

**DOCKET**

**09-AFC-7**

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**STATE OF CALIFORNIA**

**Energy Resources Conservation and Development Commission**

In the Matter of:

APPLICATION FOR CERTIFICATION  
FOR THE PALEN SOLAR POWER  
PROJECT

DOCKET NO. 09-AFC-7

**COMMENTS ON PMPD FROM  
INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY**

November 29, 2010

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## INTRODUCTION

The Center for Biological Diversity provides these comments to help assist the Presiding Member and the Committee in revising the PMPD,<sup>1</sup> assuming for the sake of argument alone that the proposed project may be permitted. However, the Center does not believe that the inadequacies in the environmental review and the poor choice of a project site have been properly addressed or that the proffered mitigation is adequate to address the impacts of the proposed project.

The Center objects to the extremely short time provided to the parties for comments on the PMPD. The Committee has “required” comments from the Parties on the PMPD (which is over 700 pages long) by Monday, November 29 at 3 pm.<sup>2</sup> The Center, nonetheless, offers the following initial comments on the PMPD and reserves the right to provide additional comments at the December 2, evidentiary hearing and up to and including at any Commission meeting at which this application is considered.

### I. The Process has Been Unnecessarily Rushed

The Committee has rushed this process through for no reason. The Center has repeatedly raised this issue to little effect as the Committee appears to believe that it must accommodate the applicant’s desired timetable over all other concerns. There are many reasons that the rush to decision is entirely unnecessary. Most importantly, the Proposed Project requires approvals from the Bureau of Land Management in a process that is far behind the Commission’s process. Indeed, the BLM has not yet evaluated the two reconfigured alternatives that the Committee is now recommending for approval. Specifically, there has been no Federal NEPA document published to date that looks at the Reconfigured Alternative 2 or 3 that are recommended in the PMPD. Until and unless BLM provides a Supplemental EIS or a Final EIS that discusses either of the Committee’s now-favored alternatives (Reconfigured Alternative #2 or Reconfigured Alternative #3) there is no reason for the Commission to rush to approve the proposed project and, as explained below, it cannot approve the proposed project at this time.

The proposed project includes areas within areas designated for wildlife protection (ACEC, DWMA, Critical Habitat, and WHMA). These are areas that are prohibited for siting unless specific exceptions are met. Those exceptions require a finding that the proposed project is not inconsistent with the primary uses of such lands and a showing of *prior* approval by the appropriate land management agency. Pursuant to the statute:

“The following areas of the state shall not be approved as a site for a facility,

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<sup>1</sup> The Center strongly urges the Presiding Member in the future to **consecutively number all pages of the document or use numbering for the chapters in addition to the pages**. It is very difficult to locate pages without a clear numbering system and the “bookmarks” in the PDF provided on the Commission webpage were non-functioning.

<sup>2</sup> As a result, the parties were provided less than 9 business days from the publication of the PMPD mid-day on Friday, November 12, due to the intervening Thanksgiving holiday, in which to review, analyze, and provide comments on a 700 page document.

*unless the commission finds that such use is not inconsistent with the primary uses of such lands and that there will be no substantial adverse environmental effects and the approval of any public agency having ownership or control of such lands is obtained:*

(a) State, regional, county and city parks; wilderness, scenic or natural reserves; *areas for wildlife protection*, recreation, historic preservation; *or natural preservation areas* in existence on the effective date of this division.

...  
In considering applications for certification, the commission shall give the greatest consideration to the need for protecting areas of critical environmental concern, including, but not limited to, unique and irreplaceable scientific, scenic, and educational wildlife habitats; unique historical, archaeological, and cultural sites; lands of hazardous concern; and areas under consideration by the state or the United States for wilderness, or wildlife and game reserves.”

(Public Resources Code § 25527.) Similarly, the Commission’s regulations state that:

(a) The commission shall not find acceptable any site and related facility to which the provisions of Sections 25526 or 25527 of the Public Resources Code apply unless the finding required by the applicable section has been made.

(b) The applicant shall be required to comply with the following requirements of Sections 25526 and 25527 at the application stage:

...  
(4) For a site in any area covered by this section, the applicant shall demonstrate *prior to the conclusion of hearings* held under Section 1748 *that the approval of any public agency having ownership or control of such lands has been obtained.*”

(20 CCR § 1729(b)(4). Nonapprovable Sites or Non-Certifiable Sites (emphasis added).)

The applicant cannot make any showing that it has the approval of the BLM, the public agency with management control over the lands in question, and the PMPD did not make the required findings pursuant to the regulations, 20 CCR § 1752(f).<sup>3</sup> Therefore, the Commission cannot certify or approve the application at this time.

In addition, to date, there has been no FDOC provided from the air district to the Commission or to the parties. There are also unresolved issues regarding water rights that are not dealt with in the PMPD or elsewhere but rather are deferred to later studies. PMPD at Soil and Water 4-5/ pdf 414-415.

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<sup>3</sup> Oddly, the PMPD relies on the *lack* of site control to dismiss alternatives that would avoid many of the impacts to species and other biological resources compared to the proposed project and the reconfiguration alternatives but completely ignores the lack of site control over BLM lands for the applicant’s favored alternatives.

The Center is concerned that the rushed process has undermined a full and fair review of the proposed project and the alternatives by the public as well. For example, at the time the PMPD was issued, no documents from members of the public, other agencies, or intervenors had been posted to the Commission website for the project since July, 2010.<sup>4</sup> While there may not be a requirement that all party documents be posted, posting documents from staff and not from other parties gives the strong appearance of an imbalance in the process. The Commission's failure to provide the same access to the public for the documents from all of the parties may undermine both public participation and fairness.

## **II. The Commission Cannot Cede Its Discretion to the Applicant**

The PMPD recommends that either Reconfigured Alternative #2 or Reconfigured Alternative #3 be approved and appears to suggest that the Commission could leave the choice to the applicant. This is incorrect. Only the Commission can exercise its own discretionary authority, it cannot give that discretion to a private entity. The Commission itself must make a determination of which project will be approved, it cannot leave that choice to the applicant to make at a later time. If the applicant is not now prepared to choose which project alternative it is asking the Commission to certify, then it should wait until it is certain before seeking approval.

The PMPD finds that both the Reconfigured Alternative #2 and Reconfigured Alternative #3 are feasible and would reduce impacts compared to the proposed project. However, Reconfigured Alternative #2 requires the Applicant to acquire additional private land that it has to date been unable to secure. On this basis alone, this Reconfigured Alternative #2 cannot be considered for approval at this time (nor, indeed, can any of the proposed project configurations at this site on BLM land as noted above, because of the lack of approval by the land manager, the BLM). Assuming for the sake of argument alone that either of the reconfiguration alternatives should be considered for approval by the Commission at this time (which the Center does not concede), the Commission should *at most* consider certification of only the western half of the proposed reconfigured alternatives to the project which is the same in both of these reconfigured alternatives and the Commission should wait to determine any additional project approval until the applicant states which of the remainder of the reconfigured alternatives it intends to build. (However as stated above, the Commission is not yet in a position to approve any of the BLM land alternatives absent approval from the BLM.)

## **III. The Proposed Project Will Have Significant Impacts that Could be Avoided By Feasible Alternatives to the Project**

### **A. The PMPD Fails to Adequately Address the Significant Impacts to Biological Resources**

The PMPD fails to adequately assess the impacts of the proposed project on biological resources. For example, Bio-12 provides for compensatory desert tortoise elsewhere within the "Colorado Desert Recovery Unit", ignoring the current Desert Tortoise Recovery Plan which

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<sup>4</sup> Testimony from Intervenor, the Center for Biological Diversity, was finally posted on the Commission website until Wednesday, November 24, 2010, only after repeated requests.

identifies this area as part of the “Eastern Colorado Recovery Unit” as discussed by Ms. Anderson in her testimony. (Exh. 640 at 5-6; Exh. 648). The PMPD does not explain or provide any support for the reliance on the *draft* Recovery Plan that has not been adopted by FWS rather than the 1994 Recovery Plan for the Desert Tortoise adopted by the U.S. Fish & Wildlife Service (Exh. 648) for establishing the appropriate area in which compensatory mitigation for the desert tortoise should be located.

Moreover, impacts to the WHMA for desert tortoise habitat connectivity remain significant as the project will block nearly all movement across this area. (PMPD at pdf 317-318). The PMPD acknowledges the significance of this impact but simply dismisses it as being “mitigated” by Bio-12 and Bio-21 both of which allow for mitigation in a broad area and neither of which provide any protection for connectivity across this WHMA. Bio-12, as explained above, provides for compensatory desert tortoise in a very large area and does not provide any mitigation for the loss of connectivity across this WHMA. Similarly, Bio-21 provides for compensatory mitigation for waters of the State elsewhere in the California desert. Nothing in these measures addresses the need to avoid, minimize or mitigate the specific impacts of the proposed project at this site to connectivity for desert tortoise in this area.

The PMPD’s conclusions regarding the efficacy of compensatory mitigation do not address whether adequate lands are available to mitigate the specific impacts in appropriate areas—it simply assumes they will be mitigated. The PMPD also does not address the adequacy of the mitigation measures and specifically does not address the issue that 1:1 mitigation is insufficient. (Exh. 640 at 3, 5, 6; Exh. 641.)

The PMPD also dismisses the significance of cumulative impacts based on the provision of compensatory mitigation for direct and indirect impacts with no explanation of how these measures may in fact mitigate the cumulatively considerable impacts of this proposed project and other past, present and foreseeable future project in the area on biological resources. For example, cumulative impacts to the Mojave fringe-toed lizard are recognized as significant but nothing in the PMPD explains how the PMPD then reached the conclusion that the cumulative impacts to the species would not remain significant based on the proposed mitigation. Cumulative impacts to this species are significant and remain so under the proposed PMPD.

In sum, the Committee has grossly underestimated the value of the biological resources on the lands that would be affected by the proposed project and as a result also underestimated the mitigation needed for direct and indirect impacts and no mitigation is provided for cumulative impacts at all. Direct, indirect, and cumulative impacts that are not adequately mitigated include, but are not limited to, impacts to the desert tortoise and the designated connectivity WHMA, impacts to the Mojave fringe-toed lizard and its habitat, and impacts to burrowing owls and other avian species found on site and in this area.

## **B. The PMPD Fails to Adequately Address the Distributed Generation Alternative**

The PMPD largely ignores CBD testimony on the distributed PV alternative and simply repeats statements from the RSA that cast doubt on the viability of distributed PV as an alternative to the PSPP. Mischaracterizations in the RSA discussion on distributed PV are

repeated in the PMPD as if CBD testimony addressing these mischaracterizations had not been submitted. The statements in the PMPD regarding the speed of deployment of distributed PV, policy hurdles to more rapid deployment of distributed PV, and cost of PV are wrong and unsupported. The PMPD also overstates the capacity factor of the PSPP, when in fact the capacity factor of the PSPP is little different than the capacity factor of distributed PV. These issues are addressed in more detail in the following paragraphs.

The PMPD states that only 3 MW of rooftop PV capacity has been installed in the 500 MW SCE PV program as of January 2010. As Mr. Power's testimony pointed out, SCE explained in its March 2008 testimony for its proposed 250 MW warehouse rooftop PV program (Ex. 621, Table III-3, p. 22) that it will begin installing PV at a rate of 50 MW per year after CPUC approval is received. CPUC approval was received in June 2009 after the CPUC added 250 MW of third party PV to the program, increasing overall authorized capacity to 500 MW and increasing the proposed annual installation rate to 100 MW per year (Exhibit 602).

The PMPD statement that SCE installed only 3 MW of PV as of January 2010 implies that this is less than would be expected and therefore mischaracterizes the SCE 500 MW program. Approximately 100 MW per year will be constructed under this program from 2010 through 2014. The program is on schedule as it was envisioned by SCE. SCE has already signed contracts with PV panel providers for its 250 MW of utility-owned capacity (Exhibits 623, 625). SCE has confirmed it is on schedule to meet the PV program installation targets. Mr. Powers questioned the CEC consultants on this point during the Palen hearing (Palen Transcript Oct 27, 2010 p. 157). The CEC consultants admitted they were unaware of the SCE PV program installation schedule.

The PMPD states that: "*However, in arguing for PV as an alternative to the PSPP, Mr. Powers runs afoul of our goals and policies, because he appears to contend that rooftop PV should be used instead of PSPP*" (Alternatives, p. 32). This makes little sense as the CPUC has already authorized distributed PV projects that are just as large as the proposed 500 MW PSPP. These projects, the 500 MW SCE warehouse rooftop PV project and the 500 MW PG&E distributed PV project, are identified in the RSA and the PMPD (Alternatives, pp. 29-30). Therefore, there is no question that a 500 MW distributed PV project can substitute for the 500 MW PSPP.

Despite statements to the contrary in the PMPD (p. 31), no *policy changes* would be necessary for SCE to simply replicate its in-progress 500 MW warehouse PV program multiple times over. SCE expressed confidence in its March 2008 application that it can absorb thousands of MW of distributed PV without additional distribution substation infrastructure, stating "*SCE's Solar PV Program is targeted at the vast untapped resource of commercial and industrial rooftop space in SCE's service territory*" (Exh. 606) and "*SCE has identified numerous potential (rooftop) leasing partners whose portfolios contain several times the amount of roof space needed for even the 500 MW program*" (Exh.624; see Exhibit 600, p. 6)

The CPUC lauds the 500 MW SCE PV program, as it lauds PG&E's 500 MW distributed PV project, for speed of construction, lack of need for new transmission, and lack of land use, water, or air emission impacts (Ex. 600, pp. 6-7; Exh. 602). The commercial and industrial

rooftop resource in SCE territory is vast. CPUC consultant Black & Veatch has identified more than 5,000 MW<sub>ac</sub> of flat commercial rooftop space within 3 miles of existing distribution substations in SCE territory (Ex. 600, pp. 12-13 (citing CEC, *2009 Integrated Energy Policy Report (IEPR) – Final Committee Report*, December 2009,<sup>5</sup> p. 193.) This is sufficient commercial rooftop PV space for the equivalent of ten PSPP projects.

SCE clearly does not anticipate any substantial challenges to adding potentially thousands of MW of rooftop PV in its service territory in its application to the CPUC for the warehouse rooftop PV program. SCE states it has the ability to balance loads at the distribution substation level to avoid having to add additional distribution infrastructure to handle this large influx of distributed PV power. (Exh. 606.) SCE explains:

“SCE can coordinate the Solar PV Program with customer demand shifting using existing SCE demand reduction programs on the same circuit. This will create more fully utilized distribution circuit assets. Without such coordination, much more distribution equipment may be needed to increase solar PV deployment. SCE is uniquely situated to combine solar PV Program generation, customer demand programs, and advanced distribution circuit design and operation into one unified system. This is more cost-effective than separate and uncoordinated deployment of each element on separate circuits.” (Exh. 606)

SCE also notes that it will be able to remotely control the output from individual PV arrays to prevent overloading distribution substations or affecting grid reliability:

“The inverter can be configured with custom software to be remotely controlled. This would allow SCE to change the system output based on circuit loads or weather conditions.” (Exh. 624)

As a result, SCE’s own statements contradict the concern raised in the PMPD that “*The State’s electric distribution systems are not designed to easily accommodate large quantities of randomly installed distributed generation resources.*” (Alternatives, p. 31). SCE is quite clear in its PV program application on the procedures it will implement to avoid negative impacts on grid reliability while absorbing potentially thousands of MW of commercial and industrial rooftop PV.

The PMPD also mischaracterizes the capacity factor of the PSPP relative to distributed PV. The PMPD makes (at p. 30) a generic comparative statement on capacity factor in the alternatives discussion: “*The Renewable Energy Transmission Initiative (RETI) assumed a capacity factor of approximately 30 percent for solar thermal technologies and tracking solar PV and approximately 20 percent capacity factor for rooftop solar PV which is assumed to be non-tracking.*” Yet in the PMPD chapter on efficiency (pdf p. 116), the estimated electricity production from the PSPP is 1,000,000 MWh per year for the 500 MW (net) project. This is a capacity factor of  $1,000,000 \text{ MWh/yr} \div (500 \text{ MW} \times 8,760 \text{ hr/yr}) = 0.228$  (22.8 percent). The actual 22.8 percent capacity factor of the PSPP is only marginally higher than the 20 percent

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<sup>5</sup> This document was officially noticed in this matter. See CBD Testimony at 9; Request for Official Notice, and Palen Transcript October 27, 2010, at 131.

capacity factor for rooftop solar in urban areas. In addition, most or all of the slight PSPP capacity factor advantage would be wasted as transmission losses (Exhibit 600, p. 19; Exh. 637).

The PMPD relies on obsolete cost information to assert that distributed PV would be more expensive than the PSPP. The PMPD states that *“The CPUC 33% Renewables Portfolio Standard Implementation Analysis Preliminary Results considered a number of cases to achieve a 33 percent RPS standard. The results of this study state that the cost of a high distributed generation case is significantly higher than the other 33 percent RPS alternative cases. The study explains that this is due to the heavy reliance on distributed solar PV resources which are more expensive than wind and central station solar.”* The CPUC analysis relied on outdated PV cost data that was subsequently superseded in the May 2010 RETI Phase 2B Final Report<sup>6</sup> prepared by Black & Veatch and the DOE’s May 2010 Solar Vision Study – Draft (Exh. 619; see Exhibit 600, pp. 13-15.) Both the RETI Phase 2B Final Report and DOE study document a significant distributed PV cost advantage over solar thermal. Even the CPUC analysis cited in the PMPD determined that there would be little difference in the cost of meeting state renewable energy targets by relying predominantly on distributed PV instead of remote, utility-scale solar projects (Exhibit 600, p. 14).

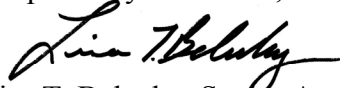
In sum, the PMPD analysis of the distributed PV alternative fails to address factual issues raised by the Center in testimony and at evidentiary hearings and is in error. Because the distributed PV alternative is feasible and would avoid many, if not all, of the significant environmental impacts of the proposed project and therefore should be adopted by the Commission.

#### **IV. Conclusion**

In sum, the Center has shown that the PMPD does not provide the information and findings necessary in order for the Commission to approve the proposed project. The PMPD did not make the required findings regarding approvals by the BLM, as it could not, and therefore the proposed project cannot be approved at this time. Moreover, no FDOC has yet been provided. The PMPD also failed to address many issues raised by the Center regarding the significant and unmitigated impacts to biological resources and failed to accurately address feasible alternatives including a distributed PV alternative. Because the proposed project will have significant impacts to many environmental resources, including biological resources, that are avoidable through the adoption of feasible alternatives, the Commission cannot properly approve the proposed project. Because the PMPD does not provide the necessary information and findings, the Committee should reschedule the PMPD conference until after the PMPD is properly revised and re-circulated.

Dated: November 29, 2010

Respectfully submitted,



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Center for Biological Diversity

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<sup>6</sup> This document was officially noticed in this matter. See CBD Testimony at 9; Request for Official Notice, and Palen Transcript October 27, 2010, at 131.



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**APPLICATION FOR CERTIFICATION  
FOR THE PALEN SOLAR POWER  
PLANT PROJECT**

**Docket No. 09-AFC-7**

**PROOF OF SERVICE  
(Revised 8/27/10)**

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**DECLARATION OF SERVICE**

I, Lisa Belenly, declare that on Nov 29, 2010, I served and filed copies of the attached Comments<sup>PMPP</sup>, dated Nov 29, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [http://www.energy.ca.gov/sitingcases/solar\_millennium\_palen]

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

**(Check all that Apply)**

**FOR SERVICE TO ALL OTHER PARTIES:**

- sent electronically to all email addresses on the Proof of Service list;
- by personal delivery;
- by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses NOT marked "email preferred."

**AND**

**FOR FILING WITH THE ENERGY COMMISSION:**

- sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

**OR**

- depositing in the mail an original and 12 paper copies, as follows:

**CALIFORNIA ENERGY COMMISSION**  
Attn: Docket No. 09-AFC-7  
1516 Ninth Street, MS-4  
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

