development authorizations and reduce the encumbrance factor for wind energy development authorizations from the current 10 percent encumbrance to a 5 percent encumbrance to account for changes in current land use requirements for wind energy turbines over the years.

### *Capacity Fee and Reductions*

The Proposed Rule's methodology for calculating a capacity fee is based on actual energy production, which is a change from the existing regulations that are based on the nameplate capacity, as an estimate of the potential energy that could be generated from the facility. A capacity fee based on wholesale electricity market prices would be collected in place of the acreage rent if the capacity fee exceeds the acreage rent. Under the Proposed Rule, the BLM would use wholesale electricity market pricing data available from the Energy Information Administration to determine the capacity fee for generation from the solar or wind energy authorization on the public lands. The BLM would, however, still retain flexibility to utilize different data sources in the future to determine wholesale electricity market prices. If the BLM collects the capacity fee, no acreage rent would be required for that year. The Proposed Rule would also reduce the Megawatt hour (MWh) rate calculation used to determine the capacity fee by 80 percent until the year 2036, to promote solar and wind energy development on the public lands consistent with the authority of the Energy Act of 2020. Starting in 2036, the MWh rate reduction would decrease from 80 percent to 20 percent of the wholesale price per MWh. In addition, the Proposed Rule would further reduce capacity fees tied to the ROW holder's use of Buy American made parts and materials identified under the Federal Acquisition Regulations (FAR) at 48 CFR 52.225-1(b). These further reductions in the capacity fee could range from a 5 percent reduction to a 20 percent reduction, depending the percent of the total facility cost attributable to the Buy American preference.

In determining the capacity fee for solar and wind energy ROW authorizations, the BLM also uses a standard rate of return in the formula to determine the overall capacity fee. The minimum rate of return under the existing regulations is 4 percent, but the BLM used the authority of the Energy Act of 2020 to lower the rate of return to 2 percent in the solar and wind energy ROW 2800 Manual update in May 2022. The Proposed Rule would increase the rate of return to 7 percent, based on the 50-year average rate of return for 10-year Treasury Bond rates. The 50-year average was used as the basis for this calculation, since the BLM decided to set the minimum term of a solar or wind energy ROW authorization to a 50-year term, however, the PLF recommends that the 30-year average still be used for this calculation of the rate of return.

### *Comments*

The PLF supports the use of the NASS land value data to determine minimum annual acreage rents, with an annual adjustment fixed at 3 percent, for solar and wind energy ROW authorizations on the public lands. The PLF also supports the use of a 100 percent encumbrance factor for determining acreage rents for solar energy authorizations and a 5 percent encumbrance factor for determining acreage rents for wind energy authorizations. The PLF also supports the collection of only the capacity fee in place of the acreage rent if the capacity fee exceeds the annual acreage rent. However, the PLF has significant concerns over the proposed reductions included in the

Proposed Rule that are used to determine the capacity fee for solar and wind energy ROW authorizations on the public lands.

It should be noted that the BLM held a competitive auction for solar energy development on four parcels of some 23,675 acres of public land in Nevada on June 27, 2023 that generated over \$105 million in bids. The development of these four parcels could support the generation of nearly 3,000 megawatts of renewable energy to the electrical grid. The BLM is also currently processing 74 renewable energy projects on the public lands, including solar, wind and geothermal energy projects and interconnected gen-tie transmission lines, that have the potential to add over 37,000 megawatts of renewable energy to the western electric grid. The BLM is also currently conducting preliminary reviews of over 150 applications for solar and wind energy development and some 51 applications for solar and wind energy site testing authorizations. It does not appear that significant and substantial reductions in the capacity fees for solar projects are required to facilitate the development of renewable energy on the public lands as authorized by the Energy Act of 2020.

The BLM has established no foundation in the Proposed Rule on how the 80 percent reduction in the MWh rate was determined as an appropriate capacity fee reduction or the basis for that reduction to extend to the year 2036. There also is no foundation provided in the Proposed Rule to the change of that capacity fee reduction to a 20 percent reduction after the year 2036. The PLF, however, can support the range of reductions in the capacity fee tied to the ROW holder's use of Buy American made parts and materials as included in the Proposed Rule. The PLF recommends that the Proposed Rule be revised to include provisions for capacity fee reductions, not to exceed a total of 50 percent of the capacity fee from both the MWh rate reduction and the Buy American reduction, for a period of 10 years from publication of the Final Rule. Any extension of these reductions would require publication of a new Rule. The PLF also recommends that the rate of return used in determining the overall capacity fee be recalculated using a 30-year average rate of return for 10-year Treasury Bond rates. This should be consistent with the PLF recommendation to retain the 30-year term for solar and wind energy ROW authorizations.

The BLM also requested comments on whether multiple project specific reductions or other capacity fee rate reductions may be more appropriate toward meeting the goals of the Energy Act of 2020. This included a request for comments on whether the BLM should implement minimum efficiency criteria for solar and wind energy development on the public lands to support the greatest use of these resources and whether the BLM should consider conditioning the MWh rate reduction on State-specific renewable energy portfolio standards. The BLM also requested comments on the possibility of adding a reduction to the capacity fee of up to 20 percent based on the use of union labor in project construction.

The PLF recommends that the MWh rate reduction be kept as simple as possible to implement and meet the goals of the Energy Act of 2020. Additional project specific reductions, including the use of energy storage, union labor agreements, project siting and sizing, or meeting renewable energy portfolio standards should not be added to the Proposed Rule. The PLF recommends that



the total capacity fee reduction not exceed a total of 50 percent for a limited 10-year period, including a fixed MWh rate reduction and the Buy American reduction.

### **Energy Storage Facilities (Section 2806.54)**

The Proposed Rule revises Section 2806.54 of the regulations to clarify that the rent the BLM determines for an energy storage facility that is not part of a solar or wind energy development facility would be based on the ROW linear rent schedule. Energy storage facilities may be authorized separately from a solar or wind energy development facility. The BLM requested comments regarding the valuation of energy storage that is not part of a solar or wind energy generation facility and whether a different method for collecting rent is warranted or appropriate for such facilities on the public lands, such as valuing battery storage based on hours of storage capacity per MWh of energy.

#### *Comments*

The PLF supports the use of the ROW linear rent schedule for determining the rent for energy storage facilities that are not part of a solar or wind energy development facility. Charging a capacity fee for an energy storage facility would be inappropriate as there is no energy generation from the facility. However, the BLM should use a 100 percent encumbrance factor for the energy storage facility in determining the acreage rent for the ROW authorization.

### **Lands Available for Solar and Wind Energy Applications (Section 2809.10)**

Under the Proposed Rule, the BLM would have the option to make public lands inside of designated leasing areas available for non-competitive leasing by application, while retaining discretion to conduct competitive offers either within or outside of designated leasing areas. This is a change from the existing regulations which required the BLM to offer lands competitively within designated leasing areas before the BLM could proceed with a non-competitive application process. The Proposed Rule would standardize the BLM's discretion to utilize a competitive process for lands within and outside of designated leasing areas. But the Proposed Rule would also allow applicants to proactively submit solar or wind energy applications in designated leasing areas that may not currently have competitive interest. The BLM has requested comments on whether the Proposed Rule should also include a notice process, whereby the BLM solicits expressions of interest in an area after receiving an application in a designated leasing area to determine if there is any competitive interest.

#### *Comments*

The PLF supports the option of making public lands inside of designated leasing areas available for non-competitive leasing by application. This provides more flexibility in making lands available for solar and wind energy development and is consistent with the statutory direction provided by the Energy Act of 2020. However, the regulations should require the BLM to provide

public notice of a non-competitive lease application within a designated leasing area before proceeding ahead with processing of the non-competitive lease application. The public notice should provide for at least a 30-day cutoff date for any expressions of interest regarding a competitive interest for offering lands within the designated leasing area.

The PLF would also recommend that the BLM remove Section 2804.31 of the regulations that provided for a competitive process for solar and wind energy site testing ROW applications.

### **Variable Offsets to Competitive Offers (Section 2809.16)**

The Proposed Rule would revise the current regulations to provide additional text that would allow the BLM to apply additional variable bonus bid offsets for competitive solar and wind energy leases that would further facilitate solar and wind energy development on the public lands. These additional variable bonus bid offsets would support the investments of potential bidders in the progressive steps made toward actual development of a project. The revised language would also provide for bidders to qualify for a variable bonus bid offset after a competitive lease offer is held. Potential additional bonus bid offsets could include incentives for the use of items that qualify for the Buy American provisions of the Proposed Rule that complements the capacity fee reduction provisions of Section 2806.52 of the Proposed Rule. The BLM also requested comments on whether the “use of union labor” could also possibly be added to the list of variable bonus bid offset factors.

#### *Comments*

The PLF supports the inclusion of additional language in the Proposed Rule regarding variable bonus bid offsets for “progressive steps toward” development, however, the PLF does not support the addition of Buy American or “use of union labor” to the specific variable bonus bid offset provisions of Section 2809.16 of the regulations. The holders of solar and wind energy ROW authorizations would already be provided a financial incentive and capacity fee reduction under Section 2806.52 of the Proposed Rule for the Buy American provisions and it would not seem appropriate for the BLM to also provide another discount or bonus bid offset for the same item. The PLF does not support capacity fee reductions or variable bonus bid offsets for the “use of union labor”. Union labor requirements vary from State to State and are more appropriate for oversight by State laws and requirements.

Thank you for the opportunity to provide comments.

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