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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-7C

**CENTER FOR BIOLOGICAL DIVERSITY
PREHEARING CONFERENCE STATEMENT**

October 22, 2013

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INTRODUCTION

Pursuant to the October 7, 2013 NOTICE OF PREHEARING CONFERENCE AND EVIDENTIARY HEARING AND HEARING ORDERS, Intervenor Center for Biological Diversity (the “Center”) provides this Prehearing Conference Statement.

As the Committee is aware, the FSA is not yet complete and the final section of the FSA, regarding air quality and public health, is not scheduled to be issued until November 1, 2013. Because cumulative impacts and alternatives are critical aspects of the environmental review process under CEQA that should consider the project as a whole including all aspects of the proposed project amendment, the Center does not believe that this matter is ready for hearing or that hearings can properly take place until 14 days after the final section of the FSA is issued. 20 Cal. Code Regs. 1747 (“the final staff assessment” shall be published and distributed at least 14 days before evidentiary hearings). The Center opposes rushing the hearings forward based on an incomplete FSA, indeed, even applicant’s counsel appears to recognize that the matter is moving forward too quickly stating in a recent email to staff: “This is exactly why I did not want to file a PD [Project Description] so quickly with no support.” (TN#200944 Email re I-10 Fencing, 10/18/13). If the Project Description remains incomplete, it is impossible to see how other aspects of the environmental review can be complete or how this matter could be ready for hearing.

Nonetheless, the Center understands that the Committee has determined hearings will be held on certain subject areas next week. As a result, the Center reserves the right to provide additional testimony after the final FSA section is issued on any and all topic area including, but not limited to, air quality, public health, biological resources,

alternatives, and cumulative impacts, license conditions and/or mitigation/avoidance measures.

The Center has filed opening testimony and rebuttal testimony, and reserves the right to provide additional testimony and documentary evidence along with written rebuttal up to and including at any evidentiary hearings on this matter and expressly to provide additional testimony after the final FSA sections are issued or if any other new information is provided by staff or the applicant. Given the extremely short schedule, the Center also requests that the Committee allow testimony at any of the hearings to encompass issues that arguably could have been raised on rebuttal.

PREHEARING CONFERENCE STATEMENT

a) The topic areas that are complete and ready to proceed to Evidentiary Hearing;

The Center is preparing to proceed to hearing on the following topics: Project Description, Alternatives, Biological Resources and Soil & Water Resources. However, the Center does not view these topics as complete and ready for final hearing given the lack of a complete FSA and the lack of adequate identification and analysis of the impacts of the proposed project amendment provided in the sections of the FSA that have been published to date. The Center is particularly concerned with the inadequacies in the identification and analysis of impacts to biological resources (direct, indirect and cumulative impacts), inadequacies in analysis of soils and the impacts to surface hydrology (particularly as to cumulative impacts), inadequacies in the alternatives analysis, and lack of adequate minimization and mitigation measures for the impacts of the project.

b) The topic areas that are not complete and not yet ready to proceed to Evidentiary Hearing, and the reasons therefor;

The Center believes that there remain fundamental unresolved issues in many areas including Project Description, Purpose and Need, Biological Resources, Alternatives Analysis, Soil and Water Resources, and Air Quality. As noted above, the Center does not view these topics as complete and ready for evidentiary hearings given the lack of adequate identification and analysis of the impacts of the proposed project provided in the sections of the FSA provided to date. The Center is particularly concerned with inadequacies in the identification and analysis of impacts to biological resources, inadequacies in the identification and analysis of impacts soils and the effects on surface hydrology, lack of adequate identification of specific, lack of specific and enforceable minimization and mitigation measures and plans, and the lack of robust alternatives analysis.

Also of concern is the lack of critical minimization and mitigation measures and plans which have not yet been provided to the public and parties in this matter which fails to comply with the requirements of CEQA. As the Committee is well aware, CEQA requires that environmental review must also analyze any proposed mitigation measures and their likely efficacy. CEQA Guidelines § 15126.4(a)(1)(D) (“If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measures *shall* be discussed . . .” emphasis added); *Save Our Peninsula Comm. v. Monterey Board of Supervisors* (2001) 87 Cal.App.4th 99, 130 (“An EIR is required to discuss the impacts of mitigation measures.”). The applicant’s rebuttal testimony to the Center’s opening testimony regarding impacts of the proposed amended project on birds (TN# 200968 PHS’s Rebuttal Testimony, 10/21/2013), provides an excellent example of why this rule is so important, many of the mitigation measures proposed by the applicant in yesterday’s filing could significantly increase the impacts of the project on the environment

including, but not limited to: increasing CO2 emissions (from airplanes, helicopters and propane cannons suggested to be used for deterring avian use of the area), increased noise (same and also triggering noise, pyrotechnics, blank shells, propane cannons, wailers broadcasting “dog barking, siren, gunfire, music, human screams or other deterrent sounds”); increased impacts to wildlife (high risk to kit fox from the proposed use of dogs which could further spread distemper in this already impacted population; risks to MFTL and other small wildlife from falcons used for deterrence; risks to these same species from “implementation of avian prey reduction measures within the fence-line”, Mylar balloons which pose a hazard to wildlife if they come lose and land in desert areas); increased impacts to water resources (water cannons or mist to deter birds); soils (increased ATV use in avian areas); additional direct and indirect impacts to birds (netting and monofilament lines that may not just deter birds from the site but also trap or kill birds); increased impacts to native vegetation and soils (from proposal to significantly reduce onsite vegetation with more frequent and aggressive mowing). The FSA evaluated none of these impacts from proposed mitigation and defers consideration and approval of such plans until after the public review process in violation of CEQA. Given these inadequacies in the sections of the FSA provided to date, it is impossible to provide a complete evaluation of whether the project will fully comply with relevant federal and state laws.

While the Center is well aware that the Commission proceeds under a certified regulatory program that is intended to be the CEQA equivalent and which provides some flexibility to the Commission (*see* § 21080.5; CEQA Guidelines § 15251(j).), that program does not allow the Commission to shift the Commission’s duty to provide for adequate CEQA review, including identification and analysis of environmental impacts and alternatives, onto other parties or members of the public. It is the Commission’s duty to comply with CEQA’s substantive and procedural mandates. Cal. Pub. Res. Code §§ 21000, 21002; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road*

Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection
(2006) 142 Cal.App.4th 656, 667-68.

c) The topic areas that remain disputed and require adjudication, and the precise nature of the dispute for each topic;

The topic areas that the Center disputes and which require adjudication include, but are not limited to: **Project Description, Alternatives, Biological Resources, Soil & Water Resources, Air Quality.** Given that the FSA is not complete, the Center reserves the right to seek evidentiary hearings on additional subject areas including but not limited to Air Quality, Alternatives, and Biological Resources.

Many of the disputed issues identified by the Center involve both legal and factual disputes while others are predominantly legal issues. The Center therefore respectfully reserves the right to address each disputed issue, and any other disputed issues identified at the prehearing conference at later stages of this process including in briefing following the evidentiary hearing.

d) The identity of each witness sponsored by each party (note: witnesses must have professional expertise in the discipline of their testimony); the topic area(s) which each witness will present; a brief summary of the testimony to be offered by each witness; qualifications of each witness; the time required to present direct testimony by each witness; and whether the party seeks to have the witness testify in person or telephonically;

The Center intends to present or rely on expert witnesses on the following topics. The Center requests that if necessary expert witnesses be allowed to testify by telephone. While in-person testimony is preferred and at this time the Center's three witnesses on Biological Resources are available to testify in person in Palm Desert on Tuesday, October 29, 2013. Bill Powers, who is available to testify on Alternatives, will testify by telephone if possible.

All experts listed below have submitted testimony and their qualifications. The Center reserves the right to submit additional testimony by way of rebuttal or initial

testimony on any late-filed information or otherwise before the evidentiary hearing for each topic. Below the Center provides a summary of the topic areas and time estimates for the witnesses already identified.

- **Bill Powers: Alternatives:** Mr. Powers' direct testimony is estimated to take no more than 30 minutes. Mr. Powers is available to testify by telephone.
- **Ileene Anderson: Biological Resources, Alternatives, Soil and Water Resources:** Ms. Anderson's direct testimony is estimated to take no more than 1.5 hours with approximately 45 minutes for biological resources, 20 minutes for Alternatives, and 10 minutes for soil and water resources.
- **Allan Muth: Biological Resources; Mojave fringe-toed lizard and sand habitat:** Professor Muth's testimony is estimated to take no more than 30 minutes.
- **Pat Flanagan: Biological Resources:** Ms. Flanagan's testimony is estimated to take no more than 30 minutes.

e) Topic areas upon which a party desires to cross-examine other parties' witnesses, a summary of the scope of each such cross-examination (including the witness' qualifications), the issue(s) to which the questions pertain, and the time desired for each such cross-examination;

Project Description: CEC Staff, Applicant witnesses, and any witnesses presented by other Intervenors regarding the Project Description. The Center estimates that questioning will take no more than 20 minutes regarding the completeness, accuracy and appropriateness of the project description.

Biological Resources: CEC Staff, CDFG staff, FWS staff, BLM staff, Applicant witnesses, and witnesses presented by other Intervenors regarding assessment of impacts to biological resources and appropriate avoidance, minimization, and mitigation strategies. The Center estimates that questioning will take approximately 1 hour and that the scope will include impacts to avian species from solar flux and collisions, impacts to

kit fox and badgers, impacts to Mojave fringe-toed lizard and its sand habitat, impacts to wildlife connectivity, cumulative biological impacts, adequacy or lack thereof for the compensatory mitigation requirements, and conditions of certification for biological resources

Soils and Water Resources: CEC Staff, BLM Staff, Applicant witnesses regarding the impacts to soil and water resources and any contrary conclusions; the appropriate avoidance, minimization, and mitigation strategies; and the efficacy and enforceability of mitigation measures suggested. The Center estimates that questioning will take approximately 30 minutes and focus on cryptobiotic soils, sand resources, surface hydrology and cumulative impacts.

Alternatives: CEC Staff, BLM Staff, Applicant witnesses, and witnesses presented by other Intervenors regarding identification and selection of alternatives for review; the analysis of those alternatives; and the analysis of the feasibility of alternative sites. The Center estimates that questioning will take approximately 30 minutes and focus on the lack of a distributed renewable energy alternative in the FSA, and the lack of on-site alternatives that minimize impacts to Mojave fringe-toed lizard and sand resources, avian species, soils and surface hydrology, and cumulative impacts.

Air Quality: Because the FSA is not yet complete on this topic area, the Center reserves this section for later hearings.

f) A list identifying exhibits and declarations that each party intends to offer into evidence and the technical topics to which they apply (as explained in the following section on Formats for Presenting Evidence);

The Center has filed and identified in the record all exhibits relied on and attaches a list of exhibits hereto in the format required. The Center reserves the right, if necessary, to provide additional exhibits up to and through the end of all of the evidentiary hearings in this matter.

g) Topic areas for which the Applicant will seek a commission override due to public necessity and convenience pursuant to Pub. Res. Code § 25525.

N/A

h) Proposals for briefing deadlines, impact of vacation schedules, and other scheduling matters; and

As explained above, the Center does not believe that this matter is ready for hearing and, therefore, briefing is also premature. However, the Center understands that the Committee intends to move forward at this time with incomplete information. In light of that, and reserving all rights to object or move for the process to be continued or stayed until complete information is available, the Center responds as follows:

The Center objects to the schedule which requires opening briefs to be filed the day after the last set of evidentiary hearings are scheduled in this matter on November 14, 2013. The Center proposes that Opening briefs be continued until 2 weeks after the final evidentiary hearing is scheduled, that is until at least **November 28, 2013**, with at least 2 weeks provided to prepare reply briefs until at least **December 12, 2013**.

i) For all topics, any proposed modifications to the proposed Conditions of Certification listed in the Final Staff Analysis (FSA).

The Center has initially reviewed the Proposed Conditions of Certification in the FSA, but has not had sufficient time to review new conditions provided in staff's rebuttal testimony yesterday. Given the short time since the initial sections of the FSA were provided, the fact that the FSA is not yet complete, and Staff continues to make changes to the proposed conditions, the Center is not at this time prepared to provide specific language for all of the proposed modifications to any of the Proposed Conditions of Certification. Nonetheless, the Center's experts have provided a few specific modifications in the filed testimony and the Center reserves the right to provide

additional proposed modifications to the Proposed Conditions of Certification in briefing and comments on the PMPD.

The Center is concerned that Conditions for all biological resources are inadequate because the identification and analysis of impacts is incomplete and inadequate. The same is true in other areas including impacts to soil and water resources. The Center also asserts that failure to adequately identify and analyze impacts and then engage with the alternatives analysis is fatal to this proposal. The alternatives analysis should have provided additional information on ways to avoid and minimize impacts in addition to the site reconfiguration proposed by the Applicant. The failure to adequately engage those initial steps has resulted in a proposed project that unlawfully includes significant but avoidable impacts. Given this circumstance, the Center asserts that approving the project as proposed is unlawful. If the Commission nonetheless intends to approve the project as proposed it must *at minimum* ensure full mitigation of all impacts under the CESA, ESA, and other laws. While the staff has provided some good proposed conditions in the portions of the FSA issued to date and in their rebuttal testimony, for many impacts the conditions are not adequate or not fully presented because most of the mitigation measures and plans relied on are not fully developed – indeed, not even draft plans are provided-- and do not have enforceable standards they fail to provide the required specificity needed. Moreover, because the formulation of the plans and specific mitigation measures is unlawfully deferred to a time after the public review process, the staff has also failed to analyze any impacts that those mitigation measures may have in violation of CEQA (as explained above in subsection b).

In sum, many of the proposed conditions appear to be unlawfully vague and do not meet the CEQA requirements that mitigation measures be specific, feasible, and enforceable. In addition, the development of mitigation measures has been unlawfully deferred and the environmental impacts that may be caused by the proposed mitigation measures are not addressed. Therefore, Center reserves the right to provide proposed

modifications for each of the conditions and additional proposed conditions after hearings or in briefing or in comments on the PMPD and at any hearing of the Commission on this matter.

Respectfully submitted,

Date: October 22, 2013



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Docket Number: 09-AFC-07C

Date: October 22, 2013

Project Name: PALEN SOLAR ELECTRIC GENERATING SYSTEM

INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY'S EXHIBITS 3000-3062

Exhibit	Docket Transaction Number	Title of Document from Docket Log	Subject Areas
3000	200905	Exhibit 3000: Center Opening Testimony and Exhibit List	Biological Resources and Alternatives
3001	200853	Anderson Testimony, Declaration & CV	Biological Resources and Alternatives
3002	200854	Journal Article re Wildlife Conservation	Biological Resources
3003	200858	Journal Article-How much compensation is enough	Biological Resources
3004	200857	Journal Article-Biodiversity offsets	Biological Resources
3005	200856	Preparing for any Action that may occur within the Range of the Mojave Desert Tortoise	Biological Resources
3006	200855	2007 Annual Report re Range-Wide Monitoring of the Mojave Population of the Desert Tortoise	Biological Resources
3007	200861	2012 DRAFT Rangewide Mojave Desert Tortoise Monitoring	Biological Resources
3008	200860	The Health Status of Translocated Desert Tortoises 2009 Report	Biological Resources
3009	200859	Recommendations of Independent Science Advisors for the California DRECP	Biological Resources
3010	200864	ISEGS DT near or on Stateline project site.	Biological Resources
3011	200929	Exh. 3011. Esque etal. 2010 Effects of subsidized predators & translocation	Biological Resources
3012	200862	BLM 2012 Solar Apps and Auths	Biological Resources
3013	200867	BLM Wind Apps & Auths July 2012	Biological Resources
3014	200866	Kern County wind projects	Biological Resources
3015	200865	McCoy Solar Energy Project PA-FEIS Vol. 1	Biological Resources
3016	200868	Desert Kit Fox Distemper outbreak	Biological Resources
3017	200869	5-Year Review Yuma clapper rail	Biological Resources
3018	200871	Yuma clapper rail recovery plan	Biological Resources
3019	200870	EBird Lake Tamarisk hotspot checklist 10-15-13	Biological Resources
3020	200874	Journal Article-Golden Eagle Population Trends in the Western United States: 1968–2010	Biological Resources

3021	200873	Golden Eagles in US-Canada - status trends	Biological Resources
3022	200872	FINAL Report_Joshua Tree National Park_GE Survey 2011	Biological Resources
3023	200876	Appendix C.7 Desert Harvest DEIS Golden Eagle Winter Survey Report	Biological Resources
3024	200875	Southern California Edison Notice to Proceed Request for the Red Bluff Substation Project Distribution Line	Biological Resources
3025	200878	Bald Eagle and Golden Eagle Mortalities at Wind Energy Facilities in the Contiguous United States	Biological Resources
3026	200877	Avian Mortality at Solar Energy Plant. (McCrary)	Biological Resources
3027	200931	Exh. 3027. Manning 2009. BUOW Pop Size in Imp Valley CA	Biological Resources
3028	200880	Staff Report on Burrowing Owl Mitigation	Biological Resources
3029	200879	USFWS 2003 Burrowing Owl FWS Status-Assessment	Biological Resources
3030	200883	Modern Insect Extinctions	Biological Resources
3031	200882	USFWS final listing Casey's June Beetle	Biological Resources
3032	200885	Wildlife Interactions at Solar 1 Facility.	Biological Resources
3033	200884	Potential Roles of Biological Soil Crusts	Biological Resources
3034	200886	Biological Soil Crusts and Wind Erosion	Biological Resources
3035	200887	Disturbance and Recovery of Biological Soil Crusts	Biological Resources
3036	200930	Exh. 3036. Impact Minimization Alternative (MFTL&RP)	Alternatives, Biological Resources
3037	200892	Pat Flanagan testimony, declaration & resume.	Biological Resources
3038	200891	Birds Banded at the Salton Sea	Biological Resources
3039	200890	Priority Areas for Breeding Birds within the Planning Area of DRECP	Biological Resources
3040	200900	A Linkage Network For The California Deserts	Biological Resources
3041	200889	Journal Article-Use of Land Facets to Plan for Climate Change: Conserving the Arenas, Not the Actors	Biological Resources
3042	200888	Journal Article-Use of land facets to design linkages for climate change	Biological Resources
3043	200897	Fig. 23. Mojave Preserve-Stepladder- Turtle Mtns Land Facet	Biological Resources
3044	200896	Fig. 24. Stepladder – Palen Mc Coy Mtns. Land Facet	Biological Resources
3045	200895	Fig. 25. Palen McCoy – Whipple Mtns. Land Facet	Biological Resources
3046	200894	Fig. 26. JTNP – Palen McCoy Mtns. Land Facet	Biological Resources
3047	200893	Fig. 28. Palen McCoy – Chocolate Mtns. Land	Biological Resources

		Facet	
3048	200899	Fig. 9. Desert Tortoise LCU	Biological Resources
3049	200898	Fig. 32. Land Facets CA Desert Map 32	Biological Resources
3050	200904	Exh 3050 Testimony of Allan Muth	Biological Resources
3051	200910	Exhibit 3051: California's Famous "duck chart" is outdated, experts say	Alternatives
3052	200467	Email from Jaime Rudd re: Palen Updated Map:	Biological Resources
3053	200466	Kit Fox Den Activity Map –September 2013	Biological Resources
3054	200531	Due Diligence Request for Information to Palen Solar Holdings from US Department of the Interior, Bureau of Land Management	Biological Resources
3055	200106	USFWS email to Pete Bloom in re: Palen Helo GOEA Nest Survey Flights	Biological Resources
3056	71593	CEC Record of Conversation: REAT #10	Biological Resources
3057	200962	Exh. 3057 Avian Mortality Report 9-1-2013 (ISEGS)	Biological Resources
3058	200966 200965	Exh. 3058a. HHSEGS FSA Part 1 and Exh. 3058b. HHSEGS FSA Part 2	Biological Resources
3059	200961	Exh. 3059. Monthly Compliance Report August 2013 (Genesis)	Biological Resources
3060	200963	Exh. 3060. ISEGS September 2013 Monthly Compliance Report	Biological Resources
3061	200964	Exh 3061 Muth Rebuttal Testimony	Biological Resources
3062	200065	CBD's Comments on SA Final - Attachment 9 Helix 2013. DPV2 MFTL Monitoring Summary 071113	Biological Resources