

## DOCKETED

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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  
OPPOSITION TO MOTION TO REOPEN EVIDENTIARY RECORD AND  
SCHEDULING ORDER**

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Pursuant to 20 Cal. Code. Regs. § 1716.5 and the March 24, 2014 memo from Hearing Advisor Celli, Intervenor Center for Biological Diversity timely provides this opposition to Palen Solar Holding LLC's "Motion to Reopen Evidentiary Record and Scheduling Order" docketed on March 21, 2014.

### **OPPOSITION TO MOTION TO REOPEN EVIDENTIARY RECORD**

The Center does not believe that the Petitioner has submitted sufficient new data to warrant reopening the record and scheduling hearings at this time.

- Petitioner has not provided any additional data from new surveys at the Palen site –including surveys which the US FWS stated are needed and which the Petitioner could be conducting this spring. For example, the US FWS stated:

In addition, risks to bald eagles (*Haliaeetus leucocephalus*) have not been considered thus far. Bald eagles were observed at Lake Tamarisk on October 5, 2013, about 5 miles from the project location and in January 2013 near Blythe at the Cibola National Wildlife Refuge to the southeast (reports available on [www.eBird.org](http://www.eBird.org)). Bald eagles do not nest at Lake Tamarisk, but this species is known to migrate across the desert from the coast and Imperial Valley to the Colorado River corridor; therefore, a similar effects analysis should be conducted for bald eagles as part of the proceedings.

...  
Surveys were conducted on the project site to assess use by migratory birds; however, *the data submitted by PSH to date are inadequate to characterize migratory bird use of the habitat, and the non-breeding occurrence of bald and golden eagles and other raptors*. Surveys using protocols recommended by the interagency Renewable Energy Action Team (REAT) were only conducted during April 2013. This short timeframe is not adequate to provide a baseline of avian use of the site prior to construction. An adequate baseline of avian use of the project site is necessary to evaluate changes to the bird community resulting from plant operations and to design meaningful adaptive management measures should impacts be observed.

(TN#: 201199, Encl. 1 at 3 & 4 [emphasis added].) The Center agrees that additional surveys are needed and include but are not limited to: both spring and

fall migratory bird surveys and surveys for golden eagles and other raptors' habitat use.

Much of the avian data from the existing large-scale projects was already available when the PMPD was issued (indeed the Center put that data in the record), the few additional months does not provide sufficient new information to warrant reopening the record and scheduling hearings at this time. Because these large-scale projects are essentially large-scale experiments, useful data needs to be systematically collected so an informative and comparable data set can be developed to respond to the Committee's request. While the project proponent submitted some additional data (TN#: 201901 Palen Solar Holdings LLC's Updated Compilation of Avian Data as.pdf) the so-called "comparison" of the data sets is misleading. The Petitioner's document *attempts to compare*: the results of a few months of systematic surveys at the ISEGS power towers during operations along with some surveys during the testing phase and incidental reporting of impacted avian species only during construction at ISEGS on the one hand, *to* incidental reporting of impacted avian species only during construction at two other projects on the other hand. The only way to demonstrate competing technologies' relative impacts is to compare systematic monitoring data from operations for at least one year. (*See also* TN#:201757, Staff Status Update No. 5 at 2 [staff noting that "Despite providing some initial insights into avian mortalities, incidental data should not be over-interpreted. Numerical comparisons between individual projects, project technology, or seasons are not possible in the absence of systematic, statistically rigorous mortality monitoring efforts."].)

The Center continues to believe that *at minimum one year avian mortality data from systematic monitoring during operations* at the Ivanpah project are needed before the record should be reopened on this Palen amendment. (TN #: 201546, TR 1/7/14 at 34-35 [Center requesting "a minimum of a one-year delay for

additional data to be collected”]; *Id.* at 45-47 [Basin and Range Watch, Kevin Emmerich “a lot of the data should be studied for at least a year at the Ivanpah project, and . . . probably even for longer than that.” Noting that “a variety of different avian studies” are needed “and those could go on for three years in both the Chuckwalla Valley and the Ivanpah Valley before you can really safely permit another one of these, in regards to conservation of avian fauna.” Also noting the need for “seasonal data for different bird migrations and come up with a curtailment schedule that could be reviewed by Intervenors, agencies, and the public.”].) The need to examine more data from existing projects is particularly critical given the experimental nature of the technology and the many already documented impacts as well as unknowns regarding impacts. Further, any data obtained must also be considered in light of the unique character of the Palen site which is located between two major Pacific flyway stop-over spots – the Salton Sea and the Colorado River.

As the Center and others also raised throughout this process (*see, e.g.*, TN#: 200853, Testimony of Ileene Anderson, Exh. 3001; TN#: 201199 [FWS comments], Encl. 1 at 1-5 [avian species], 5-6 [pollinating insects]), systematic monitoring is also needed to evaluate the impacts of the power tower technology on invertebrates including the potential insect attraction to the light from the towers when in operation and the subsequent enticement of avian aerial feeders into the harm’s way of flux.

Notably, the Ivanpah project recently petitioned to amend operations there to use over 60% more natural gas. As the petition states: “For some aspects of operation, the only way to fully understand how the systems work has been through the experience of operating the powerplants.” (TN#: 201928, Ivanpah Petition to Amend No. 4 at 3 .) Increase in natural gas consumption will likely apply to the Palen project as well and this warrants additional impact analysis.

This is clearly true of the impacts of the project on avian species as well, based on a more comprehensive data set of injury and mortality monitoring.

- The new testimony “providing a more detailed description of the benefits of the PSEGS including the potential to incorporate thermal storage” states that thermal storage would not be feasible under current policies—which is little more than a restatement of the Petitioner’s previous statement on the record when asked this question by the Committee at hearing - that it would be infeasible for this project to add storage at this site.. The drawing submitted March 3, 2014 adds no new substantive information regarding this question and it is not integrated into the current proposed project design. Further, to the extent that this information is being submitted to suggest that thermal storage would be added to the project, the environmental impacts of thermal storage at this site have not yet been assessed by staff and must be included in a revised staff assessment (“RSA”), including but not limited to impacts associated with wildland fire, water use, public safety and worker health and safety,
- The Petitioner’s report describing avian deterrent methods that might be considered as part of the mitigation measures provides a better description of the listed “methods,” but little information is provided whether or not these methods will prove to be efficacious. More importantly, neither the Petitioner nor the Staff has yet provided any information or environmental review of the impacts of these methods as required by CEQA. (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.”].) CEQA requires that environmental review must analyze the effects of any proposed mitigation

measures and their likely efficacy; because the FSA did not discuss these proffered avian deterrent measures, Staff must revise the environmental analysis and issue a revised staff assessment (RSA).

- The testimony “providing a more detailed description of the reasons why the No Project Alternative and the PV Alternative are infeasible alternatives” does not provide a basis for reopening the record because there is no reason that the Petitioner could not have submitted this information earlier in the process. More importantly perhaps, if the Committee were to find that the No Project Alternative was infeasible, then the environmental review must be revised because the No Project Alternative was used as the baseline for the evaluation of the impacts of the Petition. As the Supreme Court stated:

An approach using hypothetical allowable conditions as the baseline results in “illusory” comparisons that “can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,” a result at direct odds with CEQA’s intent. (*Environmental Planning & Information Council v. County of El Dorado*, *supra*, 131 Cal. App. 3d at p. 358.) The District’s use of the prior permits’ maximum operating levels as a baseline appears to have had that effect here, providing an illusory basis for a finding of no significant adverse effect despite an acknowledged increase in NOx emissions exceeding the District’s published significance threshold.

(*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 322.) So too here, if as Petitioner now states, the existing permit to build a trough solar project is infeasible, then the Commission using that prior permit’s impacts as a baseline also will have resulted in illusory comparisons, misled the public as to the reality of the impacts, and subverted full consideration of the environmental impacts.

If the previously permitted project is infeasible, then the Staff should have used the existing conditions as the baseline for review, and therefore the FSA is per se inadequate. If Staff had used the existing conditions as the baseline, the

significant environmental impacts found and issues at hearing would have been far broader. Petitioner, Staff, and the Committee cannot have it both ways, either the proper baseline was the No Project Alternative which is a feasible previously permitted project, or the baseline should have been the current conditions on the ground.

In light of the lack of new significant information provided by Petitioner to date and the need for additional CEQA review regarding several aspects of the proposal, the Center opposes the motion to reopen the record at this time.

### **OPPOSITION TO PROPOSED SCHEDULING ORDER**

If the Committee decides, nonetheless, that the evidentiary record will be reopened, the Center opposes the proposed scheduling order. The Commission must allow sufficient time for Staff to revise the environmental review and issue a new RSA before testimony or hearings can begin. The schedule proposed by Petitioner completely ignores the need for additional environmental review by staff and provides far too little time for: Staff to revise the environmental review; staff to issue a revised staff assessment (RSA) regarding the likely impacts from avian deterrent methods, changes to the project to accommodate storage, revise the environmental review to utilize the current environmental conditions as the baseline rather than the “infeasible” permitted project;<sup>1</sup> and for the parties to review the RSA, engage expert witnesses, provide opening testimony, rebuttal and prepare for hearings.

At the January 7, 2014 PMPD Conference, the Center raised the issue of the rushed and truncated schedule that had been pushed to get to the PMPD and expressly asked that if the record were to be reopened, the Committee not agree to another rushed

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<sup>1</sup> In addition, if the record is reopened the RSA will need to be revised regarding the proposed level of gas use in the project and air quality impacts in light of the new information from the Ivanpah project Petition No. 4 which, as noted above, is seeking to increase the level of gas use by more than 60%. Ivanpah Petition to Amend No. 4 (TN #: 201928). As the Committee has recognized, the experience at the Ivanpah plant is highly relevant to this proceeding and must be taken into account.



schedule as was pressed for by the Petitioner last year. In response to these concerns Hearing Officer Celli assured the Intervenors that there would be ample time given if the matter was reopened:

I want to just acknowledge that the Petitioner sought a Decision by December. They got their Decision by December. This is a new regime at this point, we're into a whole new thing here. I really don't know what to expect or what we're going to get from the Petitioner in the way of their data, etc. but what I would say, and what the Committee has already made clear to me, is that the Intervenors will be given ample time, plenty of time to get experts, respond, and be able to fairly and adequately respond to whatever the Petitioner puts forth. So that is the intention of the Committee.

(TN #: 201546, 1/7/14 Tr. at 53.)

Petitioner's suggestion to require opening testimony to be filed a month after the motion is made (and only a few days after a decision on the motion is required) *is not reasonable or fair* both because it would require all parties to assume the motion will be approved even before it is decided by the Committee (which clearly undermines due process), and because it does not provide "ample time, plenty of time to get experts, respond, and be able to fairly and adequately respond to whatever the Petitioner puts forth." Although the Center did review the filings from Petitioner and has contacted experts who may be able to review the information and prepare testimony, the Center cannot prudently secure experts until the Committee rules on the motion, determines whether or not the record is to be reopened at this time, and adopts a new schedule. Moreover, because spring is a very busy time for avian experts who spend time in the field, it will be extremely difficult for the Center to submit expert testimony without *at least* 60-days lead time after the decision by the Committee and issuance of a schedule.

The Center requests that if the Committee decides to reopen the evidentiary record at this time (which we oppose, as discussed above): 1) opening testimony be due no sooner than 90 days after the decision is made (if Staff does not agree to issue an

RSA) e.g., July 22, 2014, or at least a month after the RSA is issued; 2) the time for rebuttal be at least 30 days; 3) the time between rebuttal testimony being filed and any evidentiary hearings be at least 30 days; and 4) that evidentiary hearings be scheduled at a time convenient to all parties and be held in Riverside County. Given that the scope of the needed RSA and of the new information is not yet known, the Center believes it is premature to set dates for the PMPD to be issued, comments to be due, or the Commission to hear this matter. The Center also requests that the workshop noticed by Staff for April 16, 2014 (which was scheduled before responses to the motion were due and before the Committee has decided on the motion), be rescheduled no sooner than June 16, 2014, after the first quarterly report on systematic avian monitoring from the ISEGS facility is available (as earlier stated by Staff). (See TN# 201757, Staff Status Update No. 5 at 3 [“it should be understood that one quarterly report is insufficient to provide scientifically or statistically valid conclusions. Staff believes that a workshop would be most fruitful after this initial information is gathered from ISEGS and analyzed, which would be no sooner than June, 2014.”].)

The shortest proposed schedule the Center believes could be reasonable is:

Activity	Date
Staff Workshop on biology, alternatives, storage, and overriding considerations	6/16/14 (if the ISEGS avian quarterly report has been provided to all parties at least 14 days earlier).
Staff issues Revised Staff Assessment	7/22/14 (or later)
All Parties File Opening Testimony	8/22/14 (or at least 30 days after RSA issued)
All Parties File Rebuttal Testimony	9/22/14 (or at least 30 days after opening testimony filed)
Pre-Hearing Conference	10/6/14 (or at least 14 days after rebuttal testimony filed)
Evidentiary Hearings <u>in Riverside County</u>	Week of 10/20/14 (or at least 30 days after rebuttal testimony filed)

Revised PMPD	TBD
Revised PMPD comment period	TBD
PMPD Conference with Committee	TBD
Commission Business Meeting	TBD

Respectfully submitted,

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