

## DOCKETED

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STATE OF CALIFORNIA

Energy Resources  
Conservation and Development Commission

In the Matter of:

**DOCKET NO. 09-AFC-7C**

Petition For Amendment for the **PALEN  
SOLAR ELECTRIC GENERATING  
SYSTEM**

**PALEN SOLAR HOLDINGS, LLC's  
MOTION TO REOPEN EVIDENTIARY  
RECORD AND SCHEDULING ORDER**

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Palen Solar Holdings, LLC (PSH) files this Motion to Reopen the Evidentiary Record (Motion) in accordance with the direction provided in the Presiding Member's Proposed Decision (PMPD) and at the PMPD Conference held on January 7, 2014 (PMPD Conference). This motion also serves as our status report for the month of April, 2014. PSH proposes to reopen the evidentiary record in the areas of:

- Biological Resources – Limited to Avian-Related Issues
- Cultural Resources – Limited to Condition of Certification **CUL-1**
- Alternatives – Limited to the Infeasibility of Project Alternatives
- Overriding Considerations – Limited to the Project Benefits

As the Committee explained at the PMPD Conference,

I'm very much looking forward to hearing from the parties and from the public about the PMPD, but really more importantly about how we move forward in light of the Petitioner's motion to extend the record – extend the timeline -- and to gather and provide additional information that we requested in the PMPD.

As everyone here and listening already knows, or probably already knows, the PMPD proposes denying the Palen Amendment without prejudice on the grounds that the factual record developed in this proceeding does not justify the overrides of adverse unmitigable environmental impacts that we found would result from the project; however, we left the door open for Petitioner to do a number of things: build a project that has already been permitted, propose a different project on the site, or to ask the Committee

to reconsider our findings on this project if and when Petitioner is able to provide additional data that we requested in the PMPD, particularly on Avian mortality from this and other solar generating technologies.<sup>1</sup>

As described below, PSH has filed additional information as outlined by the Committee at the PMPD Conference. This motion seeks to enter this information into the evidentiary record and requests a Scheduling Order in accordance with the proposed schedule attached to this motion.

### **Filings Since PMPD**

Since the PMPD Conference PSH has filed the following additional information:

- A table providing a comparison of avian mortality data reported by projects utilizing various solar technologies; filed on February 10, 2014 and updated on February 28, 2014 and on March 21, 2014;
- Testimony providing a more detailed description of the benefits of the PSEGS, including the potential to incorporate thermal energy storage at the project in the future; filed on February 10, 2014;
- Testimony providing a more detailed description of the reasons why the No Project Alternative and the PV Alternative are infeasible alternatives to the PSEGS; filed on February 10, 2014;
- A proposed modification to Condition of Certification **CUL-1** that more appropriately provides mitigation directed towards tribal spiritual and cultural interests while also providing mitigation for the State's interest in recording important historical sites; filed on February 10, 2014;
- A response to Center of Biological Diversity (CBD) Data Request; filed on February 13, 2014;
- A proposed modification to Condition of Certification **BIO-16b** to require performance standards to be incorporated into the Bird and Bat Conservation Strategy (BBCS); filed on February 28, 2014;
- A drawing showing potential future storage equipment and location; filed on March 3, 2014; and
- A report describing avian deterrent methods; filed on March 7, 2014.

PSH intends to incorporate these documents into the evidentiary record and filed them separately and early so that all parties would have ample time to consider them prior to this motion to re-open the evidentiary record.

Below is a description of why PSH believes the documentation filed above provides the information requested by the Committee and should enable the Committee to reopen the evidentiary record so that it and all parties can have a full and fair discussion at evidentiary hearings.

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<sup>1</sup> Transcript of the PMPD Conference held on January 7, 2014, pages 10 and 11.

## Avian Issues

The Committee provided the following direction at the PMPD Conference concerning the type of avian data it was expecting to augment the existing evidentiary record.

We do acknowledge significant uncertainty around this issue and in the PMPD we granted Petitioner leave to supplement the record with additional information not only about the impacts of solar flux on Avian species, but about how that impact compares to other technologies.<sup>2</sup>

My interest is in having at a minimum a frame of reference that will help orient me in terms of this technology, this location, and how it compares to other technologies in other locations. I'm not looking for the final perfect analysis, I'm not looking for the elimination of uncertainty, but I'm looking for some orientation as to the issues that we currently do not have in our record.<sup>3</sup>

In Staff's Status Report 5, Staff outlined USFWS caveats regarding the preliminary nature of avian mortality data collected at sites to date. While we agree that the information contained in the solar technology table may be imperfect, PSH believes it does provide the Committee a useful comparison in line with its direction.

As the Committee is aware, the avian mitigation strategy reflected in the current Conditions of Certification was developed jointly by PSH and Staff. Those conditions require \$1.8 Million of upfront payments and include a strong adaptive management and monitoring program at its core. In addition to the direction provided by the Committee relating to avian mortality data, the Committee also provided direction relating to performance standards that could be used to help address uncertainty and risk.

I strongly support adaptive management and monitoring, I think that's exactly the right way to approach these projects, but I do think that where there are questions and where there's information that we need, we want to think about performance standards, we want to think about other approaches that might help mitigate risk and might give us a way of addressing some of the scenarios or some of the concerns that staff raised in its assessment.<sup>4</sup>

To that end, PSH has filed proposed modifications to Condition of Certification **BIO-16b** that include specific performance standards to be incorporated into the Bird and Bat Conservation Strategy (BBCS), which is the working plan for developing and implementing the monitoring and adaptive management program designed to reduce avian impacts.

In addition, PSH filed a report on bird detection and deterrence technologies currently in use in various applications. This report provides the Committee with background

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<sup>2</sup> Transcript of the PMPD Conference held on January 7, 2014, page 21.

<sup>3</sup> Ibid., pages 21-22.

<sup>4</sup> Ibid., page 30.

information on the current state of bird deterrent technology and avenues of future research and development in this field. In the BBCS, PSH will discuss the potential deployment of specific bird deterrent technologies at the PSEGS site as part of the adaptive management program.

PSH has repeatedly requested Staff to conduct a public workshop to discuss the Committee's direction at the PMPD Conference and the supplemental information filed by PSH. It appears that Staff believes there is no need for a public workshop to discuss the information filed by PSH. However, we are pleased that Staff has set a public workshop to discuss Condition of Certification **CUL-1** on April 8, 2014.

PSH continues to be open to discuss the information filed and invites the other parties that are not precluded by the Commission's ex parte rule to contact PSH if they desire a meeting and if Staff does not schedule an additional workshop.

### **Future Storage**

The testimony filed on February 10, 2014 addresses the potential for incorporation of thermal energy storage at the PSEGS site in the future. The drawing filed on March 3, 2014 shows how such future thermal energy storage equipment could be accommodated in the current power block configuration.

### **Cultural Resources**

On February 10, 2014 PSH filed proposed revisions to Condition of Certification **CUL-1**. The revisions specifically address the following guidance provided by the Committee at the PMPD Conference.

The PMPD did not resolve the dispute over staff's proposed cultural resource mitigation CUL-1. Petitioner argues that CUL-1 would be burdensome and open-ended and has insufficient nexus to the impact. The Committee shares many of these concerns, and I want to explain that briefly.

As I see it, there are at least two interests the Committee needs to consider when we look at cultural resource impacts; one is the generalized state interest in the conservation and documentation and better understanding of the many and varied cultural and historical resources within the State of California. And the other is a particularized set of interests and concerns of Native Americans, in this case, which is different in important respects from the State interests in these same resources and landscapes. CUL-1 seems too oriented towards the State interests and not as well suited to the Native American concerns that the Committee heard in this proceeding.<sup>5</sup>

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<sup>5</sup> Ibid., pages 17-18.

The Committee also stated:

The PMPD found that the PSEGS project would have a disproportionate impact on Native Americans, therefore, to the extent possible, we think the mitigation should be devised to address the impact of the project on Native Americans. Of course, I don't necessarily mean that in an exclusive sense, but I mean that in terms of the orientation of what impact we are trying to address: what is the nexus here between the impact and mitigation?

I also think that it is important that mitigation not be open-ended. Staff did propose I think in the briefing process a cap on cultural mitigation, I think the parties should talk about that, as well.<sup>6</sup>

Lastly, the Committee expressed a strong desire to work with the Native American community and that it has a strong voice in the mitigation:

The Committee would like the tribes to have a significant voice in developing the mitigation proposal for cultural resource impacts. Ideally, CRIT and other interested Native American tribes could take an opportunity now to work with staff and Applicant to devise such a mitigation approach. Alternatively, staff and the Petitioner could think about framing the condition in a way that is open to and responsive to input from tribes that could be sought potentially post-certification should this project be approved.<sup>7</sup>

PSH's proposed revisions to Staff proposed Condition of Certification **CUL-1** addresses each item raised by the Committee. It provides a cap on cultural mitigation using the estimates in Staff's Opening Brief and redistributes the mitigation funds with roughly one-third towards Staff interests and two-thirds devoted to Native American cultural and spiritual interests. This redistribution is more in line with the Committee direction and the impact the Committee has identified. PSH's proposed revisions also create a Native American Committee that can work with the CPM to direct the cultural funds to be used for activities such as, but not limited to, the following:

- An Annual Traditional Cultural Properties workshop among interested Native American tribes. This would/could include field trips to sites of interest, sharing of information among the tribes and an opportunity to expose their youth or other tribal members to these concepts and locations.
- Purchase of private lands that have important sites as determined by the Native American Committee.
- Funding of improvements (cleaning up) some important sites, such as Corn Springs Petroglyphs, North Chuckwalla Petroglyphs and McCoy Springs.
- Fencing important sites to prevent vandalism.

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<sup>6</sup> Ibid., pages 19-20.

<sup>7</sup> Ibid., page 19.

PSH strongly believes that the Native American community should determine how best to distribute the mitigation funds to promote its cultural and spiritual interests and the mitigation funds should be more heavily weighted toward those interests.

PSH has had one productive conference call with Counsel representing the Colorado River Indian Tribes (CRIT) to discuss these revisions and looks forward to further feedback at the April 8, 2014 scheduled public workshop.

### **Schedule**

PSH proposes the attached schedule which would allow all of the parties to file supplemental opening and rebuttal testimony prior to evidentiary hearing, which PSH is proposing to be held in Sacramento during the third week of May, 2014.

### **Conclusion**

The PMPD and the Committee at the PMPD Conference acknowledged that it would entertain this motion to re-open the evidentiary record. For the reasons discussed above, PSH requests the Committee reopen the evidentiary record limited to the following areas and adopt the attached schedule.

- Biological Resources – Limited to Avian-Related Issues
- Cultural Resources – Limited to Condition of Certification **CUL-1**
- Alternatives – Limited to the Infeasibility of Project Alternatives
- Overriding Considerations – Limited to the Project Benefits

Lastly, PSH requests that the Committee schedule a Hearing on this Motion that can also be used by the Committee as a Pre-Hearing Conference to direct the parties and prepare for evidentiary hearings.

Dated: March 21, 2014

Respectfully Submitted,



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Scott A. Galati  
Counsel to Palen Solar Holdings, LLC

**PSH'S PROPOSED SCHEDULE – Palen Solar Electric Generating System  
Petition For Amendment (09-AFC-7C)**

ACTIVITY	DATE
Staff Workshop on <b>CUL-1</b>	4/8/14
All Parties File Opening Testimony	4/25/14
All Parties File Rebuttal Testimony	5/9/14
Evidentiary Hearing in Sacramento	Week of 5/19/14
Revised PMPD	6/18/14
Revised PMPD Comment Period Ends	7/3/14
Commission Business Meeting	7/9/14