



Testimony of Johanna Wald
Senior Attorney
Natural Resources Defense Council
San Francisco Office

Hearing on S. 2921
The California Desert Protection Act of 2010
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Committee on Energy and Natural Resources
United States Senate

Mr. Chairman and Members of the Committee:

Thank you for the invitation to testify today regarding S. 2921, the California Desert Protection Act of 2010. My name is Johanna Wald, and I am a senior attorney at the Natural Resources Defense Council (NRDC). NRDC is a national, nonprofit organization of scientists, lawyers and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.3 million members and online activists nationwide, served from offices in New York, Washington, D.C., Chicago, Los Angeles, San Francisco and Beijing.

Introduction

NRDC has a long history of efforts to protect and conserve the nation's federal lands and resources, including the lands and resources managed by the Department of Interior's Bureau of Land Management (BLM) in California and other western states. In addition, we have an extensive history of advocacy promoting the increased use of energy efficiency and renewable energy sources to meet the nation's energy needs. NRDC believes the nation must transition away from fossil fuels as quickly as possible in response to the unprecedented threats posed by global warming. We must employ energy efficiency, conservation and demand side management practices, and develop clean renewable energy at multiple scales, from distributed generation to utility scale renewable energy projects to reduce the nation's output of greenhouse gas pollution.

The three main points that we will make in our testimony today are as follows:

- 1.** The nation does not need to sacrifice special and unique places on the public lands to still have renewable energy on public lands – energy that we need to address the climate challenge.
- 2.** We do need to develop renewable energy as quickly as we can, because of the unprecedented threat posed by global warming to natural resources as well as public health and wellbeing, and because treasured natural resources are already suffering the effects of warming.
- 3.** We need a renewable energy program for the public lands that ensures that necessary development takes place in appropriate areas and that allows the Secretary of the Interior and the BLM to learn from and adapt to experience gained in the permitting and operation of renewable energy projects.

I. We do Not Have to Make a Choice

The President has expressed clear and strong support for the public lands to play a critical role in his vision of a clean energy economy. For almost three years, NRDC has been heavily engaged in efforts at the national level as well as in the West, and particularly in California, to ensure that renewable energy development on these lands will take place in a balanced and environmentally responsible manner. We affirmatively support the twin goals of Senator Feinstein's legislation – to protect unique and sensitive publicly-owned wildlands in California while simultaneously lighting the way toward a cleaner energy future. We commend her for the leadership she has shown in advancing these goals.

Senator Feinstein's legislation is an important step toward balancing America's need to shift to clean energy as quickly as possible with the need to protect our precious wildlands. Coupled with support for its goals, however, we remain concerned about some aspects of the Energy title, Title II, which addresses features of renewable energy planning and siting. It is those concerns that our testimony will focus chiefly on today.

To summarize our views, we believe that this Title would legislate matters that should be left to the discretion of the Secretary of the Interior, given the fact that renewables development on the public lands is in its infancy. The Interior Department, the BLM and indeed the nation would benefit greatly from the ability to learn from and adapt to experience gained with the permitting and operation of these new projects. We very much look forward to working with the Senator and with Committee members to address our general and specific concerns going forward.

As indicated, NRDC agrees with the overarching goals of the Senator's legislation. First, we believe that our country does not have to choose between protecting our special places and having the renewable energy that we need to address the climate challenge. Senator Feinstein knows this as well and it is reflected in her bill.

The California Desert is a unique and special environment, as Congress recognized more than 30 years ago when it enacted the Federal Land Policy and Management Act of 1976 (FLPMA)

and established the California Desert Conservation Area (CDCA).¹ This vast landscape is home to diverse biological communities, scenic and wild places, and other resources including significant renewable resources. Not all of the lands in the Desert are appropriate for renewable energy – or other economic development – and the protections that the Senator’s bill would extend to important wild areas and wild rivers as well as the lands within the two new National Monuments are certainly warranted.²

II. Renewable Energy is Needed as Quickly as Possible due to Climate Change

We agree with Senator Feinstein that the nation needs to increase the generation and use of renewable energy as quickly as we can. The devastating and ongoing oil spill in the Gulf of Mexico provides tragic evidence of the need to break our nation’s addiction to fossil fuels.

¹ See 43 U.S.C. § 1781(a)(1)–(4). Upon passing this legislation, Congress found the following:

- (1) the California desert contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population;
- (2) the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed;
- (3) the California desert environment and its resources, including certain rare and endangered species of wildlife, plants, and fishes, and numerous archeological and historic sites, are seriously threatened by air pollution, inadequate Federal management authority, and pressures of increased use, particularly recreational use, which are certain to intensify because of the rapidly growing population of southern California;
- (4) the use of all California desert resources can and should be provided for in a multiple use and sustained yield management plan to conserve these resources for future generations, and to provide present and future use and enjoyment, particularly outdoor recreation uses, including the use, where appropriate, of off-road recreational vehicles

Id.

² Other positive aspects of Title I of this legislation include its recognition of the need to allow for the possibility of transmission expansion in the new monuments: it may be necessary to transmit renewable energy produced on appropriate sites outside of the monuments or outside the state to population centers of southern California to meet the state’s ambitious renewable goals (although we believe that the bill’s language on this issue can be improved.) Furthermore, NRDC welcomes the Senator’s acknowledgement of the importance of addressing the equitable interests of legitimate solar developers with proposed projects within the new monuments. See S. 2921, § 101(a) (amending the California Desert Protection Act of 1994, Pub. L. 103-433 (1994) to add Section 1307, which grants applicants who meet specified terms a “right of first refusal” in solar energy zones to be designated by BLM). With other organizations, NRDC advocated for such a provision for companies which have invested substantially in areas with BLM’s encouragement (although again we believe that the proposed statutory language can be improved). Lastly, as an organization with a longstanding interest in the BLM’s administration of grazing privately-owned livestock on the public lands, we also appreciate Senator Feinstein’s inclusion of provisions authorizing the Secretary of the Interior to permanently retire grazing permits within the Mojave Trails National Monument and to prohibit grazing on lands within the CDCA that were acquired using federal funds or donated funds. See Section 101(a) (amending the Sections 1304(c)(3) and 1904(b)(2)(C) of the California Desert Protection Act of 1994, Pub. L. 103-433 (1994)) (although, to be sure, we would have preferred this grant be for the entire California Desert Conservation Area).

On the other hand, we are very troubled by the proposal to legislatively designate permanent off-highway vehicle recreation areas. In our view, land use decisions such as these are better left to land management agencies to make through their established planning processes.

What is more, global warming itself represents an unprecedented threat to the survival of ecosystems and wildlife, including publicly owned resources, and the human communities that depend on those resources. Indeed, distinctive resources of publicly-owned lands in California and elsewhere are already suffering the impacts of global warming. To take just two examples: conifer forests and pikas, small chinchilla-like animals, are moving uphill in places like Yosemite National Park to escape warming temperatures. Joshua trees may not persist much longer in Joshua Tree National Park and other high desert areas because of climate warming.³

However, while the nation needs renewable energy quickly, we must ensure that its development is done right. We are at the very beginning of a new era, one which will culminate with the transformation of this country's economy from one based on fossil fuels to one based on clean and green energy. To ensure that this new economy has the soundest possible footing, we must be "smart from the start" in where and how we obtain that energy, whether on private or public lands. We must not only put more emphasis on conservation, efficiency, demand side management and distributed generation, we must have sound, environmentally responsible renewable energy development programs.

The Interior Department and the Obama administration have expressed a clear desire to have an environmentally responsible renewable energy program for our public lands – and NRDC, is committed to helping them achieve this objective. Developing such a program is a challenge, however. We are talking about new technologies with which the Interior Department and the BLM have very little experience. The Bureau has only just begun permitting these new technologies: as of this date, no solar projects have been permitted and only 202 wind projects have been approved on the public lands⁴ – representing less than two percent of the total installed wind capacity within the nation.⁵ What is more, the scale of these projects is unprecedented – one of the proposed solar projects in California that the BLM is reviewing at this time involves more than 7,000 acres, and the average footprint of the solar

³ Stephen Saunders, Tom Easley, Dr. Jesse A. Logan, & Theo Spencer, *Losing Ground: Western National Parks Endangered by Climate Disruption* (Rocky Mtn. Climate Org. & NRDC), July, 2006, at 6, 11, available at <http://www.nrdc.org/land/parks/gw/gw.pdf>.

⁴ Figures based on right-of-way authorizations through fiscal year 2009. See BLM, DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2011 IV-165 (2010), available at http://www.doi.gov/budget/2011/data/greenbook/FY2011_BLM_Greenbook.pdf.

⁵ In fiscal year 2009, the BLM administered 427 megawatts of installed wind capacity. In comparison, the nation has 29,440 megawatts of total installed wind capacity. See *id.* at I-20.

projects now under review is about 5,000 acres.⁶ Given the scale of these projects alone, we really cannot know what the full range of impacts might be. Because so few of these projects have been permitted, BLM and other federal agency staff have almost no experience in predicting their impacts, in developing best management practices or in evaluating the efficacy of such practices and mitigation measures. In short they have little to no expertise in renewables development on the lands under their jurisdiction.

They are learning, however, and NRDC and other members of the environmental community are expecting that they will learn a great deal from the experiences that they are having in permitting the fast-track projects – that is, those projects that are potentially eligible for approval by December 2010 and thus for funding under the American Recovery and Reinvestment Act of 2009. In California, the BLM is not only gaining experience in permitting projects on lands it manages, it is learning how to work with state agencies – and particularly the California Energy Commission and the California Department of Fish and Game – in new and effective ways that we believe will ultimately help speed the approval and construction of renewables projects on not just public lands within the state and elsewhere, but also private lands.

As indicated, we appreciate and share the goal of the energy title of the Senator’s bill – namely to speed development of renewable energy on appropriate public lands, including lands managed by the U.S. Forest Service and Department of Defense, as well as BLM. This title incorporates a number of praiseworthy concepts including its recognition that the lands managed by the Bureau are not the only federal lands that should help the nation meet its needs for renewable energy. *See* S. 2921, §§ 203–204 (requiring the Forest Service and the Defense Department to prepare programmatic NEPA documents assessing the suitability of federal lands under their respective jurisdictions for renewable energy development).

The bill also includes language to address the significant backlog of solar applications that accumulated during the last administration, and specifically provisions aimed at weeding out applications for renewable generation projects that are either speculative in nature or proposed in locations that are unsuitable for development. *See* S. 2921 § 202 (providing for deadlines

⁶ *See* BLM, *Fast-Track Renewable Energy Projects*, May 7, 2010, http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/fast-track_renewable.html (providing a frequently updated list of projects receiving fast-track review by the BLM).

for applicants and direct authority for the Secretary of the Interior to screen applications for significant resource conflicts). It is our understanding that there are projects of both types now pending in California. To achieve a rapid transition to a clean energy economy, investments of federal staff and resources must go to viable proposals whose proponents have recognized the value of getting projects on line quickly by avoiding and minimizing adverse environmental impacts.⁷

III. Renewable Siting – Smart From the Start

At the same time, however, and as noted above, the Energy Title raises some serious concerns that we would like to work with the Committee to resolve.

Our fundamental concern with this title is that it seeks to legislate key components of a renewable energy program for the public lands at the very beginning of its life, rather than allow the federal agencies to learn from and adapt to experience gained in both the permitting process and the operation of these projects going forward.

For example, Section 202 of the bill seeks to legislate ambitious and ill-conceived deadlines for BLM review of permit applications, placing a heavy resource burden on the agency, while also jeopardizing the quality of its environmental reviews. Rather than locking in deadlines for these critically important reviews, we believe that the Secretary of the Interior should be required to establish appropriate deadlines and to report to Congress on the effectiveness of those deadlines once established.

In addition, the bill seeks to establish a class of wind and solar testing projects that would be eligible for categorical exclusion (CE) from compliance with the National Environmental Policy Act (NEPA). The conservation community is very critical of efforts to legislate CEs and with good reason: historically they have created confusion and resulted in administrative

⁷ We were also pleased to see the inclusion of provisions that aim to promote advanced, high-efficiency electricity transmission in Section 209, and that recognize the importance of using some of the revenues from renewable energy development on public lands for conservation purposes. *See* S. 2921 § 201(k)(ii) (directing a significant sum of those revenues to the Land and Water Conservation Fund (LWCF) beginning in 2021).

abuses.⁸ What is more, such exclusions do not necessarily guarantee expedited development would occur for numerous reasons, including the increased likelihood of litigation.

NRDC has a long history of opposing attempts to legislate CEs and we oppose this one. Not only is it bad policy, it is also unnecessary. The Interior Department has broad discretion under NEPA to establish administrative CEs where appropriate, including in connection with proposed renewable energy activities. Furthermore, as a consequence of BLM's *Wind Energy Development Programmatic Environmental Impact Statement*,⁹ the Bureau considered the extent and breadth of such proposed activities for wind resources at a policy level. Through that process, the Bureau established that an administrative CE can be applied to meteorological testing of wind under certain circumstances.¹⁰

Similarly, the bill seeks to legislate the baseline statistics that BLM must use in determining the fair market value of public lands and thus the rental fees to be charged solar energy developers. *See* S. 2921 § 201(k)(2)(A). We are concerned that the specified statistics – from the National Agricultural Statistical Service – will likely *undervalue* the public lands because they are derived from activities unrelated to energy production of any kind, such as dryland agriculture. Rather than encourage undervaluation of these lands, Congress must ensure that DOI receives fair market value when the right to develop public lands for wind and solar resources is conveyed to private interests.

Traditionally, energy development on the public lands has been governed by a system that addresses both the need to recompense American taxpayers fairly for the loss of a limited

⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, ENERGY POLICY ACT OF 2005: GREATER CLARITY NEEDED TO ADDRESS CONCERNS WITH CATEGORICAL EXCLUSIONS FOR OIL AND GAS DEVELOPMENT UNDER SECTION 390, GAO-09-872, at 30 (2009). (referring to the CE created by Section 390 of the Energy Policy Act, GAO found that "BLM's use of section 390 categorical exclusions has frequently been out of compliance with both the law and BLM's guidance . . ."). The report further found that "[a] lack of clear guidance and oversight contributed to the violations and noncompliance. While many of these are technical in nature, others are more significant and may have thwarted NEPA's twin aims of ensuring that BLM and the public are fully informed of the environmental consequences of BLM's actions." *Id.*

⁹ 71 FR 1768

¹⁰ *See* BLM, DEP'T OF THE INTERIOR, INST. MEMO. NO. 2009-043, WIND ENERGY DEVELOPMENT POLICY (Dec. 19, 2008) (expiring on September 30, 2010), *available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2009/IM_2009-043.html.

BLM, DEP'T OF THE INTERIOR, H-1790-1, NATIONAL ENVIRONMENTAL POLICY HANDBOOK, 152 (2008), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf.

resource (surface area, subsurface minerals, or both) and the need to compensate taxpayers for the loss of other uses of the area subject to development. This legislation does not address the issue of a royalty – which would compensate for loss of other uses. We understand the Secretary is now contemplating such a policy. NRDC would support a royalty system as part of a comprehensive program for the development of renewables on public lands. At a minimum, rather than require use of the specified baseline metrics which would discount the value of lands allocated to renewable development, Congress should ensure that the Secretary retains the discretion to determine an appropriate fee at an appropriate time. In fact, that is the approach the bill takes for wind projects. *See* S. 2921 § 201(k)(2)(B) (providing that the Secretary shall establish a fee schedule).

We are also extremely concerned about the fact that this legislation is predicated on an historic realty-based system – the right of way system codified in Title V of FLPMA – as the basis for allocating wind and solar development rights on public lands. While we understand that the aim of the legislation is to enhance this system, which is the one the BLM is currently using, we are concerned that it would instead in effect codify the system – even though its utility for use in authorizing large scale renewable developments is unproven and it has a number of structural flaws that make it ill-suited for the long-term management of solar and wind resources.

For one, the right of way system was designed to issue conveyances for linear facilities such as irrigation ditches, roads and pipelines.¹¹ As well, the system is agnostic about ensuring that the best energy resources are chosen and planned for development. Rather, the process of developing these energy resources is dependent on the priorities of an administration. Whatever emphasis a particular administration may or may not place on approving projects can be the determinant factor for success or not. This also means that strategic decisions to develop the best available energy resources are often foregone. That is, often the system does not attempt to ensure that the types of projects considered are actually the most suitable for approval and will produce the greatest dividends. Additionally, terms of approval can be changed arbitrarily, which undermines the type of long-term economic certainty these kinds of projects require. Lastly, the system does not ensure that taxpayers receive a fair share of revenues in allocating public assets to private enterprises. This also means that mitigation

¹¹ *See* 43 CFR § 2801.6.

payments and other reclamation assurances are not guaranteed in the current right of way system.

Rather than reinforce use of the right of way system, we think Congress should clearly acknowledge that a more robust – not simply a faster – system, such as competitive leasing, is needed and the Secretary should be given the discretion to develop and update as appropriate such a system. In this regard, we commend to the Committee’s attention Section 366 of S. 1462, the American Clean Energy Leadership Act of 2009.

Last but not least, we are concerned about Section 205 of the bill which would establish a creative mitigation banking system to encourage development of renewable energy projects on private lands in California. NRDC supports the goal of this section because we believe that renewable development should not be limited to public lands, but rather should be balanced between private and public lands. This section was drafted prior to the start of the Desert Renewable Energy Conservation Plan (DRECP) – a major effort involving the state and federal governments and multiple stakeholders, including members of the conservation community and renewable developers, to identify appropriate zones for renewable development and for conservation along with a comprehensive mitigation strategy for public and private lands in the California Desert. The DRECP’s first official meeting occurred in March of this year with the first meeting of its independent science advisors’ panel occurring in April.

The bill was also drafted prior to the enactment, in March, 2010, of California’s Senate Bill 34, which requires the California Department of Fish and Game to develop an interim mitigation strategy for “fast track” renewable energy projects in the Desert.¹² Under these circumstances,

¹² CAL. S.B. 34 (2010). The California Senate reported that the bill, S.B. 34,

would authorize the [California Department of Fish and Game], in consultation with the Energy Commission and, to the extent practicable, the United States Fish and Wildlife Service and United States Bureau of Land Management, to design and implement actions to protect, restore, or enhance the habitat of plants and wildlife that can be used to fully mitigate the impacts of the take of endangered, threatened, or candidate species (mitigation actions) resulting from certain solar thermal and photovoltaic powerplants in the planning area of the Desert Renewable Energy Conservation Plan, as defined. The bill would establish the Renewable Energy Resources Development Fee Trust Fund as a continuously appropriated fund in the State Treasury to serve, and be managed, as an optional, voluntary method for developers or owners of eligible projects, as defined, to deposit fees sufficient to complete mitigation actions established by the department and thereby meet their requirements pursuant to CESA or the certification authority of the Energy Commission.

we urge that careful consideration be given to ensure that this section does not undermine the rigorous scientific and public participation requirements that the DRECP is subject to under the State's Natural Communities Conservation Planning Act of 1991. Provisions of particular concern include Section 205(d)(3)(C)(i), which provides that only 75% of the cost of acquiring mitigation lands need to be paid by participants. We also urge that consideration also be given to ensuring that the 200,000 acres or more of land required to be identified as part of this mitigation banking system under Section 205(c)(1) is done in collaboration and consistent with state mitigation and planning efforts.

Conclusion

In conclusion, NRDC supports the goals of Senator Feinstein's legislation and believes that it is an important step toward balancing America's need to shift to clean energy with the need to protect unique and sensitive lands. We stand ready to work to resolve the concerns detailed above with the Senator and with this Committee.

Thank you for considering our views.