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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the matter of: Amendment for the **PALEN SOLAR ELECTRIC GENERATING SYSTEM**	DOCKET NO. 09-ACF-7C

INTERVENOR COLORADO RIVER INDIAN TRIBES

REBUTTAL BRIEF (REOPENED EVIDENTIARY PROCEEDINGS)

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INTRODUCTION

Intervenor Colorado River Indian Tribes ("CRIT" or "Tribes") strongly urges the California Energy Commission ("CEC" or "Commission") to deny the proposed amendment to the Palen Solar Electric Generating System ("Project" or "PSEGS"). The solar tower technology proposed by this Project will have devastating impacts on the sensitive and irreplaceable cultural resources of the Chuckwalla Valley. While these impacts alone are sufficient to warrant denial, the process and environmental review for the Project have also been marred by serious legal inadequacies. As a result, the Commission must either deny the Project outright or direct CEC Staff to revise the existing environmental review to remedy the flaws identified by CRIT and other intervenors.

The legal briefing provided by Palen Solar Holding, LLC ("PSH") and the CEC Staff did nothing to remedy the flaws cited by CRIT in its Opening Brief. Instead, PSH misrepresents the requirements of the California Environmental Quality Act ("CEQA") and CRIT's positions throughout this proceeding to argue that the Commission should impose only minimal compensatory mitigation for cultural resource concerns, an approach that patently violates CEQA's mandate to impose all feasible mitigation for significant impacts. Nor has PSH or CEC Staff provided any substantial evidence to support their conclusions that impacts from glint and glare on pilots can be reduced to a less than significant level. In addition, PSH continues to ask the Commission to give it credit for the asserted benefits of incorporating thermal energy storage into the Project, without first providing CEC Staff with the requisite information to conduct an environmental analysis of the storage and its likely impacts. Neither PSH nor CEC Staff does anything to resolve the confusion surrounding this last-minute change to the Project description.

For all of these reasons, CRIT strongly urges the Commission to deny the petition to amend.

ARGUMENT

I. PSH Presents No Adequate Justification for Its Reduced Compensatory Mitigation.

Throughout PSH's Opening Brief, the company presents myriad excuses for why the Commission should not increase the proposed compensatory mitigation for the Project's admittedly significant cultural resource impacts above its suggested $2.47 million. Ex. 1126, Palen Solar Holdings, LLC's Proposed Revisions of Staff's Condition of Certification CUL-1 (TN# 201700). None of these excuses have merit, and in many instances, they rely on mischaracterizations of CRIT's position. The Commission should reject such efforts to shirk responsibility for the damage PSH will inflict.

For example, PSH asserts that "[t]here is no [] mandate" in CEQA to require a "floor for funding" for cultural resource impact mitigation measures. Palen Solar Holdings, LLC's Opening Brief ("PSH Opening Brief") (TN# 202932) at 3; *see also id.* at 24. In fact, the statute requires precisely that. Under Public Resources Code section 21002.1(b), an agency "shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." The "floor" on mitigation for significant impacts is therefore feasibility; so long as mitigation is feasible and capable of reducing environmental impacts, an agency must adopt it.

Implicitly acknowledging this requirement, PSH also suggests that any additional compensatory mitigation beyond the $2.47 million it proposed would be too much for it to bear. PSH Opening Brief at 3 ("PSH . . . has proposed a reasonable amount for a monetary cap, taking into account that the project can only bear so much mitigation."). But a lead agency cannot support a finding of infeasibility based on such bare, self-serving assertions of the project developer. CEQA charges the agency, not the applicant, with the task of determining feasibility. *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1351-52. Consequently, economic

infeasibility can only be shown by "'evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.'" *Id*. at 1352 (quoting *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181).[1] PSH has provided no concrete evidence regarding the impacts of the proposed mitigation measures on the Project's economic feasibility, and therefore cannot claim that CEQA requirements would be met by accepting its lower recommended mitigation amount.

PSH also erroneously claims that CRIT and other tribal representatives have proposed "elimination of the funding altogether." PSH Opening Brief at 3. CRIT has made its position on compensatory mitigation clear throughout these proceedings. *First and foremost*, no amount of money can compensate for the devastating cultural resource impacts this Project will have. However, as stated previously, under Public Resources Code section 21002.1(b), there is a mandatory duty to mitigate the harm caused to cultural resources. *Second*, none of CRIT's comments on mitigation should be taken by the Commission as a recommendation for approval of the Project. And *third*, if required to comment on the proposed mitigation, CRIT would support staff's recommendation to increase the amount of the compensatory mitigation fund. *See, e.g.*, Ex. 8028, Testimony of Chairman Dennis Patch Regarding Proposed Modifications to CUL-1 (TN# 202563); Ex. 8030, Testimony of Councilwoman Amanda Barrera (TN# 202565); Ex. 8036, Rebuttal Testimony of Councilwoman Amanda Barrera (TN# 202755)) (noting that "[she] must look to the future generations of our people and their inherited rights. Consequently, [she] concur[ed] that further increases to CUL-1B are justified"); *see also* Intervenor Colorado River Indian Tribes Opening Brief

[1] While both *Preservation Action Council* and *Goleta Valley* address the specific question of the economic feasibility of alternatives, "feasibility" under CEQA is defined uniformly (Pub. Res. Code §§ 21061.1, 21002), and thus these holdings apply with equal force to the feasibility of mitigation measures.

(Reopened Evidentiary Proceedings) ("CRIT Opening Brief") (TN# 202933) at 9-10. CRIT has never recommended eliminating funding for compensatory mitigation.

Next PSH claims that its proposed CUL-1 will "provid[e] mitigation for the State's interest in recording important historical sites," and therefore will satisfy the Commission's obligation to comply with CEQA. PSH Opening Brief at 23. This statement is belied by PSH's own testimony. As Mary Barger described, under PSH's proposed CUL-1, these investigation activities will *only* occur if directed by affected tribes. Transcript of the July 29, 2014 Evidentiary Hearing (7/29/14 Transcript) (TN# 202873), at 255. The Commission therefore cannot be assured that its CEQA obligation will be satisfied. *See* CRIT Opening Brief at 5-6.

Finally, PSH claims that its proposed mitigation is "most responsive" to the comments made by tribal representatives throughout these proceedings. PSH Opening Brief at 24. This contention, again, cannot bear close scrutiny. While CRIT continues to urge the Commission to deny the Project, CRIT has never suggested that it would be appropriate to require *less* compensatory mitigation, rather than the greater amount now advocated by CEC Staff. While CRIT recognizes that some of CEC Staff's funding will be earmarked for studies and additional "state interest" activities, CEC Staff has also requested a greater amount of funding for compensatory mitigation directed at affected tribes. Ex. 2017, Energy Commission Staff Supplemental Staff Assessment and Testimony (TN# 202480), at 28-29 (indicating that an increase over the $2.1 million originally proposed for compensatory mitigation for tribes would be justified based on five factors).

Consequently, if the Commission intends to approve the Project over the objection of CRIT and other area tribes, CRIT urges the Commission to reject PSH's proposed compensatory mitigation amount as insufficient to meet its CEQA obligation and unresponsive to the needs of area tribes.

II. Neither PSH nor CEC Staff Have Provided Any Substantial Evidence to Support Conclusion that Mitigation Measures Have Reduced Glint and Glare Impacts to Less than Significant.

According to PSH, "[t]he evidence in the record confirms that with the incorporation of Revised Condition of Certification TRANS-7, the potential glare impacts that may occur to pilots will be reduced to less than significant levels. PSH Opening Brief at 4. CEC Staff notes that "the revisions made to TRANS-7 will require glare impacts to pilots to be reduced to less than significant." CEC Staff's Palen Opening Brief – Reopener – FINAL ("CEC Staff Opening Brief ") (TN # 202934) at 2. Neither party, however, has provided any substantial evidence supporting the contention that TRANS-7 will effectively reduce glint and glare impacts to less than significant, as CEQA requires.

If the Commission approves the Project, it must find that "changes and alterations have been required in or incorporated into the project" that substantially mitigate all the significant effects as identified in the Final EIR, or else make override findings. Pub. Res. Code § 21081. This finding—that mitigation renders otherwise significant impacts less than significant—must be supported by substantial evidence. *Laurel Heights Improvement Assn. v. Regents of University of California* (*Laurel Heights*) (1988) 47 Cal.3d 376, 407. Substantial evidence does not include speculation or unsubstantiated opinion or narrative. 14 Cal. Code Regs. § 15384.

Consequently, courts have repeatedly struck down mitigation measures where lead agencies have failed to demonstrate how mitigation measures will render impacts less than significant. For example, in *Preserve Wilde Santee v. City of Santee*, the court of appeal struck down an EIR requiring the future formulation of a habitat management plan to mitigate significant impacts to the endangered Quino checkerspot butterfly. The court noted that it "appears the success or failure of mitigating the project's impacts to the Quino largely depends on what actions the approved habitat

plan will require to actively manage the Quino within the preserve." (2012) 210 Cal.App.4th 260, 281. Because the lead agency could provided no "guarantee" that these future measures would work, the EIR was inadequate. *Id.* Courts have reached similar conclusions when lead agencies presented untested future plans for greenhouse gas mitigation, the protection of vernal pool species, or sewage disposal systems. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95 (lead agencies must demonstrate that mitigation measures used to reduce an impact to less than significant are "both feasible and efficacious"); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670 (striking down EIR where "the success or failure of mitigation efforts . . . may [] depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR"); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-09 (explaining that the lead agency must have "meaningful information" that the proposed mitigation measures will actually work to avoid significant environmental effects).

Neither PSH nor CEC Staff have provided the requisite substantial evidence demonstrating that the Heliostat Positioning Plan can actually reduce the significant glint and glare impacts to a less-than-significant level. Indeed, CEC Staff's Opening Brief simply states that TRANS-7 will "require" the project owner to reduce impacts to less-than-significant, without discussing the feasibility of doing so, or even offering an opinion as to whether this mitigation will be effective. CEC Staff Opening Brief at 2. As Commissioner Karen Douglas recognized, staff previously "expressed concerns about the feasibility of resolving the issue below the level of significance." 7/29/14 Transcript, at 45. Other testimony and evidence support this skepticism. *See* CRIT Opening Brief at 11-13.

The modifications to TRANS-7 developed during the July 29, 2014 workshop do nothing to affect the efficacy of the proposed Heliostat Positioning Plan; CEC Staff offered no explanation for their apparent change in position. *Id.* at 13, fn. 6. Even PSH's expert offered nothing more than unsubstantiated opinion about the effectiveness of the Heliostat Positioning Plan. 7/29/14 Transcript at 35 (explaining that at Ivanpah the project owners has received complaints, investigated them, and implemented changes, such that there has been "mitigation of everything that has been complained about"); *id*. at 89 (Clifford Ho indicating that the most recent review of changes implemented at Ivanpah do not reveal whether the changes were able to "significantly reduce[ ]the glare"). Given the experimental nature of this technology, and the ongoing unresolved impacts from Ivanpah, Mr. Buhacoff presented no concrete facts upon which he could basis this opinion.

Consequently, PSH and CEC Staff have proposed a mitigation measure for which the success or failure depends on the project owners' ability to develop a hypothetical, untested future management plan, precisely the type of mitigation struck down by the California courts of appeal. Until the Commission has "meaningful information" that the Heliostat Positioning Plan is "both feasible and efficacious," it must conclude that the glint and glare impacts remain significant, (*Sundstrom*, 202 Cal.App.3d at 308-09; *Communities for a Better Environment*, 184 Cal.App.4th at 83), and consequently weigh this significant impact in determining whether override findings can be made.

III. PSH and Staff Admit Deferral of Analysis of Thermal Energy Storage, in Contravention of CEQA.

Both PSH and CEC Staff admit that thermal energy storage is a reasonably foreseeable result of the imposition of PD-1 (PSH Opening Brief at 6; *see also* CRIT Opening Brief at 15), though its inclusion and benefits remain highly uncertain. PSH also admits that "a project description must include all relevant aspects of a project, including reasonably foreseeable future activities . . . ." PSH

Opening Brief at 7 (citing *Laurel Heights*, 47 Cal.3d 376). The company also claims that it properly included thermal energy storage in its project description. PSH Opening Brief at 7. What PSH misses, however, is the next logical step: an EIR must include environmental analysis of all relevant aspects of the project (i.e., of all activities included in the project description); it cannot pick and chose which aspects of the project description to study. 14 Cal. Code Regs § 15378(a); *see also id.* §§ 15165, 15168.

The Supreme Court provided guidance on this requirement in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412. In that case, Sacramento County approved a residential development project without conducting an analysis of the impacts of a future water supply to serve the Project. *Id.* at 421. The Supreme Court rejected this deferral of analysis. The respondents argued first that future CEQA review could remedy the omission, but the Court rejected this approach: "the promise of future environmental analysis merely sidesteps the County's obligation to disclose and consider the impacts of supplying water to the entire planned Sunrise Douglas project at the outset, before approving that project." *Id.* at 427. Similarly, respondents argued that the future phases to be served by the water might not be built. Again, the Court disallowed this tactic: "'While it might be argued that not building a portion of the project is the ultimate mitigation, it must be borne in mind that the EIR must address the project and assumes the project will be built.'" *Id.* at 429 (quoting *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 206).

Similar logic applies here. PSH argues that PD-1 "would require the Commission to conduct an environmental review pursuant to its Certified Regulatory Program at the time of the amendment, which would satisfy its obligations under CEQA." PSH Opening Brief at 7; *see also id.* at 4; CEC Staff Opening Brief at 5. Yet this "promise of future environmental analysis" is exactly the same

reasoning rejected in *Vineyard Area Citizens*, 40 Cal.4th at 427. Similarly, PSH cannot avoid CEQA's requirement to analyze all reasonably foreseeable future activities because the second tower might never be built, or might never be built with storage. Transcript of the July 30, 2014 Evidentiary Hearing (7/30/14 Transcript) (TN# 202871), at 128-29, 133 (PSH explaining that PD-1 would obligate PSH to either "take out the condition" or "amend the potential license to have some design of energy storage"). Because PSH is requesting a license for two towers and the imposition of PD-1, it cannot now say that it wants the EIR to address some different project (i.e., leaving considerations of the second phase to some later time). PSH Opening Brief at 4 ("the Commission can consider the effects of the second phase at the time [] an amendment is filed").

IV. PSH's Project Description Arguments Are Unavailing.

As demonstrated in CRIT's Opening Brief, the recent addition of a phasing plan and condition regarding thermal energy storage have fundamentally changed key aspects of the Project, and rendered it difficult for the parties and the public to participate in the Commission's review. CRIT Opening Brief at 14. In response, PSH raises two arguments: (a) the last-minute changes were sufficiently clear so as to avoid confusion and (b), the changes to the phasing plan and the addition of PD-1 do not actually change the PSEGS's "project description." Neither of these contentions has merit.

First, the transcript of the most recent evidentiary hearing and PSH's own Opening Brief demonstrates the confusion surrounding these late changes. During the evidentiary hearing, PSH representative repeatedly claimed that they were still seeking permission to build two towers. 7/30/14 Transcript, at 58 ("It has always been a project with two towers . . . Project description number 1, that changes our obligations under a potential license, but otherwise that has always been a two-tower project that we are proposing, a 500-megawatt project that we are proposing."). But

PSH now claims that it is only seeking "full[] authoriz[ation for] the construction of the westernmost unit." PSH Opening Brief at 2. Given these inconsistent statements from the Project applicant, it is far from clear what this revised project is.

Second, PSH claims that late changes to a project description are only problematic if they affect the items required to be included in a project description as listed in 14 Cal. Code Regs. § 15124. PSH Opening Brief at 6. PSH conflates two distinct requirements under CEQA. First, a lead agency must include, at a minimum, the items included in section 15124, including a detailed map, a list of project objectives, a description of the project's technical, economic and environmental characteristics, and a description of the intended use of the environmental documents. But the agency is also required to ensure stability around all relevant aspects of the project, including aspects such as timing and reasonably foreseeable additions, in order to ensure adequate environmental review. *See* 14 Cal. Code Regs. § 15378(a) (Under CEQA, a "project" means "*the whole of an action,* which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .") (emphasis added); *see also*, *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-95 (striking down EIR where initial project description failed to include future large-scale phases of city aqueduct management program); *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 655 (unstable project description where EIR failed to disclose that project would provide for substantial increases in mine production); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 733 (project description failed where a necessary element of the project—a waste water treatment facility—was not disclosed).

Until the applicant, Commission, and public have a clear understanding of what the new Project entails, the CEC cannot approve the proposed license amendment.

CONCLUSION

CRIT urges the Commission to deny the petition to amend the Project for the reasons outlined here, in CRIT's Opening Brief, and in the testimony and public comments presented to the Commission.

DATED: August 29, 2014

COLORADO RIVER INDIAN TRIBES

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