Last August, the Secretary of the Interior issued an order that required considering the "capacity density" of an energy source in issuing permits for that energy source on federal land. The order was a blatant effort to stop renewables permitting on federal lands, because the "capacity density" measure the agency used simply looks at the area of land the energy production source requires versus the amount of energy the source produces – and a single coal-fired plant obviously has a smaller footprint than a solar or wind project.

But what I want to focus on in this post is not the merits or demerits of that rationale. Instead, I want to highlight a phrase that was used in the order: "when there are reasonable alternatives that can generate the same amount of or more energy on far less Federal land, wind and solar projects may unnecessarily and unduly degrade Federal lands."

I doubt that that language – "unnecessarily and unduly degrade" – was accidental. It mimics key language in the Federal Land Policy and Management Act (FLPMA) that requires the Bureau of Land Management (BLM) to protect federal lands from "unnecessary **or** undue degradation", what is often called the UUD standard. The UUD standard matters because it is really the only mandatory management standard BLM has to meet under FLPMA, and it is a standard that overrides any other management powers the agency has. It has to meet UUD in all the actions it takes. That is particularly important for hard-rock mining on federal lands, where the UUD standard might actually allow or require BLM to stop mining projects that are environmentally destructive – legal power that BLM would not otherwise have.

But the meaning of UUD has long been unsettled. For many years, it was interpreted (particularly by Republican Administrations) as only preventing actions on federal lands that were "unnecessary" to achieve the goal of the permitted activity. Thus, for a mining project, UUD only prohibited mining activities that were unnecessarily destructive of the environment to achieve that particular mining activity, but any impacts that are necessary could be (or perhaps had to be) permitted by the agency.

The Clinton Administration argued instead that this reading of UUD made the statutory language "undue" redundant, and it issued regulations (as applied to mining projects) that allowed the agency to stop mining projects that produced too much environmental harm, even if that harm would be necessary for the specific project. The George W. Bush Administration revoked those regulations – in the subsequent litigation over that litigation, a district court held that the Clinton

Administration position was the correct one as a matter of statutory interpretation. But there has been no further resolution of the meaning of the term.

Which makes the Secretarial Order here . . . interesting. Because the way the order is framed, I think it interprets UUD consistent with the Clinton Administration position. It requires an assessment of the environmental damage of a project not with what is necessary to achieve that type of project, but instead in terms of relative comparisons with other possible types of projects. And that second framing is much more expansive. In fact, it gets most of the way (if not all of the way) to the Clinton Administration position. If we reject renewable projects because they use "too much" land up for the energy they produce, that is in essence a conclusion that there is a maximum amount of land (or at least a maximum ratio of land to energy) we want to sacrifice for energy production. In other words, there is an environmental standard that is not tethered to what we need to meet to achieve some other goal, but a standard that applies in and of itself.

That is a big shift, coming from a Republican Administration. And I do wonder if, in the litigation over the renewable projects to come, and in future fights down the road over future projects on the public lands, the shift will be entrenched by courts undertaking statutory interpretation, and perhaps also by subsequent administrations with very different policy preferences, who will cite this as an example of the bipartisan adoption of a broad meaning for UUD under FLPMA.

Update: Corrected the statutory language, thanks to John Leshy's careful reading. The Order uses "unnecessary **and** undue" which is a different formulation. Interestingly, that variation makes the Order even more of an endorsement of an expansive definition for FLPMA, since it implies low capacity density is both unnecessary and undue!