

## DOCKETED

<b>Docket Number:</b>	09-AFC-07C
<b>Project Title:</b>	Palen Solar Power Project - Compliance
<b>TN #:</b>	201355
<b>Document Title:</b>	Energy Commission Staff Reply Brief
<b>Description:</b>	N/A
<b>Filer:</b>	Janice Titgen
<b>Organization:</b>	California Energy Commission
<b>Submitter Role:</b>	Commission Staff
<b>Submission Date:</b>	12/2/2013 3:22:17 PM
<b>Docketed Date:</b>	12/2/2013

**STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION**

**In the Matter of:**

**Application for Certification for the**

**PALEN SOLAR ELECTRIC GENERATING  
SYSTEM**

**Docket No. 09-AFC-07C**

**ENERGY COMMISSION STAFF REPLY BRIEF**

Jennifer Martin-Gallardo  
Attorney  
California Energy Commission  
1516 Ninth Street, MS-14  
Sacramento, CA 95814  
Tel: (916) 651-3748  
Fax: (916) 654-3843  
E-mail: [Jennifer.Martin-Gallardo@energy.ca.gov](mailto:Jennifer.Martin-Gallardo@energy.ca.gov)

## ENERGY COMMISSION STAFF REPLY BRIEF

### INTRODUCTION

Energy Commission Staff (Staff) believes that most of the issues raised by other parties in their opening briefs have been adequately addressed in Staff's Opening Brief, and will avoid repeating previous discussion addressing such issues. Only issues requiring further response are addressed below.

#### I. STAFF'S RESPONSE TO CENTER FOR BIOLOGICAL DIVERSITY'S OPENING BRIEF

##### 1. Staff Analyzed a Reasonable Range of Alternatives

The Center for Biological Diversity (CBD) states in its Opening Brief that staff was required – but failed – to look at redesigning the project footprint to minimize impacts. (CBD Opening Brief, p. 35.) CBD is incorrect both on what staff is required to do and what staff did.

CEQA states that the range of alternatives required in an EIR is governed by a 'rule of reason' that requires the EIR to set forth only those alternatives necessary to permit a reasoned choice. (CEQA Guidelines, section 15126.6(b)) As discussed more fully in Staff's Opening Brief, Staff thoroughly analyzed a reasonable range of alternatives and the analysis is more than sufficient under CEQA. (Staff's Opening Brief, pp. 20-23.)

Also, Staff *did* consider redesigning the footprint by reducing the footprint to just one tower, and found that although the reduction would reduce some impacts to biological resources, it would not avoid or substantially lessen the PSEGS project's significant impacts to Cultural Resources, Traffic and Transportation, or Visual Resources of the project. (Exh. 2000, p. 6.1-3.)

Staff is unable to provide a detailed analysis on specific proposals that are presented after publication of the Final Staff Assessment. However, Staff provided a brief analysis of the alternative provided by CBD just prior to the evidentiary hearings. (Exh. 2003, p. 2; 10/29/13 RT p. 62.)

##### 2. Staff Has Properly Analyzed All Of The Project's Significant Impacts

In its Opening Testimony, CBD asserts that Staff's environmental review of impacts to biological resources is incomplete and inadequate. (CBD Opening Brief, p. 26.) This is simply not true. Staff thoroughly analyzed project impacts, an effort that far exceeds the requirements of CEQA.

For those areas that CBD specifically calls out as deficient, Staff directs the Committee to a sample of the evidence in the record: Desert Tortoise Connectivity (10/29/13 RT pp. 63-64, 73, 218-219; Exh. 2000, pp. 4.2-130 to 132, 207 to 208); Avian Species (Exh. 2000, pp. 4.2-4 to 7, 150 to 169); Invertebrates (Exh. 2000, pp. 4, 72,150,153); Sand Habitat and Mojave Fringe Toed Lizards (Exh. 2000, pp. 4.2-8 to 9, 132 to 135); Desert Kit Fox (Exh. 2000, pp. 4.2-8, 144-146; 10/29/13 RT pp. 199-205); American Badger (Exh. 2000, pp. 4.2-8, 144-146); Burrowing Owl (Exh. 2000, pp. 4.2-7, 135-139); Soil Crusts (Exh. 2000, pp. 189-190, 218; 10/29/13 RT pp. 213-214.)

CEQA Guidelines state that “[an] evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of what is reasonably feasible.” (CEQA Guidelines, § 15151.) “CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors.” (CEQA Guidelines, § 15204(a).)

Biological Resources Staff in no way skirted its responsibilities under CEQA. The consideration of the PSEGS project’s impacts was extremely thorough based on the reasonably available information. Staff’s analysis certainly meets, and exceeds, the requirements of CEQA.

### **3. Mitigation Measures Are Appropriate**

Staff’s proposed conditions of certification are not impermissible deferred mitigation. CEQA Guidelines allow mitigation measures to specify performance standards which would mitigate the significant effect of a project and which may be accomplished in more than one specified way. (CEQA Guidelines § 15126.4(a)(1)(B).) Courts have approved deferral of mitigation when it is not yet practical to define specific mitigation measures, as long as the mitigation measure commits the agency to the mitigation and provides performance standards.

“When a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. Moreover, ... the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study.” (*California Native Plant Society v. Rancho Cordova* (2009) 172 Cal.App.4<sup>th</sup> 603, 621, citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011.) “[F]or [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process..., the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence

that significant impacts will in fact be mitigated.” (*Sacramento Old City Assn.*, *supra*, 229 Cal.App.3d at pp. 1029-1029.)

Therefore, Staff’s conditions of certification and mitigation measures are appropriate under CEQA.

#### **4. Staff Has Consulted With Wildlife Agencies**

CBD argues that the Commission must consider the California Department of Fish and Wildlife’s expertise regarding impacts to special status species and trust resource. (CBD Opening Brief, p. 7.) Staff has conferred extensively with the Wildlife Agencies. (10/29/13 RT pp. 158-159, 193-195.) And while CBD seems to argue that Staff must come forward with evidence that the Department provided its expertise in writing, this is not what the law requires. All information provided by the wildlife agencies, whether orally or in writing, is considered by Staff as an important part of its deliberative process.

## **II. STAFF’S RESPONSE TO COLORADO RIVER INDIAN TRIBE’S OPENING BRIEF**

### **1. Staff’s Analysis is Sufficient Under CEQA**

On the one hand CRIT praises Staff for completing a landscape level analysis of impacts.

“CEC staff identify the massive Pacific to Rio Grande Trail Landscape (PRGTL), and attempt to situate the known traditional cultural properties, trails, individual archaeological sites, and places between within this cultural and historic landscape. This approach better addresses the cultural resource concerns raised by CRIT members than the individual resource approach frequently taken in considering utility-scale solar projects.” (CRIT Opening Brief, p. 6.)

On the other hand, CRIT criticizes Staff for not thoroughly analyzing everything within that “massive” landscape.

CEQA does not require such an infeasible analysis. CEQA requires that an EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. (CEQA Guidelines § 15151). The adequacy of an EIR is determined in terms of what is reasonably feasible, in light of factors such as the magnitude of the project at issue, the severity of its likely environmental impacts, and the geographic scope of the project. (CEQA Guidelines § 15204 (a).)

Staff has not deferred analysis. Staff has made a good faith effort to fully disclose the potential impacts the PSEGS project will have on cultural resources. Staff's expert opinions are based upon the facts they have before them and reasonable expert assumptions and conclusions that experts are allowed to make. The Final Staff Assessment has identified and analyzed the PSEGS project's impacts on Cultural Resources and developed an appropriate set of conditions and mitigation measures. Proposed Condition of Certification **CUL-1** is Staff's best attempt to partially *mitigate* what Staff has already analyzed and determined to be an unmitigable significant impact.

**2. The Energy Commission's Chief Counsel's Office has not prohibited consultation with CRIT.**

CRIT counsel's claims that Staff is unwilling to comply with CRIT's standard tribal laws regarding ethnographic research are unfair and misplaced. In order to conduct ethnographic research on the CRIT reservation and with CRIT tribal members, CRIT requires a Research Application, which includes a Non-Disclosure Agreement (NDA) and Memorandum of Understanding (MOU). Energy Commission and tribal staff began working on an agreement that would be valid for several years and would apply to all Energy Commission projects that impact CRIT. In completing these documents, Staff noticed potential issues and brought those issues to the attention of the Energy Commission's Chief Counsel's Office. The Chief Counsel's Office identified that certain portions of the NDA and MOU were problematic for a state agency to agree to and would require modification. In July, 2013, Staff proffered suggested language modifications to the documents, but has not yet received a response from CRIT. Staff looks forward to a resolution to this situation so that it can include CRIT tribal members in CEC's future ethnographic efforts.

**CONCLUSION**

In conclusion, the intervenors have commented on several aspects of the FSA that they believe were inadequate. CEQA does not require an all-encompassing or perfect environmental review. The FSA identified and analyzed potential significant impacts, suggested conditions of certification and discussed mitigation measures. The FSA provides the public with information about the potential impacts of the PSEGS project and provides to the decisionmakers the information which enables them to make a decision which intelligently takes account of environmental consequences.

Date: December 2, 2013

Respectfully Submitted,

s/ Jennifer Martin-Gallardo

Jennifer Martin-Gallardo  
Attorney