

## Grading Biden's Push To Site Green Energy On Public Land

By **Keith Goldberg**

*Law360 (August 5, 2022, 2:32 PM EDT)* -- The Biden administration has made strides in attempting to fulfill a congressional mandate to boost renewable energy development on public lands, but experts say more must be done to hit the aggressive target set by Capitol Hill.

The COVID-19 relief bill passed in December 2020 tasked the federal government with granting permits for at least 25 gigawatts of wind, solar and geothermal energy on public lands by 2025, a goal known as 25 by 25. More than a year and a half later, federal efforts to achieve that target are encouraging but incomplete, project development attorneys say.

They credit the U.S. Department of Interior and its Bureau of Land Management for improving interagency coordination on reviews and permitting, prioritizing transmission development and for recently announced moves to reduce rents and fees paid by wind and solar projects on public lands.

But experts say work still must be done to update permitting programs and land management plans and to improve coordination with state and local governments. They also believe the BLM lacks the staff needed to push more projects through the permitting process.

The 25-by-25 mandate was always going to be a challenge, especially since project development on federal land generally takes longer, costs more and carries more regulatory uncertainty than development on private land, said Janice Schneider, global co-chair of Latham & Watkins LLP's environment, land and resources practice and a former assistant secretary for land management and minerals for the DOI during the Obama administration.

"There are a lot of companies that just won't develop because of that," said Schneider. "That's what the administration has to deal with and work through."

Here, Law360 breaks down the Biden administration's work to meet the 25-by-25 target and where attorneys say it's falling short.

### *Meeting Expectations*

#### **Boosting Interagency Coordination**

Getting a renewable energy project built on public land requires approvals from multiple federal

agencies, which can lead to drawn-out project reviews.

Experts say the Biden administration has taken several promising steps to improve coordination among permitting agencies, including encouraging project developers to use the so-called FAST-41 review process. Among other features, FAST-41 directs agencies to harmonize and stick to firm timetables for environmental reviews and permitting of large infrastructure projects.

The federal government says most FAST-41 participants are renewable energy, coastal restoration and transmission projects, the majority of which are offshore wind projects. The 125-mile Ten West Link transmission project running between Arizona and California that the BLM greenlighted on July 14 went through the FAST-41 process.

"This administration has embraced the FAST-41 process," said Nossaman LLP energy development partner Svend Brandt-Erichsen. "That coordination function can be valuable because when multiple federal agencies are involved, that can lead to miscommunication and delays."

But participation in the FAST-41 process is voluntary for companies. The BLM said in May that it would create renewable energy coordinating offices, or RECOs, within its state offices in four Western states to boost joint environmental compliance work on proposed renewable projects with other federal agencies, including the Environmental Protection Agency and the Departments of Energy, Agriculture and Defense.

"FAST 41-is helpful because it does set these deadlines," Latham's Schneider said. "But as is often the case, these reviews tend to expand. They don't get shorter. Permit streamlining is where the RECO offices can help."

### **Focus on Transmission**

The Biden administration has made grid development a linchpin of its clean energy policy, and experts credit the BLM for giving transmission project permitting on public lands equal priority with renewable energy project permitting.

"At BLM, there's definitely a heightened movement to get those lines through the transmission [approval] process," said Nossaman partner Brooke Marcus, who counsels energy developers on compliance with environmental permitting laws.

In addition to the just-approved Ten West Link project, the BLM in May **approved the construction** of a PacifiCorp transmission line running from Wyoming to Utah that would be capable of transporting between 1,500 and 2,000 megawatts of electricity, largely from renewable energy generation projects. The previous month, the agency issued a draft environmental impact statement for the proposed SunZia Southwest Transmission Project running from New Mexico to Arizona and kick-started environmental reviews of two other long-distance transmission projects in Nevada and Utah.

The BLM expects to propose revised regulations for issuing rights of way for both renewable energy and transmission projects by October.

Transmission development on public land is an even more arduous task than energy generation development. For example, PacifiCorp's Gateway South project is over a decade in the making. But experts say the Biden administration has realized that it has little hope of meeting the 25-by-25

mandate without major moves to expand transmission, since renewable energy development on public land frequently means siting projects in remote areas.

"When you don't have capacity on a grid, it's really difficult for an individual project proponent to be able to handle the cost and permitting requirements associated with that," said Morgan Lewis & Bockius LLP energy and environmental partner Ella Foley Gannon, who specializes in permitting and siting issues. "This also really does help steer projects to the places that have been identified as the best places to be located for avoidance of conflicts, because when the transmission's there, that where [the projects] are going to go."

### **Reducing Land-Use Costs**

The BLM said in May that it would reduce acreage rental rates for new and existing wind and solar projects on public land, as well as megawatt capacity fees for projects, which reflect the electricity-generating value of the land that projects are sited upon. The agency is altering the formula by which the rental rates are calculated and setting a standard megawatt capacity fee, which it says could reduce rents and fees by an average of over 50%.

"The rents that BLM were charging were well above fair market value, and that resulted in challenges in front of the Interior Board of Land Appeals," Schneider said. "The Interior Board of Land Appeals has stayed some of the rent payments because they were above fair-market value."

Brandt-Erichsen of Nossaman said there could be some unintended consequences of lowering the rents and fees on existing projects, including changing project owners' financial obligations under their existing contracts and how project lenders look at future projects. Still, attorneys say the BLM's decision was a recognition by the agency that higher costs represented a real barrier to entry for renewable energy developers interested in building on public land.

"At the end of the day, it comes down to the economics," said Baker Botts LLP special counsel Kyle Hayes, who works on renewable energy development. "To the extent the administration can subsidize and reduce some of the inherent, fixed costs from building these projects ... that's going to send a price signal."

### *Needs Improvement*

#### **Agency Staffing**

The 25-by-25 target is an ambitious goal, and one of the biggest concerns that project development attorneys have is that the DOI doesn't currently have the resources to make it happen

Attorneys say the BLM and its state-level offices in particular have been chronically understaffed. They say that problem has been exacerbated by recent upheaval stemming from the Trump administration moving the agency's headquarters from Washington, D.C., to Colorado in 2020 and the Biden administration reversing that move last year.

"Ultimately, the work on right-of-way grants works down to the level and organization of the realty staff in field offices," Brandt-Erichsen said. "There have to be personnel in those offices to be able to process those applications. Attracting additional staff has been an issue for BLM."

The BLM told Law360 in June that it plans to add 56 new full-time positions dedicated solely to

renewable energy projects and that 42 of those positions have either been filled or are close to being filled. Nine of the positions will be housed at the national RECO office and the other 47 positions will be spread through the four RECO offices in Arizona, California, Nevada and Utah, the agency said.

Attorneys credit the agency for recognizing its staffing problems, but say there needs to be a sustained buildup of personnel and other resources to stay on the 25-by-25 track.

"You can have every goal and policy that's designed, but when you have a shortage of staff such that they can't actually dedicate the time that's necessary to get this through in a reasonable time period, it just can't happen," Gannon of Morgan Lewis said.

### **Coordination With State and Local Authorities**

Building renewable energy projects on public land frequently requires input from federal, state, local and tribal authorities. While attorneys have been encouraged by the DOI's work to better coordinate with tribes on project development and permitting, they say coordination with state and local authorities is still lacking.

"Other than tribal consultations, which has received a strong emphasis in this administration, I haven't seen indications of other efforts to coordinate with state and local land use [authorities]," Brandt-Erichsen of Nossaman said. "Frankly, that usually falls to the developer."

However, it's much more difficult for developers to make any necessary project changes without strong, joint leadership from federal and state authorities, Gannon of Morgan Lewis said. Federal and state agencies need to work through their complementary, or contradictory, ideas about where projects should be sited or how their impacts should be mitigated, she said.

"What really helps is, yes, they're all talking to the applicant, but they're also talking regulator to regulator," Gannon said. "When there can be real, regular and meaningful conversations between states and the feds, that's where you get things done."

A BLM spokesperson told Law360 that the agency is trying to work with state and local authorities through preliminary application meetings on project proposals in order "to gain public input early in the process."

### **Species Permitting and Land Management Changes**

Balancing development with protection of affected species and their habitats is a persistent source of tension for renewable energy projects on public land. Attorneys are eagerly awaiting DOI action on a pair of significant issues on that front.

One is the BLM's amendment of land-use plans aimed at protecting the greater sage-grouse and its habitat across the West. The agency kicked off the review process last fall after a federal court blocked proposed changes by the Trump administration.

The public scoping process, where the public gets input about what environmental impacts should be reviewed, wrapped up in February, and the BLM told Law360 that it has identified issues from those comments that it will include in an upcoming environmental impact statement. Marcus of Nossaman said the agency's evaluation of new potential impacts on greater sage-grouse, including climate change,

has the renewable energy industry holding its breath.

"I think the uncertainty with what may be involved in those amendments and the uncertainty with sage-grouse populations have to be factored into project permitting," Marcus said. "And uncertainty is hard to plan around."

Another area that renewable developers want greater clarity on is Fish and Wildlife Service regulations governing incidental take permits under the Eagle Act. The FWS began a potential revision of its eagle permitting regulations last September, acknowledging that the current rules may be written in a way that hinders the permitting process.

The agency expects to propose changes by this September.

"Until we see what those proposed amendments look like, and they are ultimately finalized, whether that goes in a good direction remains to be seen," Marcus said.

--Editing by Jill Coffey.