

# ENVIRONMENTAL LAWFLASH

March 17, 2015

## **DRECP: FEDERAL ELEMENTS PROCEED, STATE AND LOCAL ELEMENTS DEFERRED**

Agencies' adoption of a phased implementation approach raises questions about the coordination of state and federal efforts to meet energy and conservation goals.

On March 10, federal and state agencies<sup>1</sup> developing the Desert Renewable Energy Conservation Plan (DRECP or the Plan) announced a major departure from the original draft: the Plan will now be implemented through a "phased approach" that proceeds with the federal elements as Phase 1 but defers state and local elements to a future Phase 2 (the news release is available [here](#)). The agencies intend Phase 2 to be individually tailored to the affected counties' needs, allowing better alignment between ongoing county planning and the DRECP's objectives. The decision, made after the agencies' initial review of more than 12,000 public comments on the draft DRECP, raises many questions regarding the DRECP's intent to have federal and state agencies act in concert to achieve renewable energy and conservation objectives.

In a brief call with stakeholders, the US Bureau of Land Management (BLM) announced that it will proceed with a Land Use Plan Amendment (LUPA) that will draw from the range of alternatives analyzed in the current draft Plan, including designating Development Focus Areas (DFAs) and conservation areas on public lands. The California Energy Commission (CEC) acknowledged that the nonfederal portions of the Plan will follow, but will likely be delayed and have a significant change in scope. In Phase 2, each affected county will determine whether and to what extent it will pursue components of the DRECP, including revised renewable energy permitting processes as well as federal and state programmatic species permits through Natural Communities Conservation Plans (NCCPs) and Habitat Conservation Plans (HCPs).

### **Background**

The DRECP's goal has been to facilitate timely development of large, utility-scale renewable energy projects and associated transmission lines in California while avoiding, minimizing, and mitigating conflicts with wildlife and other natural, historic, and cultural resources. The draft DRECP released in September 2014 covered 22.5 million acres of federal and nonfederal desert land in California. It anticipated the development of up to 20,000 megawatts of power from utility-scale solar, wind, and geothermal projects, which were to be located on approximately 2 million acres designated for renewable energy DFAs. The plan also proposed to designate approximately 5 million acres as newly protected conservation lands.

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1. The US Fish and Wildlife Service, the California Energy Commission, the California Department of Fish and Wildlife, and the US Bureau of Land Management.

## Questions Raised

The agencies' decision announced on March 10 raises a number of legal and procedural questions.

### **Will the BLM have to restart the National Environmental Policy Act (NEPA) process?**

In its initial Notice of Intent, the BLM considered—but did not carry forward—a BLM-Only Lands Alternative in which all anticipated renewable energy development under the DRECP would occur on BLM-administered public lands. This alternative, however, was not analyzed in the draft Environment Impact Report/Environmental Impact Statement (EIR/EIS). The BLM-Only Lands Alternative was ultimately eliminated because it would only partially meet the interagency objectives and the BLM's purpose and need for the draft EIS/EIR. This may require the BLM to revisit and revise the purpose and need.

Although the BLM intends to analyze the LUPA in a final EIS using the same range of alternatives presented in the draft DRECP, there is a question as to whether, under relevant precedent (including the West Mojave Plan), these alternatives are sufficient. There is also a question as to the sufficiency of the analyses of the existing alternatives, given that the BLM's actions were intended to occur in concert with private actions. The BLM proceeding alone may have different impacts that need to be analyzed. Given these questions and uncertainties, it is possible that the BLM will need to issue revised NEPA documents and recirculate them for public comment.

### **How will the phased approach impact the designation of DFAs?**

Under the Preferred Alternative jointly announced last fall, the DFAs would be located primarily on private land (78% private land vs. 22% public land), and public lands would be primarily designated for conservation. For development to move forward under the phased approach, and to achieve California's renewable energy and climate goals, development areas may need to be shifted from private to public lands, meaning that the BLM would have to add more public lands to the DFAs and designate less for conservation. Although the BLM could move forward with a LUPA that only authorizes development on the 367,000 acres that would be designated as DFAs under the Preferred Alternative, this limited designation may not allow California to meet its energy and climate goals.

### **How will the phased approach impact the reserve design?**

The proposed Plan-Wide Reserve Design, a spatial expression of the Plan's conservation strategy, will not be approved until Phase 2, if at all, as Phase 2 apparently contemplates separate county-by-county planning that may not include adoption of coordinated measures across counties. It is thus unclear how the BLM lands designated for conservation and intended to be included in the reserve design will be treated in Phase 1. Several questions still exist, such as, will BLM propose to manage public lands for their conservation values within the reserve design during Phase 1? And, will it be necessary to include more private lands in the reserve design in Phase 2 to compensate for changes made to public lands designations in Phase 1?

### **What role does the Durability Agreement play in this phased approach?**

The federal and state agencies, in their brief conference call explaining the phased approach to the DRECP, announced that the Durability Agreement would be finalized and implemented. The September 2014 draft

Durability Agreement between the BLM and the California Department of Fish and Wildlife (CDFW) was intended to ensure that current protective land use designations for BLM Conservation Lands will remain in place for at least the duration of the DRECP NCCP and that the lands will be managed consistently with protective designations for species covered under the DRECP. The agreement contemplates use of BLM Conservation Lands as part of the reserve design and for compensatory mitigation. It also contemplates coordinated implementation of the LUPA and the NCCP "to promote NLCS values and achievement of the Plan-Wide Biological Goals and Objectives." Under the phased approach, the LUPA will move forward without the NCCP. This raises the question of whether the Durability Agreement will be available during Phase 1 for compensatory mitigation on public or private lands. What would the agreement mean absent an NCCP reserve? If Phase 2 of the DRECP is never implemented, how long will conservation lands be preserved and managed to facilitate the recovery of species?

## **What will happen to the streamlined permitting incentive?**

The General Conservation Plan (GCP), a programmatic HCP, was developed to streamline the incidental take permit process under section 10 of the Endangered Species Act. Under the phased approach, however, the GCP will not be approved until Phase 2. The federal and state agencies announced that the Fish and Wildlife Service would be focusing its attention in Phase 1 on consultation with the BLM under section 7, rather than on the GCP. Will this section 7 consultation result in streamlined permitting coverage for projects on BLM land? This question is significant, given that many concerns raised by renewable energy developers in the comments regarded the complicated permitting processes. The streamlined permitting process was intended to be a major incentive for industry members to sign onto the DRECP.

## **How will the phased approach affect avian issues?**

Under the draft DRECP, the CDFW and the FWS would authorize programmatic incidental take coverage of golden eagles and other migratory birds through the Natural Community Conservation Planning Act and the ESA, consistent with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act (BGEPA). Golden eagle incidental take permits, for example, would authorize cumulative take of between 1% and 5% of the local population annually. This programmatic take coverage feature was a novel approach to dealing with avian species in the California desert because some species are also listed under the ESA while others are not. It was also important given the FWS's limited experience issuing a take permit for wind projects under BGEPA. Without the approval of the NCCP in Phase 1, this programmatic take coverage will not be available to developers, which is problematic given the growing concern about avian interaction with renewable energy projects. This change will likely make wind development on public lands in California more challenging.

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