

Natural Resources Defense Council

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December 14, 2015

Via Federal Express and email: protest@blm.gov

Director (210)
Attention: Protest Coordinator
20 M St SE, Room 2134LM
Washington, D.C. 20003

Re: 1610-5.G.1.4 - Protest of Proposed Land Use Plan Amendment and Final
Environmental Impact Statement for the Desert Renewable Energy Conservation
Plan

Dear Protest Coordinator:

Pursuant to BLM's planning regulations at 43 C.F.R. § 1610.5-2, the undersigned conservation organization is writing to protest the proposed Land Use Plan Amendment ("LUPA") and Final Environmental Impact Statement ("FEIS") for the Desert Renewable Energy Conservation Plan ("DRECP"). We have been actively engaged in the planning process for the proposed LUPA and FEIS; we have submitted National Environmental Policy Act ("NEPA") scoping comments and comments on the Draft Environmental Impact Statement ("DEIS"), and we have interests which may be adversely affected by these planning decisions.

This protest is being filed in accordance with 43 C.F.R. § 1601.5-2 and contains 1) the name, mailing address, telephone number, and description of the interests of the Natural Resources Defense Council ("NRDC") and Audubon California; 2) a statement of the issues in the proposed LUPA and FEIS being protested; and 3) a concise statement explaining why we believe the State Director's decision is wrong. We reserve the right to supplement this protest.

I. Interests of the Parties

NRDC is a non-profit environmental organization with 2.4 million members and activists, more than 380,000 of whom live in California. NRDC uses law, science and the support of its members and activists to protect the planet's wildlife and wild places and to ensure a safe and healthy environment for all living things. NRDC has worked for many years to protect wildlands and

natural values on public and private lands and to promote cost-effective energy efficiency measures and sustainable energy development. NRDC has been a long-time advocate for many of the “smart from the start” planning hallmarks of the DRECP, including landscape-level conservation planning, guided low-conflict development, and strategic regional mitigation that produces enduring protections for sensitive areas. As noted in the preceding section, NRDC has been engaged in the DRECP process for more than six years and has submitted multiple scoping comment letters and comments on the DEIS.

NRDC’s interests relate to ensuring that the DRECP planning agencies, including the Bureau of Land Management (“BLM”), comply fully with all applicable laws, including the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1701 *et seq.*, and all other applicable regulations and policies. NRDC is interested in ensuring that the DRECP reflects a durable, landscape-level approach to renewable energy development and planning, including thoughtful, responsibly sited development that avoids and minimizes negative impacts to publicly-owned lands and resources in the DRECP area. NRDC is also concerned with the planning agencies’ development of an adequate conservation strategy that sets aside areas with high ecological value and includes mitigation measures offering meaningful protections for sensitive and imperiled species and landscapes. These planning decisions need to be based on strong, science-based strategies that realize the important conservation opportunities available through the DRECP process.

Audubon California is the state office of the National Audubon Society with 150,000 members and supporters in California. Audubon’s mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth’s biological diversity. In recognition of the growing threats to human and ecological communities presented by the release of greenhouse gases and the resultant climate change, we have championed the aggressive development of both energy conservation and renewable energy generation to reduce those threats. In locations throughout our state, Audubon at the state level, and our chapters at a local level, has successfully collaborated on the development of renewable energy facilities – striking a balance between landscape conservation priorities and renewable energy.

Audubon California is primarily concerned with the impacts of the Preferred Alternative on key populations of sensitive bird species that reside in the DRECP area for some or all of the year. As such, Audubon California’s interests in this protest primarily relate to the existence of Important Bird Areas (“IBAs”) designated as unallocated lands in the DRECP and the importance of incorporating the Programmatic Eagle Conservation Strategy into Phase 1 of the DRECP.

II. Issues and Parts of Proposed Amendment and FEIS Being Protested

NRDC strongly supports the development of responsibly sited and appropriately mitigated largescale renewable energy development on public lands as one of many tools to reduce greenhouse gas emissions, confront the challenges of global warming, and assist California in meeting its

emission reduction goals. The urgent need to develop renewable energy sources, however, must be balanced against the potentially severe and irreversible impacts of that development. Renewable energy need not come at the expense of irreplaceable natural and cultural resources. Renewable development must be appropriately sited, sized, and managed in ways that avoid significant environmental resource impacts and ensure full compliance with all applicable laws and regulations.

In order to continue to advance the smart from the start approach to renewable energy development, we believe it is critical that the DRECP guide renewable development to areas with low environmental and wildlife impact risk, high energy potential, and close proximity to necessary infrastructure while ensuring that ecologically sensitive and significant lands remain protected for the future. We have identified some key concerns with the DRECP that we believe the planning agencies failed to address in the FEIS and which must be addressed in order to develop and adopt a final DRECP that meets the needs of renewable developers and provides for meaningful conservation. We greatly appreciate the hard work that has been invested in this complex process to date and believe that the issues identified in these comments can be resolved before BLM issues a Record of Decision (“ROD”).

The Preferred Alternative is the proposed LUPA and includes planning decisions for adopting a conservation strategy and streamlined permitting process for renewable development on BLM-managed lands. Under the Preferred Alternative, 388,000 acres of BLM lands are designated as Development Focus Areas (“DFAs”), locations covering the activities associated with renewable energy generation and offering streamlined approval processes.¹ Forty-thousand acres are designated as Variance Process Lands (“VPLs”), which consist of variance lands from BLM’s Western Solar Plan² and the lands defined as Study Area Lands in the Draft DRECP.³ These lands would be open for renewable energy applications under the BLM LUPA following a variance application process. Additionally, 4,966,000 acres are identified as BLM Conservation Areas outside existing conservation areas and include lands identified as National Conservation Lands (“NCLs”), Areas of Critical Environmental Concern (“ACECs”), and Wildlife Allocations.⁴ Finally, 802,000 acres are designated as Unallocated Lands.⁵ The FEIS defines these lands as “BLM-administered lands that do not have an existing or proposed land allocation or designation[.]” and explains that “[t]hese areas would be open to renewable energy applications but would not benefit from the streamlining or incentives.”⁶

¹ BLM, DRECP Proposed LUPA and Final Environmental Impact Statement, II.3-2 to -3 (October 2015) [hereinafter FEIS].

² BLM, FINAL SOLAR ENERGY DEVELOPMENT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (July 2012), *available at* <http://solareis.anl.gov/Documents/fpeis/index.cfm> [hereinafter Solar PEIS]; BLM, APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS/RECORD OF DECISION (ROD) FOR SOLAR ENERGY DEVELOPMENT IN SIX SOUTHWESTERN STATES (Oct. 2012), *available at* http://solareis.anl.gov/documents/docs/Solar_PEIS_ROD.pdf [hereinafter Solar PEIS ROD]

³ FEIS, II.3-2 to -3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at II.3-2.

We protest the FEIS and the LUPA in general, and the discussion of alternatives and environmental effects in particular, for their failure to comply with FLPMA, and other applicable laws, policies, and regulations. Our protest stems from our belief that the planning agencies have failed to fulfill their planning and management responsibilities for the affected public lands and their associated ecological resources. We have described these concerns in detail in the DEIS comments we submitted along with other organizations. The grounds on which we protest include, but are not limited to, the subjects which are identified below, and the issues and concerns which we raised in our comments on the DEIS and Draft LUPA for the DRECP.

III. Concise Statement Explaining the Reasons Why We Believe the State Director's Decision is Wrong

A. The FEIS and Proposed LUPA Do Not Comply with FLPMA

FLPMA is the primary law governing how BLM administers public lands. FLPMA requires BLM to manage public lands “under principles of multiple use and sustained yield,”⁷ and mandates that the Secretary of the Interior “take any action necessary to prevent unnecessary or undue degradation” of these lands.⁸ FLPMA also provides that public lands “be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.”⁹ Under the multiple and sustained use principle, BLM must manage its “various resources without permanent impairment of the productivity of the land and the quality of the environment.”¹⁰ BLM “takes into account the long-term needs of future generations for renewable and non-renewable resources” while considering “the relative values of the resources and not necessarily . . . the combination of uses that will give the greatest economic return or the greatest unit output.”¹¹

1. The Final DRECP Leaves over 800,000 Acres of Land Unallocated

The DRECP is a major effort in land use planning for public lands in the California desert. Though the FEIS and LUPA generally expand conservation designations from the DEIS, the FEIS also introduces a state of uncertainty to nearly 802,000 acres of land in the DRECP area. The Preferred Alternative identifies these 802,000 acres as “unallocated lands,” lands that are neither part of a conservation nor development designation.¹² The DRECP describes unallocated lands as:

BLM lands that are not covered by any of the above designations [(DFAs, BLM Conservation Areas, Recreation Management Areas, or VPLs)], although the

⁷ 43 U.S.C. §§ 1701(a)(7), 1732(a).

⁸ *Id.* § 1732(b).

⁹ *Id.* § 1701(a)(8).

¹⁰ *Id.* § 1702(c).

¹¹ *Id.*

¹² FEIS at II.3-2.

DRECP creates new management prescriptions for these lands. These lands are potentially available for renewable energy development. Examples of un-allocated lands include scattered parcels surrounded by private land, lands underneath the Salton Sea, and lands with existing development such as mines, highways, etc. that haven't seen development demand.¹³

The DRECP further explains that:

“Unallocated Lands” are BLM-administered lands that do not have a proposed land allocation or designation in the DRECP. However, the DRECP still includes specific management prescriptions for these lands. These areas would be open to renewable energy applications but would not benefit from plan-related streamlining or incentives. Development on unallocated lands may not have an adverse effect on the biological and cultural conservation design, the recreation design, or the renewable energy and transmission design of the DRECP.¹⁴

The DRECP thus adds a significant amount of land to the categories of lands already available for development as DFAs and variance lands, but leaves these unallocated lands without the benefit of the specified development procedures and safeguards identified for those other designations. Leaving 802,000 acres of BLM land unallocated and open to potential development is completely inconsistent with the directed development approach of the DRECP process as well as the foundational Western Solar Program on which the DRECP builds. It is also directly inconsistent with the Secretary of the Interior's prioritization of landscape level planning as articulated in Order 3330 on Mitigation and the report *A Strategy for Improving the Mitigation Policies and Practices of The Department of the Interior* published in April 2014 by the Department's Task Force on Energy and Climate Change.¹⁵

At the Nevada Clean Energy Summit in August 2013, Secretary Jewell highlighted the DRECP as an example of the innovative, forward thinking landscape level planning being done by the Department. She explicitly underscored the Department's commitment to meeting the President's clean energy goals by employing a landscape-level approach that addresses mitigation and conservation objectives – which is precisely the promise of the DRECP.

In the past ten years significant progress had been made in directing development on public lands to appropriate places, and the DRECP must build on, not undermine, this progress in its final land allocations. The DRECP process is intended to provide more certainty about

¹³ FEIS Frequently Asked Questions, 4 (updated Nov. 2015), *available at* <http://drecp.net/faqs/index.html>

¹⁴ *Id.*

¹⁵ JOEL P. CLEMENT, ET AL., ENERGY AND CLIMATE CHANGE TASK FORCE, A STRATEGY FOR IMPROVING THE MITIGATION POLICIES AND PRACTICES OF THE DEPARTMENT OF THE INTERIOR (Apr. 2014), *available at* http://www.doi.gov/news/upload/Mitigation-Report-to-the-Secretary_FINAL_04_08_14.pdf

which land uses can affirmatively occur in which places. We urge BLM to eliminate this kind of uncertainty from the DRECP.

We recommend BLM reduce the number of acres currently designated as unallocated lands by reexamining which lands deserve conservation designation (including areas we, along with our partners, have already identified in earlier NEPA comments), as well as which low-conflict unallocated lands might be suitable additions to proposed DFAs. Among the unallocated lands deserving conservation designation are the many portions of Important Bird Areas that remain fully or partially unallocated, and therefore unprotected, under the Preferred Alternative. We include a list of these IBAs as an attachment to this letter.

We further recommend BLM lay out a clear statement closing any remaining unallocated lands to renewable development until DFA lands are fully apportioned or the planning agencies determine it is necessary to look to additional lands outside the DFAs and VPLs in order to meet the state's renewable portfolio objectives and can demonstrate that existing projects have been successful in mitigating impacts and restoring lands affected by development.¹⁶ Assessment of the need for additional DFAs on public lands should not be undertaken until Phase II of the DRECP on private lands is completed.

We suggest BLM look to the identification protocol for new or expanded Solar Energy Zones ("SEZs") in the Western Solar Plan's ROD for an example of this type of phased planning and management.¹⁷ The ROD explains that "[t]he BLM will identify new or expanded SEZs in the context of existing solar market conditions, existing and planned transmission systems, and new (or existing) state or Federal policies affecting the level and location of utility scale solar energy development."¹⁸ The ROD then lays out a sequential process for considering whether BLM should identify new or expanded SEZs. The process requires BLM to first assess demand for additional acres in SEZs. In satisfying the first step, BLM must rely on outside expert consultation "regarding electricity demands, markets, and renewable energy policies."¹⁹ Additionally, "the BLM's assessment of demand may require the development of new state-based Reasonably Foreseeable Development Scenarios that incorporate new Federal or state policies affecting projections."²⁰ If BLM determines additional acreage is required for SEZs given relevant policy goals and trends in the market, it will apply more refined screening criteria to find potential SEZs with low natural and cultural resource conflicts.²¹

¹⁶ In either case, BLM would need to amend the DRECP LUPA before opening any of these lands to potential development.

¹⁷ Solar PEIS ROD at 168.

¹⁸ *Id.*

¹⁹ *Id.* at 169.

²⁰ *Id.*

²¹ *Id.* at 168. The four steps in the assessment process are: 1) assess demand for additional acres in SEZs; 2) establish technical and economical suitability criteria; 3) apply environmental, cultural, and other screening criteria to find SEZs with low resource conflicts, including seeking opportunities to locate new or expanded SEZs on degraded, disturbed, or previously disturbed lands; taking into account opportunities to combine other federal and nonfederal lands; reviewing

We recommend BLM develop a similar sequential process for assessing any remaining unallocated lands which are not re-designated under a different category. As a threshold step to inform the context for determining whether more land is necessary for renewable development in the DRECP area, BLM should examine, among other things, market demand, transmission location and availability, and relevant policies informing potential changes in the places and amounts of development needed (including the state's progress in meeting its portfolio goals), as well as existing levels of development and demonstrated mitigation success in existing DFAs and VPLs. If this first assessment reveals the need for additional renewable development, then, and only then, should BLM begin examining the suitability of the lands for proposed development in a manner similar to the Solar ROD's SEZ screening protocol. The first step would indicate the need for a plan amendment which would be the appropriate process for assessing the environmental consequences associated with developing on particular lands.

This approach supports and furthers the principles of guided development by encouraging development first and foremost in DFAs. Only once DFAs have been filled should the BLM open the unallocated lands for potential development under a future plan amendment process.²²

We recommend that BLM take immediate action to provide the public with updated maps, screening criteria, and detailed management information for unallocated lands.

In sum, we suggest:

- BLM first conduct further analysis on the unallocated lands and determine whether they are suitable for re-designation as conservation lands or inclusion in existing DFAs or another land use category.
- BLM close any remaining unallocated lands (lands that cannot be re-designated as conservation lands or DFAs and VPLs) to renewable development. BLM should retain the underlying management prescriptions (i.e., no new or additional restrictions beyond the resource, cultural and related conservation management actions in the DRECP FEIS), but these lands should be closed to renewable energy development through a policy statement accompanying this category of lands.
 - As part of this step, BLM must develop a clear sequential process for assessing these lands in the future and define a set of clear and consistent screening criteria before it considers potentially reopening these lands to renewable development
 - The process should involve an initial threshold assessment that examines a suite of contextual triggers, including market demand for renewable energy,

and considering information gathered through its proposed long-term monitoring and adaptive management program; and 4) analyze proposed SEZs through a planning and NEPA process. *Id.* at 168-76.

²² These recommendations would not require a supplemental EIS because the Preferred Alternative in the DEIS stated that electrical generation facilities were not allowed in Non-Designated/Unclassified lands. *See* DEIS at II.3-426.

existing relevant policies, current levels of renewable development, and demonstrated success of restoration and mitigation in DFAs and other existing renewable projects.

- If this preliminary screen demonstrates the need for additional renewable development, then BLM will proceed with a plan amendment process and perform the required and appropriate environmental assessments for individual sites

2. Management of NCLs should not be undermined in future plan amendments

While BLM has confirmed that addition of areas to the NCLs will not be subject to amendment in future land use planning efforts, the Preferred Alternative also confirms that management prescriptions may be amended.²³ Based on the explicit requirements under the 2009 Omnibus Act, Secretarial Order 3330 and BLM guidance to prioritize protection of values for which NCL units are designated and to ensure proposed actions are limited accordingly, BLM should confirm that amendments related to management of NCLs will not weaken protections.

We request that BLM reiterate that future amendments to management of goals, objectives, conservation and management actions and any other prescriptions applicable to NCLs will only be made in compliance with BLM's obligation to ensure values for which these areas were designated are protected as management priorities, and will maintain or improve, but not weaken, protections for those resources.

3. The FEIS fails to show justification for decreasing mitigation ratios

Though the FEIS makes numerous references to mitigation, including compensatory mitigation, in the context of Conservation Management Actions and the surface disturbance caps applicable to NCLs and ACECs, it fails to specifically address applicable documents and guidance.

In 2012, BLM issued a Draft Memorandum of Understanding ("MOU") between the BLM and the California Department and Fish and Wildlife²⁴ addressing durable mitigation of impacts on BLM lands in the context of the DRECP. However, instead of finalizing this MOU, BLM entered into a statewide Durability Agreement²⁵ that references important tools for achieving durable conservation (such as easements and rights-of-way) for mitigation of impacts.

Despite the general value of the Durability Agreement, the Agreement does not explicitly address the DRECP, and the LUPA does not refer to the Durability Agreement. In order to ensure that

²³ See, e.g., FEIS at II.3-275 to -276.

²⁴ Memorandum of Understanding Between the Department of the Interior and the State of California on Renewable Energy (Jan. 13, 2012).

²⁵ Durability Agreement Between Bureau of Land Management and California Department of Fish and Wildlife (October 2, 2015).

durable mitigation can occur on BLM lands in the DRECP, the LUPA must explicitly reference the Durability Agreement and the intention of BLM to make use of these conservation tools as appropriate to achieve mitigation in DRECP. BLM must provide the Agreement as an appendix to the LUPA, including any specific guidance developed for applying the Durability Agreement to the DRECP. BLM should also commit to notifying the public and providing an opportunity for comment on decisions under the Durability Agreement to use conservation tools and to consider permitting activities in mitigation areas that could undermine conservation under the DRECP.

In addition, new, specific guidance is available to BLM concerning the incorporation of mitigation in planning and management of public lands. The Department of Interior recently released guidance to the BLM through its Landscape Scale Mitigation Policy (600 DM 6).²⁶ This policy and guidance outlines responsibilities for the BLM in fulfilling the goals of Secretarial Order 3330. The policy also demonstrates the Department’s recognition of land use plans as an appropriate place for identifying, evaluating, and communicating mitigation in advance of anticipated land use activities. Additionally, the policy directs BLM to develop a mitigation manual. BLM is currently implementing a draft mitigation manual (MS-1794²⁷), which BLM must use as interim policy while the final guidance is developed.

The Department’s Landscape Mitigation Policy reaffirms BLM’s authority to implement mitigation requirements on public lands. The policy also takes a major step in committing federal agencies to a “no net loss” outcome for “resources and their values, services, and functions that are considered by the Department as important, scarce, sensitive, or otherwise suitable to achieve established goals.”²⁸ This no net loss standard for federal agencies has important implications for the management of federal lands, water, air quality, and other resources and infrastructure under the Department’s authority. It transforms mitigation from a project-level, regulatory tool to an essential part of broader agency management strategies. BLM should incorporate all components of the Department’s Landscape Mitigation Policy into the Preferred Alternative. We encourage BLM to pay particular attention to the following two elements of the Department’s policy:

(1) Landscape-level planning: The Department directs BLM to consider mitigation through a landscape-scale approach. A landscape encompasses a mosaic of both ecosystems and human systems that are characterized by a set of common management concerns.²⁹ BLM should identify the “needs and baseline conditions of targeted resources and values, services and functions, reasonably foreseeable impacts, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends.”³⁰ Data collection and analysis should inform decisions on

²⁶ Dep’t of Interior, Landscape Scale Mitigation Policy (600 DM 6), *available at* <https://www.doi.gov/sites/doi.gov/files/uploads/TRS%20and%20Chapter%20FINAL.pdf>

²⁷ BLM, Draft MS 1794 - Regional Mitigation, *available at*

http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2013.Par.57631.File.dat/IM2013-142_att1.pdf

²⁸ 600 DM at 6.5.

²⁹ 600 DM at 6.5.

³⁰ 600 DM at 6.4 E

proposed land use allocations and identify impacts associated with such allocations. BLM should determine critical conservation resources and prioritize strategies and places that provide the maximum benefit to resources throughout the DRECP planning area. Accomplishing a standard of no net loss of important resources and values requires sufficient information gathering and impact analysis at a landscape-level.

(2) The entirety of the mitigation hierarchy: An advanced approach to mitigation planning is grounded in the mitigation hierarchy. When developing land use strategies and plans, BLM is directed to first *avoid* impacts through project design and location. We reiterate that this is the best way to prevent impacts, particularly for irreplaceable resources, and should be the highest priority for the agency. Next, best practices for the development and operations should *minimize* unavoidable impacts to a full range of values including wildland and wildlife habitat. Only after avoidance and minimization, should BLM consider compensation alternatives for addressing undividable impacts.

Utilizing the landscape-scale approach and the entirety of the mitigation hierarchy are essential for achieving a no net loss outcome in the DRECP. BLM should clearly outline its strategy for mitigating impacts in the Preferred Alternative and ensure that the current Conservation Management Actions and management of surface disturbance caps are consistent with current Department policy.

It is within the context of this broader mitigation policy that we have concerns related to the management strategies currently suggested under the DRECP for the West Mojave region. Despite the Preferred Alternative's expansion of NCL designations since the DEIS, many significant areas, including large portions of the West Mojave, remain unprotected.

With conservation areas and critical habitat units extending across much of its area, the West Mojave is an important region for the conservation of sensitive species, including the federally threatened desert tortoise and the state-listed Mojave ground squirrel ("MGS"). MGS, in fact, exist nowhere else. MGS and desert tortoise habitat continues to be lost and fragmented throughout the Mojave as a result of development, grazing, mining, and other human activity.

In an effort to protect these species, BLM has designated various conservation lands for desert tortoise and MGS that include conservation management requirements limiting disturbance and mitigation ratios intended to safeguard and support these species' long-term survival. For instance, BLM designated Desert Wildlife Management Areas ("DWMA") and ACECs for the desert tortoise in various plan amendments to the California Desert Conservation Area ("CDCA") Plan. Within these protected areas, BLM adopted one-percent disturbance caps and compensatory mitigation ratios of 5:1 for habitat loss up to the disturbance limit. Similarly, BLM established the MGS Conservation Area in 2006 and included a one-percent habitat loss cap and a compensatory

mitigation ratio of 5:1 for habitat loss within that cap.³¹ BLM also acknowledged the importance of protecting MGS habitat when it established MGS habitat as one of the categories of land excluded from solar energy development under the Western Solar Plan.³²

Unfortunately, the DRECP's Preferred Alternative undermines the recovery of both desert tortoise and MGS in the West Mojave. The Preferred Alternative permits greater impacts to the species through habitat loss and reductions to compensatory mitigation ratios compared to current management strategies for this region. In desert tortoise habitat, 5:1 compensatory mitigation ratios would be required for impacts in designated critical habitat but no longer in DWMA's or ACECs. More than 200,000 acres of DWMA/ACEC habitat, however, is located outside the boundaries of the desert tortoise critical habitat units, and these additional lands would only require 1:1 mitigation ratios under the Preferred Alternative. Though these DWMA/ACECs lands do not have critical habitat designations, they still represent important desert tortoise habitat. The vast majority of the DWMA/ACEC acreage located outside critical habitat units is either within Desert Tortoise Connectivity Habitat (Priority 1 Habitat) as identified by the U.S. Fish and Wildlife Service ("USFWS") or within Desert Tortoise High Value Habitat (Priority 2 Habitat) as identified by the USFWS. The DRECP should preserve the 5:1 mitigation ratio for these high value habitat areas instead of the much lower 1:1 mitigation ratio it now suggests.

Similarly, in addition to the direct loss of habitat from development, the Preferred Alternative diminishes management protections for MGS. It reduces compensatory mitigation from the 5:1 ratio currently in effect throughout the MGS Conservation Area, as codified in the ROD for BLM's West Mojave Plan amendments to the CDCA Plan,³³ to 2:1 in "key population centers" and 1:1 in MGS Conservation Area everywhere else outside key population centers and desert tortoise critical habitat units. Though the 5:1 compensatory mitigation requirement for impacts to desert tortoise critical habitat covers a portion of MGS habitat, the Preferred Alternative leaves large areas of important MGS habitat with the minimal protection of only 1:1 or 2:1 compensatory mitigation requirements.

Thus, the DRECP Preferred Alternative undermines existing conservation management for desert tortoise and MGS by allowing for direct habitat loss and reduced compensatory mitigation. The DRECP must not contribute to additional habitat loss, including loss of habitat linkages and high priority habitat, for either species. This loss of protection is inconsistent with BLM's obligations under FLPMA and other relevant policies and regulations.

³¹ Part of USFWS's 2011 finding that listing of MGS under the federal Endangered Species Act was not warranted at the time relied on BLM's establishment of a MGS WHMA with a one percent habitat loss limit and a compensatory mitigation requirement of 5:1.

³² Solar PEIS ROD at 38.

³³ See BLM, RECORD OF DECISION WEST MOJAVE PLAN AMENDMENT TO THE CALIFORNIA DESERT CONSERVATION AREA PLAN, 15 (Mar. 2006), available at http://www.blm.gov/pgdata/etc/medialib//blm/ca/pdf/pdfs/cdd_pdfs/wemo_pdfs.Par.4dfb777f.File.pdf/wemo_rod_3-06.pdf

We recommend BLM retain 5:1 compensatory mitigation ratios for all activities that will result in habitat loss in critical habitat units, DWMAs, species conservation areas, ACECs, and in priority habitat linkages and other conservation areas important to these species.³⁴ We thus urge BLM to adjust LUPA-BIO-COMP-1 to require 5:1 compensatory mitigation to all public lands within the DWMA/ACECs throughout the CDCA and to require 5:1 compensatory mitigation for all MGS Important Areas (key areas, linkage, climate change expansion, and expansion areas) (See DEIS, Appendix C-39 for the MGS Important Areas map). We also recommend that BLM strengthen the Conservation Management Actions for MGS and desert tortoise to contain specific actions to ensure that habitat linkages remain functional.

B. The FEIS Is Inconsistent with the Western Solar Plan

1. Riverside East DFA/SEZ

A key element of the DRECP's success is the creation of appropriately sited DFAs that minimize conflicts and offer meaningful incentives for developers, and we support BLM's identification of proposed DFAs as priority areas for renewable development. The DRECP offers BLM the opportunity to build on and refine the Western Solar Plan and establish a process to further limit conflict and impacts from development in DFAs.

The DFAs in the Preferred Alternative include some low-conflict areas where projects are likely to succeed, but they also include some high-conflict areas that are inappropriate for development and where projects are unlikely to succeed. We believe BLM needs to further refine the Riverside East DFA, in particular, to ensure it meets the guided development purpose of the DRECP and satisfies the requirements laid out in the Western Solar Plan for the Riverside East SEZ. As currently proposed, the Riverside East DFA is inconsistent with the Western Solar Plan.

We appreciate the modifications BLM made to the Riverside East DFA since the DEIS, but because the Riverside East SEZ/DFA is surrounded by six Areas of Critical Environmental Concern and contains several Wildlife Habitat Management Areas, limiting conflict and impacts in this DFA is especially important and we remain concerned that certain areas are still insufficiently protected. In particular, we recommend that BLM create a larger ACEC around the Upper McCoy Wash, an area that contains extensive microphyll woodland habitat and important desert tortoise populations. This area needs the site-specific protection that the ACEC designation will provide.

The Western Solar Plan also required that BLM, in coordination with the USFWS and the California Department of Fish and Wildlife, identify two north-south wildlife corridors of sufficient width (a minimum of 1.3 miles; wider corridors could be necessary depending on the results of future site-specific studies).³⁵ The FEIS indicates that the proposed Riverside East DFA contains only one multispecies habitat linkage that does not appear to meet the requirements of even one of the north-

³⁴ See FEIS, No Action Alternative.

³⁵ Solar PEIS at 132.

south corridors described by the Western Solar Plan. BLM should remove inappropriate areas from the Riverside East DFA, including the McCoy Wash, and work to resolve any other inconsistencies.

2. *BLM should eliminate additional conflicts from DFAs to prevent unnecessary or undue degradation of public lands*

We focused our review on DFAs that include contiguous blocks of public lands within or adjacent to DFAs in the Proposed LUPA Preferred Alternative. DFAs identified in other alternatives should not be included in the ROD. The DFAs in the Preferred Alternative include some low-conflict areas where projects are likely to succeed, but they still include some high-conflict areas that are inappropriate for development and where projects are unlikely to succeed.

Eliminating high-conflict areas from DFAs would meet BLM's obligations under FLPMA to: “. . . take any action necessary to prevent unnecessary or undue degradation of the lands.”³⁶ BLM acknowledges that only a small percentage of the total DFA acreage is likely to be developed, giving the agency great flexibility to further refine the DFAs to limit conflicts and impacts. *See, e.g.*, Table IV.7.21 projecting 81,000 acres of permanent impact from development in 388,000 acres of DFAs in the Preferred Alternative, Proposed LUPA, p. IV.27-3. Accordingly, BLM can refine DFAs to avoid unnecessary or undue damage to lands with wilderness characteristics and important habitat and still achieve its goals for renewable energy development.

In the context of selecting the best DFAs for the DRECP, BLM must avoid unnecessary or undue degradation of other resources; and this approach is also most consistent with agency policy to identify DFAs with the lowest impacts and potential conflicts. Consequently, we urge the BLM to eliminate the specific locations and categories of land outlined below; these areas should be closed to development, and where appropriate, made BLM Conservation Designations. If that is not possible, the areas should be identified as potential mitigation lands for projects developed within the DFA, applying the mitigation hierarchy and seeking to achieve avoidance first and foremost.

DFAs in the Preferred Alternative that should be refined to reduce conflicts and support development

- **Daggett Triangle:** We recommended that the federal lands adjacent to the eastern portion of Daggett Triangle, sometimes referred to as East Pisgah, should be closed to application and designated as National Conservation Lands. This area is important not only as a key desert tortoise linkage but also for other species.
- **North of Kramer Junction/395.** We recommend that the BLM adopt Alternative 4, which would allow development in the southern portion of this area and preserve essential connectivity in the northern portion.

³⁶ 43 U.S.C. §1732(b).

C. BLM Has Failed to Commit to a Timeline or Clear Process Regarding Proposed Mineral Withdrawals

1. *BLM should lay out a clear timeframe for fulfilling its obligations under FLPMA and the DRECP by withdrawing NCL lands and lands in proposed DFAs*

In the DRECP, the planning agencies explain that “[t]o achieve the purposes of FLPMA[, the CDCA,] and the 2009 Omnibus, and consistent with FLPMA’s multiple use and sustained yield mandate, the BLM will consider for mineral withdrawal any National Conservation Lands it identifies in connection with the DRECP decision.”³⁷ BLM “will also consider the withdrawal of any lands designated as DFAs on a case-by-case basis.”³⁸

FLPMA authorizes the Secretary of the Interior to make, modify, revoke and extend withdrawals, subject to valid existing rights, to remove lands from the operation of the public land laws, including the Mining Law of 1872.³⁹ A withdrawal generally segregates the lands from some or all of the public land laws and some or all of the mining and mineral leasing laws for a specific period of time, typically 20 years (though this term may be extended).

To initiate the process, the Secretary publishes a notice of proposed withdrawal. The lands identified in the notice would then be segregated from mineral development (subject to existing rights) for up to two years. This segregation period is used to study the proposed lands and conduct environmental analyses in compliance with NEPA and other regulations to determine if the lands should be withdrawn from location and entry of new mining claims. This process will invite participation by the public, tribes, environmental groups, industry, state and local government, as well as other stakeholders. BLM has the authority to make withdrawal recommendations to the Secretary, and the withdrawal process will be undertaken under the leadership of BLM.

Mining withdrawals are important tools that can be used to ensure the durability of land use plans and the integrity of conservation lands. Mineral entry is not compatible with the purposes of NCLs or DFAs. Therefore, we support BLM’s proposed phased approach to processing mineral withdrawals within NCLs and DFAs under the DRECP, and we encourage BLM to ensure that all such lands are eventually covered under a withdrawal order. In order to provide long-term protection for NCLs and ensure DFAs remain suitable as priority renewable energy development areas, BLM should provide a timeline for issuing notices of segregation and completion of analyses for both phases of mineral withdrawal.

We recommend that BLM immediately develop a priority list of NCL lands for the Secretary of the Interior for withdrawal under Phase 1. The criteria for identifying areas under Phase 1 should

³⁷ FEIS at App Z., Z.2.

³⁸ *Id.* at Z.3.

³⁹ 43 U.S.C. 1714.

include examination of the conservation importance of each area, as well as the vulnerability of each area to new claims given the land's mining history and mineral potential. The most threatened and sensitive areas should be prioritized for the first phase of withdrawal notices. Areas of Critical Environmental Concern and other special management areas should also be prioritized for Phase 1.

We recommend that the notice of segregation for lands prioritized for Phase 1 be released concurrently with the DRECP ROD, or at least no later than 90 days after the release of the ROD. In addition, the ROD should address the BLM's commitment to complete withdrawal evaluations (for both phases) within the two-year segregation timeline. We also recommend that BLM commit to a reasonable timeline for withdrawal recommendations under Phase 2 and issue the Phase 2 notice of segregation no later than two years after the release of the ROD. The BLM must also ensure that withdrawal proposals are regularly tracked and are updated and extended as required so that a segregation period does not expire while BLM is evaluating an area for withdrawal.

D. BLM Should Incorporate Sections of the Programmatic Eagle Conservation Strategy into Phase I of the Final DRECP

In coordination with several partner organizations, NRDC and the National Audubon Society have been deeply engaged in eagle conservation efforts and particularly as related to renewable energy development. Numerous recommendations are detailed in our comments on the draft DRECP, as well as in previous comments on eagle conservation concerns, and we incorporate those issues by reference here.⁴⁰ We appreciate the significant effort undertaken thus far to address eagle conservation efforts in the DRECP and acknowledge the complex legal, biological and policy-oriented issues that must be addressed to ensure the preservation of golden eagle populations in the California desert.

We disagree with BLM's assessment that the issues outlined and described by the programmatic eagle conservation strategy in the Draft DRECP are not applicable to Phase I of the DRECP, focusing on BLM managed lands.⁴¹ The significant effort and consideration undertaken for the development of programmatic strategy is critical for providing a path forward regarding eagle conservation concerns and rather than deleting this strategy in Phase 1, we urge BLM to consider incorporation of relevant sections—explicitly those that relate to a landscape-level conservation strategy that would otherwise be lost on a project-by-project approach—as well as to firmly commit to working closely with FWS and CDFWG on those remaining issues through the next phases of the DRECP.

⁴⁰ Audubon, et al., Joint Comments on the Draft Eagle Conservation Plan Guidance (May 19, 2011); Audubon, et al., Joint Comments on Advance Notice of Proposed Rulemaking, Docket No. FWS-R9-MB-2011-0094 (July 12, 2012); National Audubon Society, Natural Resources Defense Council and Sierra Club, Joint Comments on Eagle Management and Permitting, Docket No. FWS-R9-MB-2011-0094 (September 22, 2014); Defenders of Wildlife, et al., Joint Recommendations on Wind Energy Development in DRECP (August 24, 2012); Audubon California, et al., Joint Comments on the eagle permit application for the Shiloh IV Wind Project (November 29, 2013).

⁴¹ DRECP, Appendix H.2.11.

One of the best strategies for conserving eagles will be to incentivize the siting of development projects and other impacts away from areas where they have the highest risks for eagles and towards areas with the least potential for impacts, *before* any such impacts occur. The draft DRECP stated that “[i]n the event that multiple applications are submitted that collectively would exceed the amount of available take...[p]rojects that have a low risk of eagle take and a high generation capacity will be given the highest priority.”⁴² This is an extremely important concept that should be applied and reinserted into the final DRECP.

Because it is a landscape-level approach, the DRECP provides a unique opportunity to:

- Incentivize upfront avoidance measures and development of low risk projects;
- Address disturbance and loss of foraging habitat, across all sources of impacts to help guide mitigation requirements and the approach to allocate take;
- Examine, prioritize and dictate mitigation actions beyond a project-specific level; and
- Institute an overarching conservation strategy, research framework and population-wide monitoring plan for eagles.

We urge BLM, in coordination with the cooperating agencies, to capitalize on the work that has already been done and reinsert the sections of the eagle strategy that address these important issues. The DRECP represents a significant opportunity to put in place a comprehensive, conservation-driven and fully transparent conservation strategy for golden eagles that will be a model for other areas, inform the ongoing USFWS’ eagle permitting revisions, and demonstrate a path forward for ensuring preservation of the species while allowing environmentally responsible development to proceed. Ensuring that the DRECP includes a comprehensive eagle conservation strategy is the only way to ensure compliance with requirements under the Bald and Golden Eagle Protection Act.

IV. Conclusion

California’s public lands are already being used to generate clean, renewable energy and will continue to do so in the coming decades. Following a guided, landscape-level development model that protects wild lands and wildlife habitat from development and incentivizes project siting in low-conflict areas is critical to balancing clean energy and conservation. We appreciate that the FEIS and LUPA make significant progress in this effort by concentrating development on lands where environmental impacts are less severe, where transmission access can be more easily provided, and where projects can proceed more efficiently, and by protecting important conservation and sensitive areas with several types of conservation designations.

To reach the full potential of the DRECP’s promise, we recommend BLM make the refinements to the FEIS discussed above before finalizing a Record of Decision. Finally, as a stakeholder to the DRECP, we intend the comments in this letter to assist in strengthening the credibility of the

⁴² Draft DRECP at H-28.

DRECP as a plan to guide appropriately sited development and meaningful and lasting conservation. We request a meeting with BLM to address the concerns laid out in this protest. We have worked to resolve protests in California in the past, and we would like the opportunity to do so again here.

Sincerely,

A handwritten signature in black ink, appearing to read "Helen O'Shea". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Helen O'Shea
Director, Western Renewable Energy Project
Natural Resources Defense Council

A handwritten signature in black ink, appearing to read "Garry George". The signature is cursive and includes a long horizontal line extending to the right.

Garry George
Chapter Network Director/Renewable Energy Director
Audubon California