

The Desert Renewable Energy Conservation Plan: An Impossible Task?

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I. INTRODUCTION

First proposed in 2008, the Desert Renewable Energy Conservation Plan (DRECP or Plan)¹ is an ambitious effort to designate appropriate locations for the development of solar, wind, and geothermal energy within the Mojave Desert and Colorado/Sonoran Desert regions in California. Over the last seven years, however, the Plan's likelihood of success has declined dramatically and there are signs the DRECP, like other recent large-scale plans, may be collapsing under its own weight. Controversy has been so heated that the state and federal agencies preparing the Plan decided this past Spring to segregate the Plan's three fundamental components and utilize a "phased approach," with the Bureau of Land Management's (BLM) land use planning amendments prioritized first.²

In theory, the Plan is extremely popular. A recent opinion poll found that while only one in four surveyed knew about the Plan, 67 percent of those familiar with the DRECP supported it.³ Of those who had never heard of the Plan, 74 percent supported it after hearing its goals.⁴ A review of the 12,000 comments submitted on the draft Plan tells a much different story. Indeed, the Plan has been the subject of widespread criticism from renewable energy developers, environmental groups, local communities, and every county located within the Plan area. Perhaps the most common criticisms are that the Plan is overly complex and confusing, and that it fails to articulate how permit streamlining will ultimately be achieved.

The Plan, which has a 25-year term, would cover over 22.5 million acres within seven different counties: Imperial, Inyo, Kern, Los Angeles, Riverside, San Bernardino, and San

Diego.⁵ The four agencies preparing the DRECP include BLM, the California Energy Commission (CEC), the California Department of Fish and Wildlife (CDFW), and the U.S. Fish and Wildlife Service (the "Service"). These agencies form the Renewable Energy Action Team (REAT).

The Plan includes extremely lofty goals, including:

- Based on a planning goal of 20,000 megawatt (MW) by 2040, "identify the most appropriate locations within the Plan Area for the development of utility-scale renewable energy projects, taking into account potential impacts to threatened and endangered species and sensitive natural communities."⁶
- Provide a framework for a permitting process through which "proposed renewable energy projects within the Plan Area may obtain regulatory authorizations" in a "more efficient and coordinated" manner that "results in greater conservation, than a project-by-project, species-by-species review."⁷
- "Locate renewable energy development" (1) "on lands with suitable renewable energy resources," (2) "in proximity to existing and planned transmission," and (3) "on disturbed lands in areas with low biological conflict, to the extent feasible."⁸
- "Contribute to the long-term conservation and management of Covered Species and natural communities within the Plan Area."⁹

Wind and solar energy developers claim that the DRECP may frustrate, instead of promote, state and federal renewable energy goals. Environmental groups claim that the Plan will have a negative impact on desert species and that the environmental effects of the Plan will not be adequately mitigated. Indeed, even members of the Stakeholder Committee¹⁰ have stated they cannot support this version of the DRECP.¹¹ Local entities are concerned that decisions made under the DRECP would foreclose local determinations regarding land use, and that the Plan assumes a large proportion of renewable development will occur *outside of* federal public lands—a bold assumption given competing objectives and considerations in those non-federal areas.

Some of the most important questions now concern how the REAT agencies will implement the DRECP under the newly announced "phased approach." On March

10, 2015, only a few weeks after the close of the public comment period on the draft Plan, the REAT agencies announced a new phased approach to the three components of the draft Plan: 1) BLM's Land Use Plan Amendment (LUPA), 2) federal General Conservation Plan (GCP), and 3) state Natural Community Conservation Plan (NCCP).¹² Under this phased approach, the agencies would first focus on BLM's LUPA, which would include completion of an Environmental Impact Statement (EIS) tailored solely to the LUPA. Phase II of the Plan—if ever implemented—would include the NCCP and/or the GCP. According to CEC Commissioner Karen Douglas, “[u]sing a phased approach to the DRECP allows us to build on county priorities and address local needs in the planning process.”¹³ It is unclear how removing non-federal areas from the planning process will address county priorities. Indeed, this phased approach may increase conflicts among competing planning and policy priorities rather than resolve them.

II. BACKGROUND

The DRECP is being developed under the California Natural Community Conservation Planning Act (NCCPA), the Federal Endangered Species Act (FESA), and the Federal Land Policy and Management Act (FLPMA). In addition to the four REAT agencies (CEC, CDFW, BLM, and the Service) preparing the Plan, other agencies participating in the Plan process include the California Public Utilities Commission (CPUC), the California State Lands Commission (CSLC), California Department of Parks and Recreation, the California Independent System Operator, the National Park Service, the U.S. Environmental Protection Agency, and the U.S. Department of Defense.

State and Federal Renewable Energy Goals

The DRECP planning process began in late 2008, following California's Renewable Energy Transmission Initiative, which for the first time incorporated land-use planning into the statewide planning process for electric transmission facilities.¹⁴ That year Governor Schwarzenegger signed Executive Order S-14-08 establishing a 33 percent Renewable Portfolio Standard (RPS) target for California by 2020.¹⁵ The Order specified that the DRECP “shall provide binding, long-term endangered species permit assurances, facilitate the RPS desert project approval process, and provide a process for state and federal conservation funding to implement the DRECP.”¹⁶ The Order directed the CEC and CDFW to initiate, by December 1, 2008, the DRECP process for the Mojave and Colorado Desert regions¹⁷ and to “issue the final DRECP by June 1, 2012.”¹⁸ That final target has proven far too ambitious.

In early 2009, the Department of the Interior (DOI) issued Secretarial Order 3285, encouraging federal agencies to work with states, tribes, local governments, and other

stakeholders to identify appropriate areas for renewable generation and transmission and to ensure environmentally responsible development of these resources on public lands.¹⁹ In June 2013, after the DRECP was underway, the President's Climate Action Plan directed the DOI to permit enough renewable projects on public lands by 2020 to power more than 6 million homes.²⁰

Since then, California Governor Jerry Brown, during his fourth inaugural address on January 5, 2015, announced California's intent to continue increasing the amount of electricity derived from renewable sources by 2030, from one-third to 50 percent.²¹ This is a target that exceeds the existing Renewable Portfolio Standard and is meant to keep the State on track to achieve the greenhouse gas target stated in Executive Order S-3-05—80% below 1990 levels by 2050.²²

Preparation of the DRECP

In March of 2009, the REAT agencies kicked off the DRECP with a series of public meetings to discuss ideas for the DRECP. Between 2009 and 2012, the REAT agencies created a stakeholder Advisory Committee and Independent Science Advisory panel and held more than 40 meetings involving stakeholders such as tribes, scientists and the public.²³ A draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) was prepared pursuant to the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The draft DRECP EIR/EIS was released for public review in September of 2014. Originally scheduled to close on January 9, 2015, the public comment period was extended by the REAT agencies to February 23, 2015 in response to numerous requests from the public. Ultimately over 12,000 comments were submitted on the draft DRECP.

The DRECP is comprised of three large efforts:

- BLM's **Land Use Plan Amendment (LUPA)** covering nearly 10 million acres of BLM-administered lands. The LUPA would establish management direction for BLM-administered land through amendment to existing land use plans.
- A **General Conservation Plan (GCP)** covering nearly 5.5 million acres of non-federal lands. The GCP would provide a programmatic framework for streamlining the incidental take permitting process under the Federal Endangered Species Act for renewable energy and transmission on non-federal lands. The DRECP includes incidental take permit applications from the CEC and CSLC.
- A state **Natural Community Conservation Plan (NCCP)** that encompasses the entire DRECP Plan Area and would provide for the conservation and management of covered species and the impacts that will result from activities covered by the DRECP.

The DRECP would apply to certain “Covered Activities,” which include pre-construction, construction, operation, maintenance, and decommissioning activities for wind, solar, solar-thermal, and transmission lines, so long as they are within “Development Focus Areas” (DFAs) in the Plan Area.²⁴

DRECP Target of 20,000 MW

The DRECP utilizes a top-down formula to: (1) estimate the amount of renewable energy potentially generated in the Plan area; and (2) allocate where renewable energy development should be located. In deciding how much renewable energy to plan for under the DRECP, the CEC developed a “renewable energy acreage calculator” to determine how much renewable energy, and related acreage, is needed to meet the state’s long-term greenhouse gas reduction policies and renewable energy mandates. In 2012, the CEC estimated the 22.5 million acres covered by the DRECP had a capacity of between 17,163 MW and 19,491 MW through 2040.²⁵ Based on this calculation, a total of 20,000 MW of new generation and transmission is assumed under the DRECP. The DRECP, however, acknowledges that its underlying calculation “is highly speculative.”²⁶ As stated in a comment letter submitted by the American Wind Energy Association (AWEA), the 20,000 MW target “is based on an overall estimate of required electric-sector carbon reductions that studies accepted by the California Air Resources Board have shown to be too low.”²⁷ AWEA also stated that the DRECP “will make it challenging to meet Governor Brown’s recently stated goal of moving California to 50% renewable energy by 2030, and also fails to account for a doubling of renewable energy that the Draft Plan itself anticipates will be needed between 2040 and 2050.”²⁸

New Phased Approach

In response to immense criticism on the draft Plan, the REAT agencies announced that they would abandon efforts to complete the LUPA, GCP, and NCCP together, and have instead adopted a phased approach. According to the REAT agencies, the “primary driver for the decision” to move to a phased approach came from feedback from counties within the DRECP planning area requesting “better alignment between county planning, renewable energy, conservation and the objectives of the DRECP.”²⁹ Thus, the rationale for using a phased approach is to “build on county priorities and address local needs in the planning process” and to “explore opportunities for a tailored, county-by-county approach that fits within the DRECP plan.”³⁰

Under Phase I, the agencies will complete the BLM LUPA, which designates development focus areas, conservation areas, and recreation management areas on 9.8 million acres of BLM-administered public lands. Under Phase

II, the REAT agencies will turn to addressing issues and concerns with the GCP and the NCCP, including the proposed permitting processes. The REAT agencies are also considering whether to continue with a “plan-wide NCCP, individual county NCCPs, or developing a coordinated, but less-formal, approach to siting and mitigating the impacts of renewable energy projects.”³¹

As to the structure of the environmental analysis under NEPA and CEQA, the first phase will now only include an EIS for the LUPA and not an EIR. The EIS for the first phase will no longer provide coverage for the GCP. While the DRECP originally set a goal of 20,000 MW of renewable energy within the Plan area, BLM has confirmed that under the new phased approach, like the original draft Plan, only a portion of renewable energy development will occur on BLM-administered lands.³² Thus, the new approach will do nothing to address county concerns that the Plan places too much renewable energy development onto private lands and not enough on public lands.

III. SUMMARY OF DRECP ALTERNATIVES

The DRECP Draft EIR/EIS includes detailed analysis of six alternatives: the No Action alternative, the Preferred Alternative, and Alternatives 1-4. The alternatives vary in distribution of Development Focused Areas (DFAs), amount of development flexibility provided by DFAs, and technology mixes to meet the 20,000 MW target. DFAs are those areas where renewable energy development would be streamlined for approval. Reserve Design Areas are those areas identified for conservation, outside existing protected areas, to meet the DRECP Plan-wide biological goals and objectives. Some alternatives also include Study Area Lands, which may be available for renewable energy development, but require more analysis.

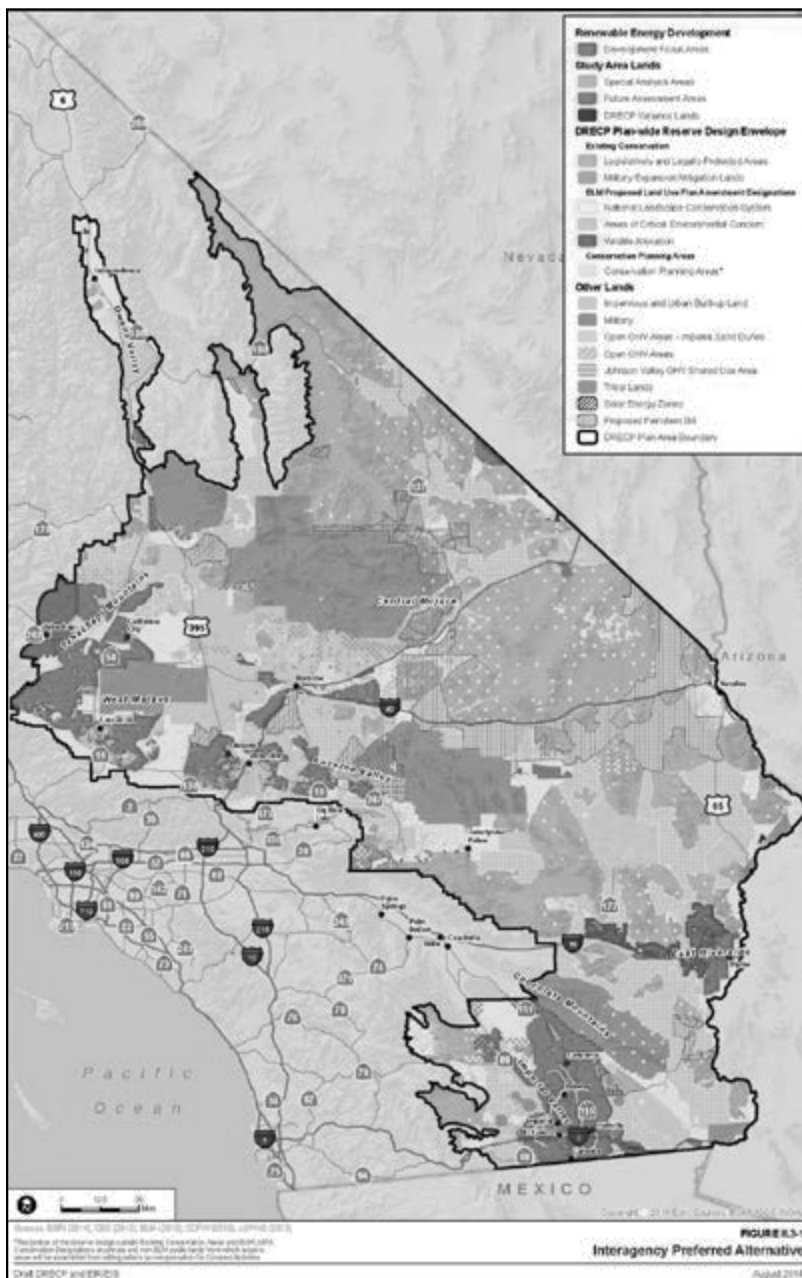
Under the No Action Alternative, there are 6,286,000 acres potentially available for development, 7,662,000 acres of existing protected areas, and 2,996,000 acres of existing BLM Land Use Plan conservation designations. Of the five action alternatives, Alternatives 1 and 3 are considered the most restrictive of energy development, Alternative 2 provides for the largest developable area, and Alternative 4 designates the largest number of acres as Study Area Lands.

Table 1: Comparison of Alternatives*

	Preferred Alternative	Alternative 1	Alternative 2	Alternative 3	Alternative 4
DFAs—Acres	2,024,000	1,070,000	<u>2,473,000</u>	1,405,000	1,608,000
Percent of Plan Area	11%	6%	<u>13%</u>	7%	8%
Study Area Lands	183,000	37,000	109,000	11,000	<u>588,000</u>
Plan-Wide Reserve Design Envelope	14,921,000	15,039,000	15,087,000	<u>15,161,000</u>	14,478,000
Urban Areas, Other Lands, and Undesignated Areas	5,457,000	<u>6,439,000</u>	4,916,000	6,008,000	5,910,000
Plan Area Total	22,585,000				

*All figures are in acres and the highest acreage amount in each category is underlined.

Figure 1: Map of Preferred Alternative³³



One major complaint by counties within the Plan Area is the DRECP's reliance on *private lands* to account for a majority of the DFA acreage needed to meet the 20,000 MW goal. Under the Preferred Alternative, BLM would only designate 367,000 acres of DFAs on BLM-administered lands, 25,000 acres on other federal lands, and 64,000 acres on state and local public lands, leaving the bulk (1,569,000 acres or 77.5% of total DFA acreage) to private lands.³⁴ The largest acreage amounts within a single county for DFAs are found in San Bernardino County. There, the DRECP proposes 399,000 acres of DFAs³⁵ under the Preferred Alternative. Yet, much of this acreage is located on land that the County of San Bernardino recently identified as prime developable land. Of the 600,000 acres of prime developable land within the County, the DRECP proposes 298,700 acres should be DFA acreage, 200,700 acres should be Conservation Planning Area acreage, and 10,400 acres should be allocated for new transmission development.³⁶ Taken together, that is more than 85% of the County's prime developable land.³⁷ This concerns the County because it has found that solar photovoltaic and concentrating solar power facilities "have not produced equivalent long-term tax revenue and jobs in comparison to other types of commercial and industrial development in the County."³⁸

The REAT agencies' new phased approach may ultimately exacerbate rather than help address these conflicts in competing land uses at the local level. While the REAT agencies have stated they will utilize a phased

approach to “build on county priorities and address local needs in the planning process” with respect to the GCP and NCCP, it appears that BLM will still proceed with its existing proposal for DFA acreage on BLM-administered lands. Thus, the first Plan phase will foreclose renewable energy in large portions of federal lands, which alone will force a great deal more renewable energy development onto private lands. In other words, it appears “county priorities” and “local needs” will *not be addressed* when it comes to planning for more renewable energy development on federal lands.

IV. DRECP'S PROPOSED GENERAL CONSERVATION PLAN

The second phase of the DRECP is a General Conservation Plan (GCP). While the requirements of the Federal Endangered Species Act (ESA) are generally well known, and Habitat Conservation Plans (HCP) have become familiar, federal agencies have, in limited cases, taken a different approach to effectuating ESA compliance. Rather than wait for a non-federal applicant to request an Incidental Take Permit (ITP) and negotiate HCP terms and conditions, federal agencies have prepared “template” or “programmatic” HCPs. Under a GCP, the federal agency analyzes potential take of threatened or endangered species and, once adopted, the agency issues take permits to non-federal entities that demonstrate compliance with the GCP's terms and conditions. If ever implemented, the DRECP's GCP would be prepared by the Service and would be used as a rubric by which ITPs could be issued for Covered Activities related to renewable energy development on non-federal lands. The GCP is thus intended to streamline issuance of ESA section 10(a)(1)(B) permits for impacts stemming from solar, wind, and geothermal renewable energy development within designated portions of the Plan area. The GCP's goal is to issue ITPs to applicants in relation to 37 separate covered species.

The Evolution of the GCP

The ESA prohibits actions that have the potential to result in a “take” of any listed species. The term “take” under the ESA includes any attempt or action involving the harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capturing, or collecting of any listed species.³⁹ “Harm,” in turn, includes the alteration of habitat that results in injury to, or death of, any listed species by preventing essential behavior (such as breeding, feeding or sheltering).⁴⁰ When non-federal activities have the potential to result in take of a listed species, the take may be allowed under an ITP. Section 10 of the ESA requires a conservation plan, typically referred to as a “Habitat Conservation Plan” or “HCP.” HCP requirements include: (1) analysis of impacts that have the potential to occur as a

result of the proposed taking of a threatened or endangered species; (2) steps to be taken by the permit-holder to “minimize and mitigate such impacts;” (3) sufficient funding for implementing these steps; (4) a plan of action for handling any unanticipated circumstances; and (5) a discussion of potential alternative actions taken into consideration by the permittee that would not result in the take of a listed species, and the basis for not choosing these alternatives.⁴¹

On October 5, 2007, the Service expanded the scope of HCPs by creating a General Conservation Plan (GCP) Policy.⁴² Under the GCP structure, the expert agencies on their own develop the 10(a)(1)(B) conservation plan they deem “suitable for the needs of a local area” and complete related NEPA compliance for the later issuance of permits. Once the GCP is adopted, the Service issues permits to those individuals or entities who desire an ITP and demonstrate compliance with the GCP's terms and conditions.⁴³ Thus, the permit process for each individual applicant is frontloaded, theoretically allowing for the formulaic issuance of permits after the GCP is adopted and compliance is demonstrated.

According to Service, this approach is not new and has been previously described by other names including “template HCPs,” “umbrella HCPs,” or “programmatic HCPs.”⁴⁴ The Service has stressed that “the only difference between the GCP and a traditional HCP is that the Service develops the GCP under which individual ITPs can then be issued to landowners, instead of an applicant doing so.”⁴⁵

The scope of prior “umbrella” HCPs, however, varies considerably. For example, the 2007 Florida Scrub-Jay Umbrella Habitat Conservation Plan (Scrub Jay HCP) applies to portions of 34 counties in Florida.⁴⁶ However, that HCP covers only a single species—the scrub jay—and only applies to previously platted, urban lots, of one acre or less in size.⁴⁷ Prior to the Scrub Jay HCP, individual landowners, with property located in urban areas and occupied by scrub-jays, were faced with the choice of not clearing or constructing in scrub-jay habitat, complying with the Act by obtaining an individual section 10(a)(1)(B) ITP, or simply violating the take prohibitions under section 9 by clearing lots without coverage from an ITP.⁴⁸ The high administrative cost of compliance with the ESA, together with the goal of protecting a single species and the relatively minimal nature of the Covered Activities—lot clearing and individual home construction—rendered the GCP a relatively efficient tool to encourage FESA compliance by individual applicants.

Larger scale “umbrella” or “programmatic” HCPs, however, have, at least to date, been less successful. For example, the Great Plains Wind Energy Habitat Conservation Plan (Great Plains HCP) is a current effort by the Wind Energy Whooping Crane Action Group (WEWAG)

and the Service to address the potential impacts of wind energy development in a 400-mile wide corridor (a 200-mile core area as determined by the center line of whooping crane migration, plus a 100-mile buffer on each side) that runs for approximately 1,500-miles from the Gulf Coast of Texas to the Canadian border.⁴⁹ The Great Plains HCP intends to cover activities related to a single type of renewable energy development—wind energy—and the take of four covered species, over a massive ecosystem. The Great Plains HCP was initially scheduled to be released for public comment in the Spring of 2014, with a final HCP published in the Spring of 2015.⁵⁰ To date, however, a draft HCP has not been finalized or released, and WEWAG and the Service continue to work to develop a document that can effectively address the broad scope and complexity presented by the goals of the Great Plains HCP. The Great Plains HCP currently has no timeline for release or public comment.

The scope of the GCP in the DRECP is significantly larger than these prior variations of HCPs. Specifically, the GCP attempts to analyze take from the development of wind, solar, and geothermal renewable energy on 22.5 million acres, and to cover a total of 37 proposed Covered Species: 14 bird species (including the California Condor, Golden Eagle, and Swainston's Hawk), 5 mammals, 4 amphibians, 4 fish, and 10 plant species. The broad nature of the Covered Activities, coupled with a long list of Covered Species, requires an analysis far more complicated than that in a traditional single applicant HCP or that in prior “umbrella” or “programmatically” HCPs, such as the Scrub Jay HCP and the Great Plains HCP.

Is A GCP The Best Tool?

According to the Service, “[a] GCP is not a substitute for a County- or State-wide regional HCP which would cover many activities differing in scope and type of impact.”⁵¹ Instead, the Service states that GCPs are useful for “a smaller subset of activities, such as building single family homes, a specific type of agricultural practice, or similar activities of limited scope.”⁵² The primary reason provided by the Service is that “[t]he Service does not have the personnel or expertise to adequately analyze all activities that would be addressed in planning efforts of this scale.”⁵³ Because there is no private applicant, the REAT agencies must bear the entire effort and cost of analyzing a take. It is unclear whether the REAT agencies have the personnel or expertise to adequately analyze all Covered Activities and their attendant impacts on the 37 Covered Species.

Additionally, the typical negotiation process between the Service and an applicant when preparing an HCP—a process which may be advantageous both for the applicant and the federal agencies—is not available with use of a GCP. Instead, the applicant has no formal role in the GCP until after the essential frame-

work is adopted by the federal agencies. “Because there is no applicant to assist with an analysis of the effects of covered activities and with drafting the NEPA documents, the scope of a GCP will be limited to what Service personnel can effectively analyze.”⁵⁴ Further, it is uncertain how overall feasibility of the GCP will be ensured, or if the GCP’s goals will be achieved when applicant participation is uncertain.

A GCP must meet the same criteria as an HCP under Section 10 of the ESA. Thus, a GCP will only be approved where “the applicant will ensure that adequate funding for the plan will be provided.”⁵⁵ The funding source may not be speculative in nature.⁵⁶ Here, the DRECP specifies two agencies that are expected to participate in the GCP: the CEC (as to thermal power plants of 50 MW or more) and the California State Lands Commission (as landowner over small portions of non-federal lands).⁵⁷ It is uncertain whether other agencies, developers, or property owners, will participate in the GCP, and at what rate. Funding of the GCP is also complicated because at least some of the counties within the DRECP Plan Area have suggested they will not permit renewable energy development on large portions of private lands categorized under the DRECP as DFAs.⁵⁸ The GCP, however, assumes that, irrespective of local jurisdiction land use plans, these private lands will all be available for development, and that this development will in turn fund the GCP.

The GCP identifies potential non-development funding sources, including federal grants for which the DRECP is “expected to be competitive;” federal legislation that has been proposed but not enacted; a state tax credit that expires in June of 2015; and a state funding source for which DRECP “appears to be eligible” but actual funding “depend[s] on allocations, relative cost effectiveness and nexus with GHG reductions.”⁵⁹ In short, securing funding for the DRECP is far from assured. Further, now that the REAT agencies are proceeding with a phased approach, the viability of the GCP is even more uncertain.

V. DRECP’S INTERPLAY WITH BLM’S SOLAR PROGRAMMATIC EIS

Another major issue with the DRECP is the conflict between the Plan’s proposed DFAs and BLM’s prior designation of “Solar Energy Zones.” In October 2012, BLM and the Department of Energy released their Approved Resource Management Plan Amendments/Record of Decision (ROD) for Solar Energy Development in Six Southwestern States (Solar PEIS).⁶⁰ The Solar PEIS “assess[es] the environmental impacts of developing and implementing agency-specific programs that encourage environmentally responsible utility-scale solar energy development in Arizona, California, Colorado, New Mexico, Nevada, and Utah.”⁶¹ The selected alternative under the PEIS identifies spe-

cific locations that BLM and DOE determined to be well suited for utility-scale production of solar energy, commonly referred to as Solar Energy Zones (SEZs). While energy development would be prioritized in SEZs, the Solar PEIS also allows for utility-scale solar energy development on variance lands outside of SEZs in accordance with a specific variance process.⁶²

The total developable acreage in the SEZs approved as part of the Solar PEIS for the State of California was only 153,627 acres, split between two SEZs.⁶³ Both SEZs are located within the boundaries of the DRECP plan area.⁶⁴ Compared to the acreage designated as DFAs under the DRECP's Preferred Alternative (2,024,000 acres), the SEZs appear miniscule. Moreover, while some of the action alternatives appear to designate all SEZs as DFAs, several of the action alternatives do not. For example, while the Preferred Alternative appears to include all SEZs within DFAs, Alternatives 1 and 3 very obviously omit large portions of the SEZs from DFAs. (See Figures B1-B4.)

Figure B-1: Data Basin Map of Solar Energy Zone Acreage Near Interstate 10⁶⁵

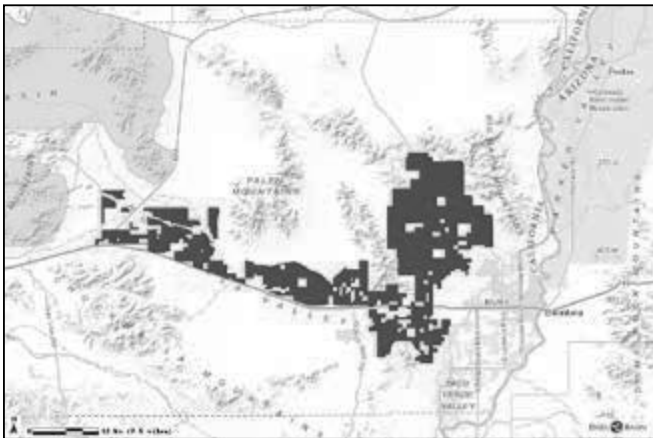


Figure B-2: Data Basin Map of Preferred Alternative—DFA Acreage Near Interstate 10

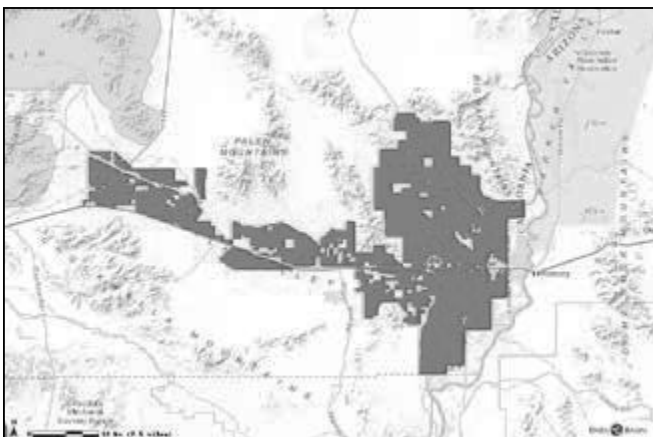


Figure B-3: Data Basin Map of Alternative 1—DFA Acreage Near Interstate 10

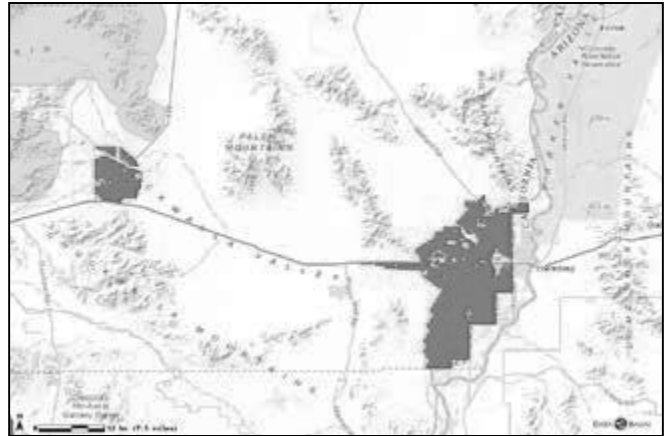
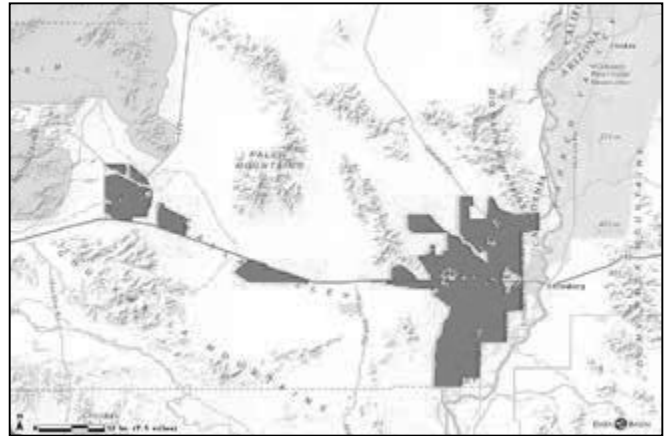


Figure B-4: Data Basin Map of Alternative 3—DFA Acreage Near Interstate 10



Another major inconsistency between the DRECP action alternatives and the Solar PEIS is the approach taken with respect to “Study Area Lands” under the DRECP and “Variance Areas” under the Solar PEIS. Under the Solar PEIS, a “Variance Area” is defined as an area that may be available for a utility-scale solar energy ROW with special stipulations or considerations.⁶⁶ The Solar PEIS identified lands outside of exclusion areas and SEZs as Variance Areas for utility-scale solar energy development.⁶⁷ Applications in these areas will be reviewed on a case-by-case basis based on environmental considerations, coordination with appropriate federal, state, and local agencies and tribes, and public outreach.⁶⁸

Under the DRECP, “Study Area Lands” collectively refers to three mapping categories: (1) Future Assessment Areas (FAAs), areas subject to future assessment for suitability for renewable energy development or ecological conservation; (2) Special Analysis Areas (SAAs), areas known to have high value for renewable energy development and high value for ecological and cultural conservation and recreation; and (3)

DRECP Variance Lands, which represent BLM Solar PEIS Variance Lands as screened for the DRECP and EIR/EIS based on BLM screening criteria.⁶⁹ Thus, the DRECP only includes a small portion of the Solar PEIS Variance Areas within Study Area Lands. Whereas the Solar PEIS identified 1,354,559 acres of Variance Areas within California, the range of Study Area acreage under the DRECP is 37,000 (Alternative 1) to 588,000 acres (Alternative 4). Thus, while BLM only a few years ago designated over 1.3 million acres of Variance Areas in the Solar PEIS, now BLM is only carrying forward a fraction of those Variance Areas in the DRECP. This move by BLM calls into question the usefulness of the Solar PEIS as it applies to California.

VI. SIMILAR CHALLENGES TO THE ABANDONED BAY DELTA CONSERVATION PLAN HCP

Like the DRECP, the Bay Delta Conservation Plan (BDCP) initially utilized a sweeping, multi-agency draft joint HCP/NCCP. The goal of the BDCP generally is to allow water diversions from the Sacramento and San Joaquin Delta and to repair the ecological health in the estuary.⁷⁰ Similar to the DRECP, the BDCP initially attempted to provide a structure for issuing endangered species permits under ESA Section 10. Under this approach, permits were to be issued for north Delta water diversion facilities, the operation of these and existing facilities, and various other covered activities including habitat protection and restoration, twin tunnel water transportation, in connection with a comprehensive conservation strategy that addressed nearly 60 species.⁷¹ The BDCP as originally contemplated included a 50-year HCP and 22 conservation measures aimed at improving water operations, protecting water supplies, and protecting water quality.⁷²

The BDCP, however, faced problems similar to the DRECP. The BDCP began in 2007 and the initial draft document was released in 2013.⁷³ Two years later, the Department of Water Resources and the other state and federal agencies leading the BDCP announced that an HCP would no longer be pursued under the BDCP's preferred alternative, and that ESA compliance would be achieved strictly through Section 7.⁷⁴ This drastic change in course was brought about by "the challenges with meeting the standards required to issue long term assurances associated with compliance with Section 10 of the ESA" as well as comments received regarding "the levels of uncertainty regarding effectiveness of habitat restoration and the future effects of climate change."⁷⁵

Not only did the BDCP abandon its original method of ESA compliance, it, like the DRECP, has been segmented into more obtainable pieces. Specifically, the BDCP's new preferred alternative regarding water conveyance, termed "WaterFix," has been separated from larger Delta habitat restoration efforts (termed "EcoRestore"), which

will be overseen by the California Resources Agency and implemented under the California Water Action Plan.⁷⁶

Thus, while both the DRECP and the BDCP began with grand goals of large-scale action, each plan has become mired in complexities, uncertainties, and a perceived top-down approach. While the DRECP has not yet formally abandoned the HCP process as the BDCP has, lead agencies under both plans ultimately chose to segment various portions of their respective plans in order to keep their efforts moving forward.

VII. CONCLUSION: AN UNCERTAIN FUTURE

The REAT agencies have spent seven years on a 25-year Plan. While the Plan effort has generated a large volume of incredibly valuable data, implementation of the Plan's original goals is increasingly uncertain. Now that the process is being segmented into phases, it could take another seven years before a GCP or NCCP is completed. A phased approach will allow local governments more time to negotiate the NCCP and GCP, but it does not address the concern that too little renewable energy development is being planned on *public lands*, placing a heavy burden on counties to plan for development on private lands. Important issues that face any large-scale HCP continue to plague the agencies, including a lack of clear funding sources, a lack of assurances for proposed land uses, and elusive streamlining for permittees. What is more, the ever increasing goals set by California—in renewable power production and reduction in greenhouse gas emissions⁷⁷—will become even more difficult to achieve absent more coordination, not less, with local agencies, the renewable energy industry, and other stakeholders.

ENDNOTES

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- 1. The Draft DRECP and its Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) are available at <http://www.drecp.org/documents/> (accessed July 2015).
- 2. News Release, *Public Input Drives Next Steps for Desert Renewable Conservation Plan*, March 10, 2015, available at http://www.drecp.org/documents/docs/2015-03-10_DRECP_Path_Forward_News_Release.pdf (accessed July 2015).
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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at Appendix A1.
11. Comment Letter from Greg Suba, Conservation Program Director, California Native Plant Society (Feb. 23, 2015), available at http://www.drecp.org/draftdrecp/comments/California_Native_Plant_Society_comments_2015-02-23/California_Native_Plant_Society_comments_2015-02-23.pdf (accessed July 2015).
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13. *Id.*
14. DRECP Draft EIR/EIS, Executive Summary, *supra* note 5, at 7.
15. See Exec. Order No. S1408 (Nov. 17, 2008), available at <http://gov.ca.gov/news.php?id=11072> (accessed July 2015).
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17. *Id.* at ¶7.
18. *Id.* at ¶¶11, 12.
19. BLM Order No. 3285 (March 11, 2009), available at http://www.blm.gov/or/energy/opportunity/files/order_3285.pdf (accessed July 2015).
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24. *Id.* at 16.
25. *Id.*
26. *Id.*
27. Comment Letter from American Wind Energy Association, (Feb. 23, 2015) at 5-6, available at http://www.drecp.org/draftdrecp/comments/American_Wind_Energy_Assoc_comments_2015-02-23.pdf (accessed July 2015).
28. *Id.*
29. Press Release, *supra* note 12 at 1.
30. *Id.*
31. *Desert Renewable Energy Conservation Plan: Path Forward—Frequently Asked Questions*, (June 2015) at 2, available at http://www.drecp.org/documents/fag_Path_Forward.pdf (accessed July 2015) (hereinafter Path Forward).
32. *Id.* at 3.
33. DRECP Draft EIR/EIS, Preferred Alternative, at II.3-7, available at http://drecp.org/draftdrecp/files/c_Volume_II/II.3_Preferred_Alternative.pdf (accessed August 2015).
34. *Id.* at II.3-166.
35. *Id.*
36. Comment Letter from County of San Bernardino (Feb. 20, 2015) at 3, available at http://drecp.org/draftdrecp/comments/San_Bernardino_County_comments_2015-02-20.pdf (accessed August 2015) (hereafter San Bernardino Position Paper).
37. *Id.*
38. *Id.* at 5.
39. 16 U.S.C. § 1532(19).
40. 50 C.F.R. § 17.3; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697-98 (1995).
41. 16 U.S.C. § 1539(a)(2)(B).
42. U.S. Fish & Wildlife Service, *Memorandum to Assistant Regional Directors* (Oct. 5, 2007) at 5, available at <http://www.fws.gov/policy/m0369.pdf> (accessed July 2015) (hereafter FWS Memo).
43. *Id.* at 3.
44. *Id.* at 4.
45. *Id.*
46. *Florida Scrub-Jay Umbrella Habitat Conservation Plan And Environmental Assessment* (Nov. 2007) at 2, available at http://www.fws.gov/northflorida/scrub-jays/Docs/Umbrella/20121000_FSJ_Umbrella_HCP_EA_2014rev.pdf (accessed July 2015).
47. *Id.* at 3.
48. *Id.* at 1.
49. *Great Plains Wind Energy Development Request for Incidental Take of Federally Protected Species Under the Endangered Species Act Questions and Answers*, at 2, available at <http://www.fws.gov/southwest/es/Documents/FWSBiregionalwindenergyEISITPFAQs7-27-11.pdf> (accessed July 2015).
50. *Id.*
51. FWS memo, *supra* note 42, at 5.
52. *Id.* at 4.
53. *Id.* at 5-6.
54. *Id.* at 5.
55. 16 U.S.C. § 1539(a)(2)(B).
56. *National Wildlife Federation v. Babbitt*, 128 F.Supp.2d 1274, 1295 (E.D. Cal. 2000).

57. *Appendix M: U.S. Fish and Wildlife Service Conservation Plan*, at M-1, available at http://www.drecp.org/draftdrecp/files/Appendix_M_General_Conservation_Plan.pdf (accessed July 2015).
58. For example, the County of San Bernardino's stated priority is "for the minimal amount of private lands available in the County to be retained for development." (San Bernardino Position Paper, *supra* note 36, at 10.)
59. DRECP Draft EIR/EIS, Preferred Alternative, *supra* note 33, at II.3-297.
60. Approved Resource Management Plan Amendments/Record of Decision for Solar Energy Development in Six Southwestern States (October 2012), available at http://solareis.anl.gov/documents/docs/Solar_PEIS_ROD.pdf (accessed August 2015).
61. DRECP Draft EIR/EIS, BLM Lands and Realty, at III.13-6, available at http://www.drecp.org/draftdrecp/files/d_Volume_III/III.13_BLM_Lands_and_Realty.pdf (accessed July 2015).
62. Final Solar Energy PEIS, Executive Summary (July 2012), at ES-7, available at http://solareis.anl.gov/documents/fpeis/Solar_FPEIS_ExecutiveSummary.pdf (accessed August 2015).
63. *Approved Resource Management Plan Amendments/Record of Decision (ROD) for Solar Energy Development in Six Southwestern States* (Oct. 2012), at 30, available at http://solareis.anl.gov/documents/docs/Solar_PEIS_ROD.pdf (accessed July 2015).
64. DRECP Draft EIR/EIS, BLM Lands and Realty, *supra* note 61, at III.13-6.
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66. Final Solar PEIS, Executive Summary, *supra* note 62, at ES-14–15.
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75. *Id.* at ES-15.
76. *Id.* at ES-3.
77. Office of the Governor, *Governor Brown Sworn In, Delivers Inaugural Address* (Jan. 5, 2015), available at <http://gov.ca.gov/news.php?id=18828> (accessed August 2015).