

Appendix F.<sup>1</sup> OIG is not seeking additional public comment on the proposals listed in Appendix F at this time. Rather, this notice seeks additional recommendations regarding the development of new or modified safe harbor regulations and new Special Fraud Alerts beyond those summarized in Appendix F.

A detailed explanation of justifications for, or empirical data supporting, a suggestion for a safe harbor or Special Fraud Alert would be helpful and should, if possible, be included in any response to this solicitation.

#### A. Criteria for Modifying and Establishing Safe Harbor Provisions

In accordance with section 205 of HIPAA, we will consider a number of factors in reviewing proposals for new or modified safe harbor provisions, such as the extent to which the proposals would affect an increase or decrease in:

- Access to health care services,
- The quality of health care services,
- Patient freedom of choice among health care providers,
- Competition among health care providers,
- The cost to Federal health care programs,
- The potential overutilization of health care services, and
- The ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

In addition, we will also take into consideration other factors, including, for example, the existence (or nonexistence) of any potential financial benefit to health care professionals or providers that may take into account their decisions whether to (1) order a health care item or service or (2) arrange for a referral of health care items or services to a particular practitioner or provider.

#### B. Criteria for Developing Special Fraud Alerts

In determining whether to issue additional Special Fraud Alerts, we will consider whether, and to what extent, the practices that would be identified in a new Special Fraud Alert may result in any of the consequences set forth above, as well as the volume and frequency of the conduct that would be identified in the Special Fraud Alert.

Dated: December 22, 2011.

**Daniel R. Levinson,**

*Inspector General.*

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## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

#### 43 CFR Part 2800

[WO-300-1430-PQ]

RIN 1004-AE24

#### Advance Notice of Proposed Rulemaking Regarding a Competitive Process for Leasing Public Lands for Solar and Wind Energy Development

**AGENCY:** Bureau of Land Management.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Bureau of Land Management (BLM) is issuing this Advance Notice of Proposed Rulemaking (ANPR) to solicit public comments and suggestions that will be used in preparing a proposed rule to establish a competitive process for leasing public lands for solar and wind energy development.

**DATES:** The BLM will accept comments and suggestions on the ANPR until February 27, 2012.

**ADDRESSES:** You may submit comments by any of the following methods:

*Mail:* Director (630) Bureau of Land Management, U.S. Department of the Interior, Room 2134LM, 1849 C St. NW., Washington, DC 20240, Attention: 1004-AE24.

*Personal or messenger delivery:* U.S. Department of the Interior, Bureau of Land Management, 20 M Street SE., Room 2134LM, Attention: Regulatory Affairs, Washington, DC 20003.

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions at this Web site.

**FOR FURTHER INFORMATION CONTACT:** Ray Brady at (202) 912-7312 or Linda Resseguie at (202) 912-7337 regarding the substance of this ANPR. For information on procedural matters or the rulemaking process generally, you may contact Joseph Berry at (202) 912-7442. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-(800) 877-8339, 24 hours a day, seven days a week to contact the above individuals.

**SUPPLEMENTARY INFORMATION:** In order to foster the growth and development of the renewable energy sector of the

economy and to administer the public lands in a more orderly manner, the BLM believes that a rulemaking is needed to enhance the Agency's ability to establish an efficient competitive process for issuing Right-of-Way (ROW) leases for solar and wind energy development that is based upon the Agency's authority under the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1701 *et seq.*).

The BLM believes that a competitive process would enhance its ability to capture fair market value for the use of public lands, as required under Section 504(g) of FLPMA (43 U.S.C. 1764(g)), and ensure fair access to leasing opportunities for renewable energy development. This rulemaking would establish competitive bidding procedures for lands within designated solar and wind energy development leasing areas, define qualifications for potential bidders, and structure the financial arrangements necessary for the process.

The purpose of this ANPR is to solicit public comments that will be helpful to the BLM in preparing a subsequent proposed rule, as well as to gather the input that is needed to develop an efficient competitive process for ROW leasing. The scope of the proposed rule will include existing BLM wind and solar policies and guidelines, and terms and conditions of lease authorizations as well as the competitive process.

To help the BLM prepare the proposed rule, the Agency is seeking public comments and suggestions on the scope of the competitive process. See section III of this ANPR for a list of specific questions relating to this topic.

#### I. Public Comment Procedures

##### Commenting on the ANPR

Written comments and suggestions should:

- Be specific;
- Explain the reasoning behind your comments and suggestions; and
- Address the issues outlined in the ANPR.

For comments and suggestions to be the most useful, and most likely to inform decisions on the content of the proposed rule, they should:

- Be substantive; and
- Facilitate the development and implementation of an environmentally and fiscally responsible process for leasing public lands for solar and wind energy development.

The BLM is particularly interested in receiving comments and suggestions in response to the questions listed in

<sup>1</sup> The OIG *Semiannual Report to Congress* can be accessed through the OIG Web site at <http://oig.hhs.gov/publications/semiannual.asp>.

section III of this ANPR. These specific questions will focus the feedback on matters most in need of public input for the development of the regulations. This public input will assist the BLM in creating a fair and workable competitive process. All communications on these topics should refer to RIN 1004–AE24 and may be submitted by the methods listed under the **ADDRESSES** section of this ANPR.

Comments received after the close of the comment period (see **DATES** section of this ANPR) may not necessarily be considered or included in the Administrative Record for the proposed rule. Likewise, comments delivered to an address other than those listed under the **ADDRESSES** section of this ANPR may not necessarily be considered or included in the Administrative Record for the proposed rule.

#### *Reviewing Comments Submitted by Others*

Comments, including names and street addresses of respondents, will be available for public review at the personal or messenger delivery address listed under **ADDRESSES**, during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays. Individual respondents may request confidentiality, which will be honored to the extent allowable by law. Those wishing to withhold their name or address (except for the city or town) must state this request prominently at the beginning of their comment, and state a reason for the request. Submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

## **II. Background**

Congress has directed the Department of the Interior (Department) to facilitate the development of renewable energy resources. In Section 211 of the Energy Policy Act of 2005 (EPA), Congress declared that before 2015, the Secretary of the Interior (Secretary) should seek to have approved non-hydropower renewable energy projects (solar, wind, and geothermal) on public lands with a total combined generation capacity of at least 10,000 megawatts of electricity.

Since passage of the EPA, the Secretary has issued several orders that emphasize the importance of renewable energy development on public lands and the Department's efforts to achieve the goal Congress established in Section 211 of the EPA. The most recent Secretarial Order 3285A1, "Renewable

Energy Development by the Department of the Interior," was issued in February 2010 by Secretary Ken Salazar. The Order established the development of renewable energy on public lands as one of the Department's highest priorities.

The FLPMA provides comprehensive authority and guidelines for the administration and protection of the public lands and their resources, and directs that the public lands be managed "on the basis of multiple use and sustained yield" (43 U.S.C. 1701(a)(7)). One of the principal or major uses defined by FLPMA includes the issuance of ROWs on public lands. The FLPMA also mandates that "the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute" (43 U.S.C. 1701(a)(9)).

#### *Competitive Right-of-Way Procedures*

Title V of FLPMA authorizes the BLM to issue ROWs for electric generation systems on the public lands (including solar and wind energy generation systems). Title V includes the authority to issue a ROW easement, lease, permit, or license as defined by Section 103(f) of FLPMA.

In June 2005, the BLM completed the Final Programmatic Environmental Impact Statement (PEIS) on Wind Energy Development relating to the authorization of wind energy projects on public lands. This Final PEIS provided an analysis of the environmental impact of the development of wind energy projects on public lands in the West and identified approximately 20.6 million acres of BLM public lands with wind energy development potential. However, the Final PEIS did not identify wind energy development leasing areas.

On December 17, 2010, the Department of the Interior and the Department of Energy as co-lead agencies published the Draft PEIS for Solar Energy Development in Six Southwestern States. The Draft Solar PEIS assessed the environmental, social, and economic impacts associated with solar energy development on public lands in Arizona, California, Colorado, Nevada, New Mexico, and Utah (<http://solareis.anl.gov>). Under the Preferred Alternative identified in the Draft Solar PEIS, the BLM would establish Solar Energy Zones (SEZs), which are areas that have been identified as the most appropriate for development because they contain the highest solar energy potential and fewest environmental and resource conflicts. The BLM included in the Draft Solar PEIS an option to offer lands within SEZs on a competitive basis. This option is further discussed in the

Supplement to the Draft Solar PEIS published on October 28, 2011 (<http://solareis.anl.gov>). The designation of any SEZs for solar development would be made final upon the approval of a Record of Decision, following completion of a final EIS. Additional solar energy development leasing areas could also be identified and designated in the future through other BLM land use planning efforts.

The FLPMA does not limit the term of a solar or wind energy ROW lease. In accordance with Title V of FLPMA and the BLM's existing ROW regulations, a solar or wind energy ROW authorization is limited to a "reasonable term" (43 U.S.C. 1764(b) and 43 CFR 2805.11(b)). The regulations further articulate a number of factors that the BLM considers in determining a reasonable term, including the overall costs and useful life of the project. Most major ROW authorizations also include provisions for renewal of the authorization consistent with the provisions of the existing regulations (43 CFR 2805.15(d) and 2807.22). The BLM has established policies related to terms for current solar and wind energy authorizations, but it believes a rule would help further clarify the term of solar and wind energy leasing.

Due to the substantial investments required for typical solar or wind energy projects and the projected life of these facilities (generally in excess of 20 years), it is in the public interest to provide for a term for solar or wind energy ROW leases that would allow a reasonable period of time for construction, development, and continued operations of sufficient duration to make projects economically feasible. In addition, many Power Purchase Agreements (PPAs) for the purchase of electricity generated from solar or wind energy facilities are for terms of 20 years or longer. The BLM currently issues all solar energy ROW authorizations for a term not to exceed 30 years. A wind energy development authorization is generally for a term of 25–30 years.

The existing ROW regulations (43 CFR 2804.23) provide authority for conducting a competitive process but only to resolve competing applications for the same facility or system. For public lands outside of designated solar or wind energy development leasing areas, the BLM expects to continue to use this existing regulatory authority.

The BLM believes a rulemaking would help to establish a more comprehensive and efficient competitive process for public lands with designated solar and wind energy development leasing areas. This

rulemaking would provide the authority to offer lands through a nomination and competitive process instead of simply through an application process. The new regulations could include the following provisions for leasing within designated solar or wind energy development leasing areas.

- *Call for Nominations.* A call for nominations would be published to solicit expressions of interest for parcels of land within designated solar or wind energy development leasing areas. Nomination of a specific parcel would require payment of a nomination fee to be determined by the regulations. (Section 304 of FLPMA provides authority to the BLM to establish reasonable filing fees.)

- *Review of Nominations.* The BLM would review the nominations to identify parcels of land within designated solar or wind energy development leasing areas that are suitable to be offered competitively and then complete the work necessary, including the National Environmental Policy Act (NEPA) and other required reviews, to prepare the selected parcels for the competitive offer. At this lease stage, the NEPA analysis for parcels would likely tier to the Final Solar PEIS, once it is published, and the BLM's 2005 Wind Energy Development PEIS. Because the 2005 Wind Energy Development PEIS and associated Record of Decision did not identify wind energy development leasing areas, the BLM would designate these areas before considering nominations for a competitive wind energy ROW leasing process.

- *Notice of Competitive Offer.* A notice would be published at least 30 days prior to the competitive offer. The notice would include a legal description of the lands involved, the process for conducting the competitive offer, a minimum bid requirement, the qualifications for potential bidders, and the due diligence requirements for the successful bidder to submit a Plan of Development (POD) for the lands involved in the competitive offer. The POD defines the specific development plans of the lease holder.

- *Bonus Bid Competitive Process or Other Competitive Procedures.* A variety of competitive bid procedures could be defined by the new regulations. These competitive procedures could include sealed bids, oral auctions or ascending bidding, two-stage (combination of sealed and oral auctions) bidding, or multiple-factor bidding methods.

Multiple-factor bidding could include monetary or nonmonetary factors and could be structured similarly to the method that the Bureau of Ocean Energy Management provides for offshore wind leasing (30 CFR 285.220). Multiple-factor variables for competitive wind and solar could include, but are not limited to, qualified bidder or other fees, variable cash bonuses, technical merit of the applicant, timeliness, financing and economics, environmental impact, and public benefits. Bonus bids would be deposited into the U.S. Treasury. The bonus bid from the successful bidder would be nonrefundable. All other bids would be returned. The new regulations could define a fee structure and determine whether particular fees might be deposited into the Treasury or be used to reimburse the BLM for administrative and other costs.

- *Issuance of Competitive ROW Leases.* A ROW lease would be issued to the successful bidder. The successful bidder would be required to submit a POD within the timeframes specified in the Notice of Competitive Offer and to pay cost recovery fees for review and approval of the POD. The review and approval process for the POD would require compliance with the NEPA and other Federal laws and regulations.

- *Administration of Competitive ROW Leases.* To reduce uncertainty about future changes in the terms and conditions of the lease, the competitive ROW lease could be a 30-year fixed-term lease, with specific terms and conditions, and be available for renewal.

In order to facilitate the efficient development of solar and wind energy within designated energy development leasing areas, the BLM would include a requirement in each ROW lease that the holder submit a POD within a specified period of time and begin construction within the approved timeframes. Each ROW lease would also include terms and conditions requiring the holder to maintain all facilities in accordance with the design standards in the approved POD. There are no specific provisions in the existing regulations regarding such diligent development requirements and the BLM believes a rule would help further define the due diligence development requirements for competitive solar and wind energy leases.

The BLM also would require that a minimum performance bond be provided for all competitive solar and wind energy ROW leases to ensure compliance with the provisions of the

regulations and the terms and conditions of the lease. The BLM believes a rule would be appropriate for defining the performance bonding requirements for competitive solar and wind energy leases.

### III. Description of the Information Requested

The BLM is particularly interested in receiving comments on the following questions relating to regulations for a competitive process for solar and wind energy development on the public lands:

1. How should a competitive process be structured for leasing lands within designated solar or wind energy development leasing areas?
2. Should a competitive leasing process be implemented for public lands outside of designated solar or wind energy development leasing areas? If so, how should such a competitive leasing process be structured?
3. What competitive bidding procedures should the BLM adopt?
4. What is the appropriate term for a competitive solar energy ROW lease?
5. What is the appropriate term for a competitive wind energy ROW lease?
6. Should nomination fees be established for the competitive process? If so, how should the fees be determined?
7. How should the bidding process for competitive solar and wind energy ROW leases be structured to ensure receipt of fair market value?
8. Should a standard performance bond be required for competitive solar and wind energy ROW leases and how should the bond amount be determined?
9. What diligent development requirements should be included in competitive solar and wind energy ROW leases?

The BLM is also interested in receiving any other comments regarding the content and structure of the competitive process for solar and wind energy development. Because this discussion is specifically focused on the development of the competitive process, comments are not being requested regarding solar or wind energy environmental issues.

**Marcilynn A. Burke,**

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Land and Minerals Management.*

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