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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  
REPLY BRIEF**

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In accordance with the Committee Revised Scheduling Order dated June 2, 2014, and the Committee Memorandum dated August 1, 2014, Palen Solar Holdings, LLC (PSH) files this Reply Brief to address the issues raised in the Opening Briefs of the Intervenors.

**INTRODUCTION**

PSH provides this Reply Brief to address the issues and contentions raised by the Center For Biological Diversity (CBD), the Colorado River Indian Tribes (CRIT), and Basin & Range Watch (BRW).

There are several material errors that permeate the Opening Briefs of Intervenors CBD, CRIT and BRW. They include:

- Failure to present any affirmative credible evidence to substantiate their claims or to rebut evidence presented by Staff or PSH.
- The incorrect claim that the Project Description is “confusing” or “unstable” and failure to recognize that the Commission has evaluated the “whole of the project.”
- The erroneous claim that the Commission relied on an inappropriate environmental baseline.

- The incorrect assertion that the California Environmental Quality Act (CEQA) requires the Commission to wait for additional avian data from the Ivanpah Solar Electric Generating System (ISEGS).
- Failure to apply the two-part feasibility test for evaluation of alternatives.
- The false perception that Conditions of Certification **BIO-16a** and **BIO-16b** inappropriately defer analysis or mitigation.
- The false contention that the analysis of deterrent methods was insufficient.
- Failure to recognize that for visual, cultural, and avian impacts, the evidence in the record and the governing law support the Commission's findings of override.

We have also addressed Condition of Certifications **CUL-1** and **TRANS-7** in addition to Overriding Considerations.

## **REBUTTAL TO INTERVENOR CONTENTIONS**

### **Evidentiary Standards and Burden of Proof**

Title 20 of the California Code of Regulations codify the regulatory requirements for the Commission (Commission's Regulations). Section 1751(a) sets forth the legal requirement that the Commission base its decision exclusively on the hearing and evidentiary record.<sup>1</sup> Although the Commission need not adhere to the strict application of evidentiary rules that would be applicable in a court of law, the Commission is prohibited from relying on hearsay evidence as the sole support for a finding.<sup>2</sup> It is undisputed that the applicant or petitioner, in this case PSH, has the burden of presenting substantial evidence to support the findings and conclusions required for a Final Decision that authorizes construction and operation of the facility.<sup>3</sup> According to traditional evidentiary constructs and due process, a party opposing a fact must present credible evidence that the party with the burden of proof for that fact has not satisfied that burden or the burden of proof shifts to the opposing party. This concept is enforced by Commission Regulations.<sup>4</sup>

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<sup>1</sup> 20 CCR Section 1751 (a). The presiding member's proposed decision shall be based exclusively upon the hearing record, including the evidentiary record, of the proceedings on the application.

<sup>2</sup> 20 CCR Section 1212. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.

<sup>3</sup> 20 CCR Section 1748 (d). Except where otherwise provided by law, the applicant shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility.

<sup>4</sup> 20 CCR Section 1748 (e). The proponent of any additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety shall have the burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision. The presiding member may direct the applicant and/or

CEQA requires that an agency's findings be supported by "substantial evidence".<sup>5</sup> The CEQA Guidelines provide guidance on the amount and type of evidence that is sufficient to support findings by the Commission. Section 15384 (a) defines substantial evidence as follows:

"Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.<sup>6</sup>

The Courts have provided guidance on the CEQA definitions of substantial evidence. In *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, the court held that

Much of the instant dispute stems from the unreasonable definition respondents appear to give to the term substantial evidence, equating it with overwhelming or overpowering evidence. CEQA does not impose such a monumental burden on appellant. Rather, substantial evidence is simply evidence which is of "ponderable legal significance ... reasonable in nature, credible, and of solid value." (Lucas Valley Homeowners Assn. v. County of Marin, supra, 233 Cal.App.3d at p. 142, 284 Cal.Rptr. 427.) CEQA Guidelines (Cal.Code Regs., tit. 14, s 15000 et seq.) state that "Substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal.Code Regs., tit. 14, s 15384, subd. (a).)

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staff to examine and present further evidence on the need for and feasibility of such modification or condition. With respect to the duties and responsibilities of an Intervener, see also 20 CCR Section 1712 (c). Each party shall have the responsibility to comply with the requirements for filing and service of documents, the presentation of witnesses and evidence, and any other reasonable conditions which may be imposed by order of the presiding member.

<sup>5</sup> Public Resource Code Section 21082.2 (a).

<sup>6</sup> Title 14 CCR Section 15384 (a).

As has been shown in our Opening Brief and discussed further below, PSH has presented credible substantial evidence, including expert opinion, supported by foundational undisputed facts. The substantial evidence in the record supports the following findings:

- Avian impacts from solar flux have been reasonably estimated, will very likely involve common species of birds, and may very well be mitigated to less than significant levels<sup>7</sup>;
- Deterrent methods have a reliable likelihood of success, based on prior evidence of effective large-scale commercial use;
- Constructing Phase I will result in significantly less impacts than constructing Phase I and Phase II simultaneously;
- Phase II will not begin construction unless the Commission approves an amendment to include thermal energy storage (TES) in that phase. At that time the full impacts of Phase II with TES will be evaluated and the analysis will reasonably include all available data related to avian impacts associated with solar projects;
- Avian mortality thresholds such as performance standards and curtailment are infeasible; and
- The benefits of the PSEGS significantly outweigh its environmental impacts.

When considering expert testimony (the majority of testimony in the evidentiary record for this proceeding), the courts have a longstanding tradition of yielding to the agency's broad discretion to disbelieve testimony or give it little weight, especially if the expert opinion is inherently improbable, if the witness is biased, or if the opinion is unsupported by the facts upon which it purportedly relies.<sup>8</sup> As expanded on in the Deferral of Mitigation section below, the expert opinion of Dr. K Shawn Smallwood is unreliable, as the facts he relies upon as the foundation for his opinion are erroneous, thereby producing a facility avian mortality estimate that is highly improbable.

### **Project Description**

The Project Description for PSEGS is not "unstable" or "confusing," as suggested by CBD and CRIT. PSH's Opening Brief provides a thorough analysis of why the Project

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<sup>7</sup> See discussion of uncertainties in the Section of PSH's Opening Brief (docketed 8/15/14 TN 202932) and this Reply Brief entitled Overriding Considerations.

<sup>8</sup> *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal App 3d 491, page 504. See also *Citizens' Committee to Save Our Village v. City of Claremont* (1995) 37 Cal App 4<sup>th</sup> 1157, page 1170 where the court held that expert opinions "rise only to the level of reliability and credibility as the evidence constituting the foundation for those opinions".

Description is adequate under CEQA – a position which Staff fully supports in its Opening Brief.

First, the Revised Phasing Plan reduces the construction and operation of the PSEGS to one tower now, with a commitment to incorporate TES into the second unit, pending Commission approval of a future amendment.<sup>9</sup> This evidence remains clear in the record and unrebutted.

Second, the PSEGS Project Description is not “unstable.” For the reasons discussed below, the PSEGS Project Description is stable, adequate, extremely thorough, and detailed. Neither CBD nor CRIT have been able to articulate exactly what part of the Project Description is “unstable.” A simple assertion is not evidence. The evidence in the record is clear that PSEGS is well-defined.

The Intervenors criticize the Revised Phasing Plan even though it addresses issues they themselves have raised as reasons to support the Commission’s denial of the project. First, the Intervenors have consistently claimed that more data is needed to evaluate avian impacts. Now, in accordance with the Revised Phasing Plan, the first unit would be constructed before the second unit. This will result in, at a minimum, additional avian data collected from ISEGS, allowing the Commission to consider this data as it evaluates the amendment and makes a decision on Phase II. Second, it is undeniable and unrebutted that the impacts from constructing one phase would be significantly less than the impacts of constructing both phases.<sup>10</sup> Third, Phase II will not be constructed unless it obtains an amendment incorporating TES. CBD and CRIT’s allegation that this commitment is “illusory” should be flatly rejected. CBD cites to a portion of the Testimony of Mr. Charles Turlinski to make the claim that PSH is planning to ask the Commission to ignore Condition of Certification **PD-1**. To clarify, Mr. Turlinski did not state that PSH planned to ask the Commission for such relief. As he explained further in his testimony, he was simply attempting to describe the powers that the Commission has to either require compliance with a condition or amend the Final Decision to remove it.<sup>11</sup> Everywhere else in the record, PSH has been clear that it plans to incorporate TES into the design of Phase II<sup>12</sup>.

Using this logic put forth by the Intervenors, every condition contained in any Final Decision would be considered “illusory” because project owners can ask for the amendment of those conditions and the Commission has the legal authority and power to

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<sup>9</sup> Exhibit 1124.

<sup>10</sup> Exhibit 1206 (“Construction of only Unit 1 at this time would reduce the impacts to Biological Resources by roughly one-half”).

<sup>11</sup> 7/30/14 RT pages 133 through 134, Testimony of Mr. Charles Turlinski.

<sup>12</sup> Exhibit 1124, Exhibit 167, 7/29/14 RT page 30, Testimony of Mr. Matt Stucky.

grant such amendments. PSH requests the Committee to include Condition of Certification **PD-1** to “codify” its commitment to incorporate TES into the design of Phase II.

### **Environmental Baseline**

CBD and CRIT again raise an issue in their Opening Briefs about the scope of the proceedings. Both claim that if the solar trough and PV alternatives are infeasible as demonstrated with substantial evidence by PSH, the Commission cannot process the project as an amendment. Both Intervenor confuses the issue of environmental baseline with the scope of the evidentiary proceedings and that CEQA directs agencies to tier or build upon previous environmental documentation when considering development on the same site.

It is absolutely clear that the existing Final Staff Assessment (FSA) and the Presiding Member's Proposed Decision (PMPD) evaluate the “whole of the project.” That is, the Commission has properly disclosed the environmental setting as currently undeveloped land. In every technical area, the Commission did not assume the solar trough was constructed and operating for purposes of describing the environmental setting. It is this undeveloped setting that was used as the baseline for the analysis. For example, the mitigation required for biological impacts is not the difference between the amount of land developed for the solar trough project and the PSEGS Amendment. The impacts identified and the amount of habitat compensation is for the **total disturbance** compared to undeveloped land.

CBD and CRIT are confused about the scope of additional information that the Commission requires to process an amendment. The solar trough project has a CEC License that fully discloses the total impacts and mitigation. Focusing the analysis on whether an impact is increased or decreased is properly within the CEC regulations for an amendment, since CEQA expressly allows the Commission to build upon CEQA work already performed. In other words, the Commission requested information about the differences in impacts between the Approved Project and the PSEGS Amendment in order to tier off of the work performed for the Approved Project. Even though such tiering is specifically authorized by CEQA, the FSA and the PMPD clearly and correctly disclose the total impacts and mitigation proposed using the environmental baseline of undeveloped land. Therefore, the Committee should reject the intervenor contentions that the analysis is somehow flawed.

CRIT and CBD cite cases that are not directly on point. Regardless of whether the approved project is feasible or not, CEQA allows an agency to prepare a Supplemental or Subsequent Environmental Impact Report (EIR) to tier off of the previous environmental assessment prepared for an earlier project involving the same site.<sup>13</sup> Neither CRIT nor

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<sup>13</sup> Public Resources Code Section 21166; CEQA Guidelines Sections 15162 and 15163.

CBD articulate with any specificity which topic or issue was not addressed thoroughly in any of the environmental documents because the Commission allegedly only considered the differences in the impacts. The Commission is not only authorized, but directed, by CEQA to avoid redundant evaluation and to use prior environmental analysis.<sup>14</sup> More importantly, the Commission's regulations, including Section 1769, which authorizes amendments, have been certified to be the functional equivalent of CEQA by the Secretary of Resources. If an amendment process was not authorized and consistent with CEQA, Section 1769 would have prevented the Secretary of Resource's certification of the regulations as CEQA-equivalent.

In summary, CEQA and the Commission regulations authorize the processing of an amendment in the manner undertaken for PSEGS. Notwithstanding the authority of the Commission to document only the differences in environmental impacts between the Approved Project and the PSEGS, as documented in the existing PMPD, the Commission painstakingly describes the environmental setting of the project as undeveloped land, then assesses the impacts to that undeveloped land, and ultimately adopts mitigation measures. The entire analysis and the mitigation measures were not developed to address only the differences in impacts from the Approved Project and PSEGS, but mitigate the impacts to the undeveloped land for the full development of the PSEGS. The Commission should reject CRIT and CBD's arguments as superficial and inaccurate.

### **No Need for Additional ISEGS Avian Data**

A consistent theme throughout the original proceeding and this amendment proceeding from CBD is that the Commission must slow down, stop rushing, and wait for more data. This argument is echoed by BRW. First, CBD urged that more preconstruction baseline avian data was needed. As shown in Exhibit 1158, PSH has provided significant avian preconstruction baseline survey data throughout these proceedings to supplement the data previously collected during the original proceedings.<sup>15</sup> The total amount of preconstruction baseline survey data at PSEGS provides "more comprehensive baseline information on avian use for any solar energy project considered by the Commission and it surpasses the work done for many wind projects."<sup>16</sup>

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<sup>14</sup> See *Bowman v. City of Petaluma*, (1986) 185 Cal. App. 3d 1065 (relating to subsequent and supplemental EIRs); *Benton v. Board of Supervisors* (1996) 226 Cal. App. 3d 1467 (County had issued a permit pursuant to a Negative Declaration and when applicant proposed new location. The Court held that the County could restrict its review to the incremental effects of the relocation distinguishing the case on the fact that the County had issued a prior permit); *Temecula Band of Luiseno Mission Indians v. Rancho California Water Dist.* (1996) 43 Cal. App. 4<sup>th</sup> 425 (The Court upheld that a change in a pipeline project for which a Negative Declaration had been prepared and permit was approved allowed a subsequent change to focus on the differences between the Approved Project and the proposed change.)

<sup>15</sup> Includes one year of focused avian surveys and multiple seasons of Golden Eagle surveys.

<sup>16</sup> 7/30/14 RT page 239, Testimony of Dr. Ken Levenstein.

CBD and BRW also claim that more avian mortality data is needed from ISEGS. Yet, incongruously, CBD then claims the information from ISEGS that was compiled and compared to data from other facilities (see Exhibit 1133) is misleading and cannot be relied upon. CBD introduced the same evidence of avian mortality for two months in the earlier evidentiary hearings and then relied upon it to claim avian mortalities at ISEGS would be catastrophic.<sup>17</sup>

CBD claims that more data is needed from ISEGS to capture at least a year of monitoring data, yet its own expert says the monitoring protocol at ISEGS is flawed despite its approval by CEC Staff, California Department of Fish and Wildlife (CDFW), and the Bureau of Land Management (BLM) and its acceptance by U.S. Fish and Wildlife Service (USFWS).

The Committee should see the complaints for what they are: a deliberate tactic to derail the project. As the court found in *North Coast Rivers Alliance v. Marin Municipal Water Dist. Board* (2103) 216 Cal.App.4th 614, 640, quoting the *Laurel Heights I* decision:

“A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR. That further study . . . might be helpful does not make it necessary.”

Since CBD simultaneously relies on the data it claims cannot be relied upon by others, the Committee should recognize the arguments as biased. The Committee should appropriately view CBD's arguments and expert testimony as lacking credibility.

### **Infeasibility of Alternatives**

CRIT and CBD misapply the law that governs the Commission's consideration of potentially feasible alternatives. They merge a clear two-part test into one, which is erroneous. The courts have held that when it comes to determining whether a project alternative is feasible, agencies should employ a two-step process. The first step is to include in the analysis a discussion of alternatives that are “potentially feasible.” The second step for the agency is to determine whether the alternatives are “actually feasible.”<sup>18</sup>

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<sup>17</sup> See Exhibit 3001, page 13.

<sup>18</sup> *San Diego Citizenry Group v. San Diego* (2013) 219 Cal App 4<sup>th</sup> 1, 18, the court held “CEQA provides two “junctures” for findings regarding the feasibility of project alternatives. First, alternatives are determined to be potentially feasible in the EIR. (*California Native Plant, supra*, 177 Cal.App.4th at p. 981.) Second, in deciding whether to approve the project, the decision maker determines whether an alternative is actually feasible. (*Id.* at p. 981.) “At that juncture, the decision makers may reject as infeasible alternatives that were identified in the EIR as potentially feasible.” (*Ibid.*)”

In this proceeding, CBC and CRIT often allege non-compliance with CEQA based on their comparison of the traditional EIR process with the Commission's siting process. For the Commission process, it is critical to distinguish Staff's role versus the Commission's role to understand full CEQA compliance. For example, it is important to note that while the FSA is an important environmental document, and although it resembles an EIR, it is not the legal equivalent of a Final EIR. The Commission regulatory process has been certified by the Secretary of Resources as a "certified regulatory program" pursuant to PRC Section 21080.5. While this determination does not exempt the Commission from compliance with the substantive requirements of CEQA, it does exempt the Commission from several of the procedural requirements. The purpose is to avoid redundancy by allowing a regulatory process such as the Commission's to be the "functional equivalent" of an EIR process, although not identical. The FSA is an independent analysis performed by Staff for use by the Commission. The combination of the FSA and all of the other evidence in the record including public comment is then used by the Commission to prepare a Final Decision. Therefore, it is more accurate to compare the Final Decision to a Final EIR in a traditional CEQA setting except that the Final Decision must also include CEQA-related findings.

Staff's alternatives analysis was conducted according to the requirements set forth in CEQA, which included an evaluation of alternatives that Staff believed to be "potentially feasible." While we disagree with the omission of important parts of the project objectives pertaining to the business objectives of PSH, the analysis is more than sufficient under the law for the first step of the Commission's analysis. It is thorough and certainly meets the goal of CEQA to foster meaningful public participation and informed decision-making. Staff's alternatives analysis informs the Commission and the parties whether there are "potentially feasible" alternatives to the project that may avoid or reduce significant immitigable environmental impacts. In fact, Staff's inclusion of these alternatives as "potentially feasible" and carrying them forward for detailed comparative analysis in its FSA is fostering the very debate the parties are currently briefing. Failure of Staff to include an analysis of potentially feasible alternatives would have been a CEQA violation.

The very important next step in the Commission process is actual deliberation by the Commission and the ultimate determination of whether the alternatives can meet the project objectives and are "actually feasible." Staff has not offered an opinion on the feasibility of alternatives. CRIT provided no evidence on the feasibility of alternatives. CBD provided the testimony of Mr. Bill Powers. All of Mr. Powers' testimony centers on the need for the PSEGS. Mr. Powers claims that the Committee should simply not act and renewable energy would be developed in the form of distributed rooftop PV. This contention was disputed by PSH witness Mr. Arne Olson, who credibly pointed out the errors in Mr. Powers' assumptions.<sup>19</sup> However, the broader point is that Mr. Powers' assertion that the PSEGS is not needed is misplaced in the current forum. It is undisputed

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<sup>19</sup> Exhibit 1179.

that the PPA has been approved by the California Public Utilities Commission (CPUC). Such an approval indicates that the PPA was expected to contribute to PG&E's Renewable Portfolio Standard compliance obligations and was, therefore, fulfilling a need. A determination of need is outside the jurisdiction of this Commission. Mr. Powers' arguments that the amount of distributed rooftop PV should restrict PPAs for utility-scale renewable energy are properly the subject of ongoing CPUC proceedings, or even a legislative process, but not in a Commission siting case forum. Mr. Powers did not present any evidence that a utility-scale PV or solar trough project was feasible for PSH or could be developed in a reasonable amount of time by another applicant at the PSEGS site.<sup>20</sup>

Therefore, the only unrebutted, credible evidence in the record is that the Alternatives are not feasible and would not meet the project objectives. Each reason that the Alternatives are infeasible is articulated in our Opening Brief. We request the Committee in the PMPD and Final Decision articulate each reason supporting a finding of infeasibility. In a recent case entitled *Save Panoche Valley et al., v. San Benito County* (2013) 217 Cal.App.4<sup>th</sup> 503, the court noted the importance of an agency to specify that each finding is supported by substantial evidence and each finding independently supports the finding that an alternative is infeasible. At page 523, the court stated:

As the Board noted in its resolution approving the EIR and its statement of overriding considerations, each reason it stated for the project's infeasibility was independent of one another, and each was sufficient reason for denial of the alternative. Since we find that there was substantial evidence to support the Board's determination that the Westlands CREZ alternative was infeasible due to its lack of proximity and due to its location in Kings and Fresno Counties, and because the land itself was privately owned by Westside Holdings and the Westlands Water District, we need not reach the issue of whether or not substantial evidence supported the Board's other findings of infeasibility.

## **No Deferral of Analysis**

### **Legal Standard**

Both CRIT and CBD claim that the Commission is improperly deferring analysis in violation of CEQA. CEQA Guidelines Section 15126.4 (a) (1) (B) provides:

However, Measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.

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<sup>20</sup> See *Save Panoche Valley et al., v. San Benito County* (2013) 217 Cal.App.4<sup>th</sup> 503, 522 ("An alternative may be deemed infeasible if it is unable to be completed in a reasonable amount of time").

CBD correctly cites the recent decision in *POET, LLC v. State Air Resources Board* (2013) 218 Cal App 4<sup>th</sup> 681 for the most current guidance on the criteria for evaluating mitigation measures. The *POET* court held that an agency may defer specific detailed formulation of mitigation measures only where the agency (1) undertook a complete analysis of the significance of the environmental impact, (2) proposed potential mitigation measures early in the planning process, and (3) articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.<sup>21</sup> However, CBD's claims that the analysis of the PSEGS does not meet this three part test should be rejected, as explained below.

### Application of the *POET* Criteria

#### **Criterion 1**

The first criterion articulated in *POET* requires the Commission to conduct a complete analysis of the solar flux avian impacts. CBD claims the analysis is incomplete but does not articulate with any specificity in what way the analysis is incomplete. The reason CBD cannot articulate why the analysis is incomplete is that it is not. The heart of CBD's argument is not that the analysis is incomplete, but rather that it disagrees with the results of the analysis. This is an important legal difference. It is ultimately the Committee's decision to weigh the evidence.

To evaluate the adequacy of an appropriate CEQA analysis, it is important to note that CEQA does not require the exhaustive types of studies that CBD suggests. For example, "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project, [t]he fact that additional studies might be helpful does not mean that they are required."<sup>22</sup> A study, required by an agency, which "takes place over two winters could conflict with the requirement that EIR's for private projects be prepared and certified within one year."<sup>23</sup> CEQA requires the EIR performed on a potential project to "reflect a good faith effort at full disclosure", and does not "mandate perfection or the EIR to be exhaustive" and "will be judged in light of what was reasonably feasible."<sup>24</sup> In fact, the purpose of the data is to ***provide enough information upon which to inform the public and the decision makers about the change to the environment that may be attributed to the project.***

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<sup>21</sup> *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal. App. 4th 681, 737-40 (quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95)

<sup>22</sup> *Gray v. County of Madera*, (2008) 167 Cal. App.4th 1099. (Quoting *Associated of Irrigated Residents v. County of Madera*, (2003) 107 Cal.App.4th 1383).

<sup>23</sup> *Id.* (See also, Public Resources Code 21100.2, 21151.5; CEQA Guidelines 15108.)

<sup>24</sup> *City of Long Beach v. Los Angeles Unified School District*, (2009) 176 Cal. 889.

CEQA Guidelines Section 15151 provides:

an evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of what is reasonably feasible.

CEQA Guidelines Section 15204 (a) provides:

CEQA does not require a lead agency, to conduct every test or perform all research, study, and experimentation recommended or demanded by commenters.

In this case, **all** of the parties agree that the data is sufficient to conclude that the PSEGS would result in significant avian impacts from concentrated solar flux. Therefore, CBD's claim is simply unsupported by the evidence in the record.

For avian impacts, PSH has presented multiple years of biological survey data collected at the PSEGS site.<sup>25</sup> In fact, the undisputed evidence shows that the preconstruction baseline data at PSEGS provides "more comprehensive baseline information on avian use for any solar energy project considered by the Commission and it surpasses the work done for many wind projects."<sup>26</sup> In addition, even though there is no approved modeling technique to estimate solar flux impacts, PSH provided a quantitative risk assessment utilizing a methodology currently approved and used for evaluating risk to eagles of colliding with wind turbines.<sup>27</sup> Staff provided a relative risk assessment.<sup>28</sup> While PSH disagrees with Staff's relative risk assessment, PSH even provided a quantification estimate using Staff's approach and data from ISEGS.<sup>29</sup> Even Dr. Smallwood provided estimates, although wholly inaccurate.<sup>30</sup> Therefore, there is significant amount of data and analysis of the potential avian impacts due to solar flux presented to the Committee. For the reasons discussed in our Opening Brief<sup>31</sup>, we believe our estimates are the most scientifically supportable and urge the Committee to adopt them.

CBD cites to the estimates of avian mortality predicted by Dr. Smallwood. Dr. Smallwood's estimates are based on inaccurate assumptions and flawed methodology and should be rejected. His "approach to estimating fatalities at PSEGS and ISEGS based on the Solar One is not sufficiently documented to reproduce and, thereby cannot be verified

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<sup>25</sup> Summarized in Exhibit 1158.

<sup>26</sup> 7/30/14 RT page 239, Testimony of Dr. Ken Levenstein.

<sup>27</sup> Exhibit 1139, Section 3.0; Exhibit 1134, pages 7 through 8; methodology and results explained by the Testimony of Mr. Wally Erickson at 7/30/14 RT pages 240 through 243.

<sup>28</sup> Exhibit 2018, pages 31 through 42.

<sup>29</sup> Exhibit 1205; explained by the Testimony of Mr. Wally Erickson at 7/30/14 RT pages 255 through 259.

<sup>30</sup> Exhibit 3XXX, pages; placed into context by the Testimony of Mr. Wally Erickson at 7/30/14 pages 259 through 260.

<sup>31</sup> PSH Opening Brief, docketed 8/15/14 TN 202932.

independently”.<sup>32</sup> The first inaccurate assumption was the use of national averages for searcher efficiencies and scavenger estimates as described by Mr. Wally Erickson.<sup>33</sup> These assumptions result in an estimate of the avian mortality that is not detected in or suggested by surveys. Dr. Smallwood admitted that he did not use the site-specific searcher efficiencies and scavenger estimates that were developed by ISEGS using scientifically-designed searcher efficiency and scavenger trials at the site.<sup>34</sup> The estimates developed by PSH for ISEGS and for PSEGS used more reasonable estimates of searcher efficiencies instead of the artificially low numbers used by Dr. Smallwood.

Additionally, Dr. Smallwood used only the data from April and May 2014 to extrapolate annual estimates at ISEGS, ignoring all of the additional months of data that are included in Exhibit 1133.<sup>35</sup> Dr. Smallwood claims he could not find the data<sup>36</sup>, yet PSH has been docketing and updating Exhibit 1133<sup>37</sup> which included all avian data collected at ISEGS, the Genesis Solar Energy Project (GSEP) and the Desert Sunlight Project (DSP).<sup>38</sup> ISEGS began generating solar flux on one tower in April 2013 and at that time began surveying the near-tower area with biologists. For ISEGS, all of the avian mortality data was available in the ISEGS compliance docket. For PSEGS, the latest version of Exhibit 1133 was available at the time Opening Testimony was filed. Dr. Smallwood did not correct his estimates based on the several months of data preceding March and April in his rebuttal testimony. Moreover, it appears that CBD in general, and Dr. Smallwood specifically, believed that because the electrical output was less than full capacity, the amount of solar flux generated was reduced. As shown in the unrebutted testimony of Mr. Gustavo Buhacoff, ISEGS was generating solar flux nearly 85 percent of the available sunlight hours even though the ISEGS plant was not delivering electricity to the grid in volumes equal to 85 percent of its capacity during sunlight hours.<sup>39</sup>

Mr. Erickson also pointed out that Dr. Smallwood used a 20 percent factor for the survey area at ISEGS, when in fact the area surveyed is 100 percent near the solar towers (which includes some of the solar field), 20 percent of the outer solar field in arc shaped plots that actually cover 24.1 percent of the heliostat field, 100 percent coverage of the fenceline,

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<sup>32</sup> Exhibit 1173, page 10.

<sup>33</sup> Exhibit 1173, insert quote

<sup>34</sup> 7/30/14 RT page 261, Testimony of Wally Erickson; estimates developed in Exhibit 1173.

<sup>35</sup> Exhibit 1173, pages 9 and 10.

<sup>36</sup> 7/30/14 RT pages 377 through 378, Testimony of Dr. Smallwood.

<sup>37</sup> Exhibit 1133 was first docketed on February 10, 2014 and updated twice with the current version introduced into evidence on 7/30/14.

<sup>38</sup> See Exhibit 1135 for a discussion of how Exhibit 1133 was developed.

<sup>39</sup> Exhibit 1137 and 7/30/14 RT page 368, Testimony of Wally Erickson (referencing Mr. Buhacoff’s testimony that 85 percent of the operating hours had solar flux being generated.)

and 100 percent coverage of the transmission line.<sup>40</sup> The weighted percentage of area surveyed is actually 30.1, not 20 percent, as Dr. Smallwood assumed.<sup>41</sup>

These errors and using a method of simply scaling up the data from Solar One to ISEGS resulted in Dr. Smallwood predicting 28,380 bird mortalities per year at ISEGS. This equates to an average of 2,365 bird mortalities per month. As shown above, Dr. Smallwood's assumptions upon which he bases his estimate are unfounded. The monitoring protocol at ISEGS was approved by the USFWS, CEC, CDFW and BLM. Yet if Dr. Smallwood is to be believed, the monitoring protocol is **missing on average in excess of 2,300 birds every month**. Yet, on the other hand, CBD and CRIT argue that the Commission should wait for more of the exact same data before considering PSEGS. The fact is the monitoring protocol at ISEGS has not been modified by the Technical Advisory committee (TAC) since its formal adoption in November 2013.<sup>42</sup> Surely, if the data was so inaccurate as to miss thousands of birds per month, the TAC would have altered the protocols right away.

In fact, 100 percent of the 850 foot area around the towers at ISEGS has been surveyed by biologists since each tower began generating solar flux.<sup>43</sup> In October 2013, ISEGS started monitoring the facility in accordance with the agency-approved protocol, which included the same 100 percent coverage of the near tower areas. This combined data represents over 15 months of avian mortality data in the PSEGS record. CBD's claim that the Committee should wait for more data to be collected at ISEGS is simply a red herring in an attempt to cause additional delay with the hope that the PSEGS will no longer be viable.

In addition to the estimates discussed above, PSH provided numerous documents to provide a "frame of reference" to the Committee in an effort to place the solar flux impacts in context. They include:

- Exhibit 1133 includes a comparison of avian mortality at the DSP, the GSEP and the ISEGS.
- Exhibit 1138 shows that incidental reports of bird mortality are directly related to the number of workers on-site for the GSEP. We believe this relationship is important to understand when evaluating the trend in avian mortality reported in Exhibit 1133, whereas ISEGS is undergoing systematic monitoring pursuant to an approved monitoring plan.

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<sup>40</sup> Exhibit 1173, page 12 and Exhibit 1174 page i.

<sup>41</sup> Exhibit 1174, Table 1, page 14.

<sup>42</sup> Exhibit 1175, TAC allows the use of canines to assist with searcher efficiency but did not recommend increasing the coverage or frequency of near tower monitoring efforts at ISEGS.

<sup>43</sup> The first tower at ISEGS began generating solar flux in April 2013. Exhibit 1133 and Exhibit 1134, page 5.

- Exhibit 1155 provides a table of the size in acres of the DSP, GSEP, ISEGS, the Approved Project, and the PSEGS to enable Exhibit 1133 to be read in context of the relative size of each project.
- Exhibit 1159 provides a diurnal plot of fall raptors across numerous wind project areas for comparison to the PSEGS site.
- Exhibit 1134, Table 3 provides other sources of bird mortality which not only provides a frame of reference to place the potential impacts at PSEGS but also provides opportunities to direct the funds provided in Condition of Certification **BIO-16a** to achieve real mitigation.
- Exhibit 1160 provides a flux distribution for PSEGS.
- Exhibit 1161 provides a distribution plot of the ISEGS avian carcasses to demonstrate that the solar flux injuries occur near the tower where the concentrated solar flux is highest.
- Exhibit 1162 is a density plot showing that the ISEGS solar flux impacted birds were concentrated near the tower.
- Exhibits 1201 and 1202 were provided to assist in the explanation of the difference between heat flux and solar flux.
- Exhibit 1203 is a graph of the avian mortality at ISEGS between January 1, 2014 and June 30, 2014, which indicates that mortality increases may be seasonal.
- Exhibit 1204 is a map showing that birds are nesting and reproducing in the ISEGS heliostat field.

In addition to the exhibits identified above, the evidentiary record contains Exhibit 3107 which is the report by the National Fish and Wildlife Forensics Laboratory, and numerous avian related exhibits sponsored by CBD and admitted into evidence that attempt to characterize the potential avian impacts. Staff has prepared a detailed evaluation of solar flux impacts in Exhibits 2000<sup>44</sup>, 2017<sup>45</sup> and 2018.<sup>46</sup> Clearly, the Commission has an evidentiary record sufficient to establish the potential avian solar-flux impacts.

## **Criterion 2**

The second criterion established in the *POET* case requires that mitigation measures be proposed early in the process. In its original Petition For Amendment filed in December

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<sup>44</sup> Pages 4.2-154through 169.

<sup>45</sup> Pages 7 through 14.

<sup>46</sup> Pages 31 through 42.

2012, PSH proposed conditions for mitigation funding and for preparation of a comprehensive Bird and Bat Conservation Strategy (BBCS) to address potential avian impacts. Those conditions were the basis for the current Conditions of Certification **BIO-16a** and **BIO-16b**. These proposed mitigation measures could not have been proposed any earlier in the process. Staff and PSH worked diligently with input from USFWS and CDFW in numerous workshops and in written proposals to hone Conditions of Certification **BIO-16a** and **BIO-16b** to address potential impacts to avian species. CBD never offered one change to these conditions, which now represent hundreds of hours of effort over a 19 month period. The proposal of mitigation measures early in the amendment process for PSEGS clearly satisfies Criterion 2 of the *POET* test.

### Criterion 3

*POET* also requires that the agency articulate specific performance criteria that would ensure that adequate mitigation measures were eventually implemented. As articulated on page 551 of the *Guide to CEQA, 11<sup>th</sup> Edition*, by Remy, Thomas, Moose and Manley,

In general, an agency should not rely on a mitigation measure of unknown efficacy ***in concluding that a significant impact will be mitigated to a less than significant level.*** Over the last several years, however, the courts have developed legal principles regarding the extent to which an agency, ***in concluding that a significant impact will be fully mitigated, can rely on a mitigation measure that defers some amount of environmental problem-solving until after project approval.***

This summary is consistent with the plain language of CEQA Guidelines Section 15126.4 (a) (1) (B) which provides:

However, Measures may specify performance standards which would ***mitigate the significant effect*** of the project and which may be accomplished in more than one specified way. (emphasis added.)

It is within this context that the concept of a performance standard was developed. Most of the cases evaluate the sufficiency of mitigation measures upon which the agency is relying to conclude that the impact was fully mitigated to less than significant levels. These cases make it clear that where the agency is relying on such a mitigation measure to ensure significant effects are mitigated and where the mitigation measures allow selection of different approaches after approval, such measures must have enforceable performance standards.<sup>47</sup> However, in *Fairview Neighbors et al. v County of Ventura* (1999) 70 Cal.

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<sup>47</sup> *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692 (court overturned EIR based on City's reliance on a mitigation measure with no performance standards to base finding of no significant impact); *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296 (court set aside approval of a sewage treatment plant because the board of supervisors approved a Negative Declaration which concludes no significant impacts, by requiring mitigation

App. 4<sup>th</sup> 238, the Court made it clear that the lack of a performance standard did not invalidate mitigation measures where the agency considered feasible mitigation **but concluded impacts were significant and unavoidable and made the appropriate findings of override**. Specifically, the Court held:

The EIR states that a HMCP would be prepared in the future subject to using standards and procedures not yet determined by a biologist not yet approved. Under *Sundstrom* and its progeny, such a "mitigation" measure is improper. But the instant EIR concludes that even if a HMCP and other biological mitigation measures are implemented, the impacts of the project on biological resources would be significant and unmitigable. A proposed "mitigation" measure which could not be effectual whenever and however attempted is illusory. The Board assessed the EIR, explaining the impact of the project on biological resources and the inability to mitigate those impacts. The Board properly adopted a statement of overriding considerations regarding these impacts.

*Sundstrom* is distinguishable from the instant case. In *Sundstrom*, a negative declaration relied on future proposed mitigation studies to provide presumed mitigation measures. That was improper. (*Sundstrom v. County of Mendocino, supra*, 202 Cal.App.3d at pp. 306-307.) It simply deferred environmental assessment to a future date after approval of the project. That is not what occurred here. Here the EIR explains what the environmental impacts would be, and it concludes that the impacts would be significant and unmitigable regardless of the proposed mitigation measures or future studies. Under such circumstances, the Board may adopt a statement of overriding considerations and approve the project. The EIR is only required to provide the information needed to inform the public and the decisionmakers of the significant problems which would be created by the project and to discuss currently feasible mitigation

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measures be developed after the approval and therefore the approval "**relied**" on the mitigation measures to ensure all impacts were below less than significant levels); *Sacramento Old City Association v. City Council of Sacramento* (1991) 221 Cal. App. 3d 1011 (court upheld use of a traffic control plan with specific objectives to rely on impacts being mitigated to less than significant levels – court stated at page 1029, "Where future agency action to carry a project forward is contingent on the devising means to satisfy the criteria, the agency should be able to rely on its **commitment as evidence that significant impacts will in fact be mitigated.**" Emphasis added); *Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California* (1988) 47 Cal. 3d 376 (upholds mitigation measure by which project noise levels will be kept within performance standards to support finding that noise impacts fully mitigated); *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal. App. 20 (court upheld conditions of approval for a water diversion channel with engineering performance standards to support the County's reliance on the conditions to support the finding of no significant impacts);

measures. (See *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028 [280 Cal.Rptr. 478].)<sup>48</sup>

With respect to potential impacts to avian species at PSEGS, neither Staff nor PSH are recommending that the Committee rely on the mitigation measures incorporated into Conditions of Certification **BIO-16a** and **BIO-16b** to make a determination that the impacts will be fully mitigated to less than significant levels. In fact, Staff and PSH agree that due to the uncertainty in the ability to estimate the quantity and species that will be impacted and the uncertainty in the effectiveness of deterrent methods and supplemental mitigation investments, the solar flux related impacts to avian species may not be fully mitigated. This is consistent with the approach authorized by the Court in *Fairview*.

That is not to say that the Conditions of Certification **BIO-16a** and **BIO-16b** do not include enforceable performance standards to ensure that they are effective and that the many mitigation requirements embodied within them will be implemented. The conditions do include such performance standards to ensure that each mitigation measure included in these conditions will be performed, implemented and, where feasible, effective. But it is important to understand the goal of each individual requirement, as opposed to CBD's view that the entire suite of measures together must include performance standards that ultimately ensure impacts are mitigated to less than significant levels.

The performance standards outlined in **BIO-16b** are extensive. The first performance standard is the requirement that mitigation funding be provided prior to commercial operation. The condition specifies the amount and the timing which will ensure the funding is provided. With the implementation of this performance standard the Commission can rely on the fact that the funding will be provided prior to any avian impacts.

PSH has proposed, based on discussions at the evidentiary hearing, that Condition of Certification **BIO-16b** be revised to include additional "outcome based" performance standards for use of the mitigation funding to ensure that mitigation is directed toward species that are actually impacted by the PSEGS and to avoid a "scattershot" approach. These modifications to Condition of Certification **BIO-16b**, which have been docketed under separate cover<sup>49</sup>, provide that the mitigation funding be directed towards specific conservation efforts with overarching goals to achieve a one-to-one offset ratio for State and Federal listed species taken by the project and a ratio to be determined by the TAC to

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<sup>48</sup> *Fairview Neighbors et al. v. County of Ventura* (1999) 70 Cal. App. 4<sup>th</sup> 238, page 244 through 245. See also *Sheryl Gray v. County of Madera* 167 Cal. App. 4<sup>th</sup> 1099, at page 1119 (court held that the mitigation measures proposed by the County of Madera did not include valid performance standards but stated, "The County could have approved the Project even if the Project would cause significant and unavoidable impacts on water despite proposed mitigation measures if the County had adopted a Statement of Overriding Considerations that made such findings. However, the County did not do so. Rather, the County concluded that the proposed mitigation measures rendered the water issues less than significant.")

<sup>49</sup> Docketed on August 15, 2014, TN 202929.

avoid population level impacts to other special-status species. The modifications also require the TAC to meet and determine how to direct the mitigation funding three years after commercial operation. After the operational monitoring data elucidates the avian impacts that have not been successfully avoided, the TAC will work with the project owner and other technical experts to determine facility mortality estimates for state and federal listed species and for those species that may be experiencing population level impacts. Then the TAC will solicit proposals from private and/or non-profit parties such as mitigation banks, bird conservancies, or other agency programs to compete for the mitigation funds with specific measures that demonstrate they can use the funds to achieve a one-to-one offset for State and Federally listed species and reduce impacts to species potentially experiencing population level mortalities at the PSEGS. This is an appropriate performance standard, which would allow the TAC and the CEC Compliance Project Manager (CPM) to determine specifically how to achieve the standard outlined and, more importantly, will ensure the mitigation is implemented. With the inclusion of this language, the Commission can rely on the mitigation funding being applied in the fashion outlined in the performance standard.

Recently Tom Dietsch of the USFWS filed comments opposing the “outcome based” performance standard language proposed by PSH. The purpose of the language was to respond to direction by the Committee in a manner consistent with CEQA. The purpose was not to use the performance standards to ensure compliance with other federal laws that are enforceable through mechanisms outside the CEC License. The intent of the language was not to prohibit the TAC from using the funds for programs such as the Sonoran Joint Venture, which is the conservation effort preferred by the USFWS. Nothing in PSH’s proposed language prohibits directing mitigation funds to the Sonoran Joint Venture or to any of the other programs listed in Condition of Certification **BIO-16a**. Rather, the language ensures that such mitigation funding would be spent wisely by the TAC and used in a fashion that is accountable. Requiring a party to develop a plan to use the mitigation funds to achieve specific mitigation targets by species would ensure that mitigation funding is not directed towards programs that bear little to no nexus to the impacts caused by PSEGS. State-listed, federally-listed, and other special-status species were specifically identified in the proposed language because Staff consistently based its thresholds of significance for its independent CEQA evaluation on these types of specially protected species.

Another performance standard inherent in Condition of Certification **BIO-16b** is that the BBCS shall be prepared in accordance with USFWS guidance (currently the 2012 USFWS Land Based Wind Energy Guidelines). The Condition further spells out each item that must be addressed in the BBCS which is another form of performance standard to ensure that a plan is comprehensive and does not omit critical information. With these performance standards, the Commission can rely on the fact that a BBCS will include the

items outlined in the condition and will be prepared in accordance with the latest USFWS guidance.

In addition, the condition outlines the makeup and responsibilities of the TAC, which will be actively involved in the review of avian monitoring information. The Commission can rely on the fact that the TAC will be comprised of agencies with jurisdiction that will review this information and, in conjunction with the project owner, follow through on performance standards. However, the Commission cannot rely on the TAC to ensure full mitigation.

Performance standards are also outlined in requiring avian and bat use surveys, prey abundance surveys to identify locations and changes in prey abundance as well as golden eagle nest surveys and monitoring within a 10-mile radius of the site. Therefore, the Commission can rely on these performance standards to provide the TAC with adequate baseline information.

The core of Condition of Certification **BIO-16b** is the monitoring during construction and operations which is required for a minimum of three years. The condition has a reporting requirement and requires onsite and offsite monitoring. Onsite monitoring must be systematically conducted at representative locations within the facility, at a level that will produce statistically robust data; account for potential spatial bias; and allow for the extrapolation of survey results to unsurveyed areas and the survey interval based on scavenger and searcher efficiency trials and detection rates. The survey program must also include offsite monitoring. The survey program must account for specified weather events and must include searcher efficiency and scavenger trials which may be used by the TAC to adjust the frequency of monitoring. The condition requires that the survey program develop statistical methods to generate facility estimate of potential avian and bat impacts. The survey program will also include field detection and mortality or injury identification, cause attribution, handling and reporting protocols consistent with applicable legal requirements. The Commission can rely on these performance standards to ensure that a comprehensive monitoring program is being implemented for a minimum of three years and adjusted based on actual data and experience.

Condition of Certification **BIO-16b** includes Sections 7 and 8 that outline potential adaptive management activities that range from implementation of deterrent methods to feasible modifications to the heliostat positioning. As described in Exhibits 1130, 1140, 1141, and 1186, it is difficult to determine which of the available deterrent methods or what feasible heliostat positioning strategies may be helpful at this time. While the condition requires adaptive management, the Commission should not rely on this section for anything other than the fact that adaptive management will be implemented. In other words, neither Staff nor PSH have factored into its description of the project's potential impacts<sup>50</sup> the effectiveness of future adaptive management—not because it will not work, but because it

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<sup>50</sup> PSH is only party that provided credible estimates.

is difficult to quantify at this time. Therefore, although the Commission should acknowledge that required adaptive management measures will be helpful and likely to reduce impacts, it should not rely on these measures to find that the potential solar flux impacts will be fully mitigated.

The Commission has considered two potential performance standards in connection with the adaptive management program: mortality thresholds and curtailment. The evidence in the record is undisputed that both are infeasible and therefore should be rejected.<sup>51</sup>

There are no feasible performance standards that could be adopted at this time that would support the Commission finding that all impacts will be mitigated to less than significant levels. All feasible mitigation measures have been incorporated into the proposed Conditions of Certification. No party has proffered additional feasible mitigation measures for consideration.

Therefore, the Commission can be assured that it has considered all feasible mitigation measures and adopted “specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.” This criterion appears to merely require the performance criteria to ensure mitigation is implemented and effective only where relied upon to achieve full mitigation. All of the performance standards articulated above for avian impacts accomplish that goal. The *POET* decision did not assert that the underlying purpose of a performance standard is to support an agency’s reliance on the performance standard to conclude that an impact is fully mitigated. The Commission need not, and cannot, make that finding based on the PSEGS record.

The Court in *Woodward Park Homeowner’s Association v. City of Fresno* (2007) Cal.App.4th 683, 728-729 articulated an agency’s options under CEQA.

When the city identifies an impact of a project, CEQA gives it only four choices: (1) to find, based on substantial evidence, that the impact is insignificant; (2) to find, based on substantial evidence, that although the impact is significant, no mitigation is feasible and the project is justified by overriding considerations in spite of this; (3) to require a mitigation measure and find, based on substantial evidence, that the mitigation measure renders the impact insignificant; or (4) to find that mitigation measures are within another agency’s responsibility and that the other agency has adopted them or can and should do so.”

In the case of PSEGS, the Commission should proceed under Option 2 above, and consider making a finding that PSEGS’ benefits outweigh its impacts and make the

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<sup>51</sup> Exhibits 1134 page 11 and Exhibit 1173, page 19 (Mortality Thresholds); Exhibits 1136, 1137, 1173 and 1178 (Infeasibility of Ineffectiveness of Curtailment); and 7/30/14 RT Pages 427 through 436; Testimony of Mr. Matt Stucky and Mr. Chris Morris (Infeasibility of Curtailment)

appropriate finding of override for the uncertainty inherent in the estimation of potential avian impacts and the ultimate effectiveness of the adaptive management and supplemental mitigation programs.

### **Deterrent Methods**

CBD has also criticized PSH for providing some of the avian risk reduction measures that may be considered by the TAC. They claim this is impermissible deferral. As explained at evidentiary hearing, the purpose of the testimony was to inform the Committee that measures that are employed at other developments (e.g., airports, tailing ponds) may be helpful to reduce and minimize risk to avian species.<sup>52</sup> In addition, the TAC is comprised of agencies with jurisdiction over avian species that may be impacted by the PSEGS. As described above, CEQA does authorize environmental problem solving after approval.

In addition, CBD correctly cites that CEQA requires an analysis of mitigation measures if they would cause impacts if implemented. However, we disagree with CBD's contention that Staff's general analysis of the potential impacts that may be associated with the deterrent methods is insufficient. While CEQA does require an analysis of the mitigation measures, CEQA Guidelines Section 15126.4 (a) (1) (D) provides:

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 measure shall be discussed but in less detail than the significant effects of the project as proposed (*Stevens v. City of Glendale* (1981) 125 Cal. App. 3d 986).

For PSEGS, Staff provided a general analysis of the potential deterrent methods. First, Staff listed the potential deterrent methods it analyzed and this list was consistent with the descriptions of each method provided by PSH experts.<sup>53</sup> Together, this constitutes a reasonably available description of each method sufficient to perform the general analysis required by CEQA Guidelines Section 15126.4.

Staff then concluded:

Staff considered whether these deterrent methods would result in potential impacts for each subject area. The only subject areas to identify potential impacts with certain deterrent methods are Biological Resources, Cultural Resources, Visual Resources, and Traffic and Transportation.<sup>54</sup>

Staff's general analysis highlights that the deterrent methods may potentially cause an increase in some impacts and although those impacts are difficult to quantify, the lack of

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<sup>52</sup> 7/30/14 RT Pages 232 through 233 and 410 through 411, Testimony of Mr. Matt Stucky;

<sup>53</sup> Exhibit 2018, pages 6 and 7; Exhibit 1130.

<sup>54</sup> Exhibit 2018, page 7.

quantification does not invalidate the analysis. Such a general analysis is sufficient to put the Committee (the decision-makers) on notice that the deterrent methods may cause different or additional impacts. It is this disclosure that is the heart of the CEQA analysis. Staff's general analysis is consistent with Section 15126.4 of the CEQA Guidelines.

### **No Violation of LORS**

Staff and PSH agree that the PSEGS will not violate any applicable LORS. CBD's speculation that the PSEGS will take an eagle or other fully protected species is unwarranted and not supported by any evidence in the record. Please see PSH's Opening Brief.<sup>55</sup>

### **Condition of Certification CUL-1**

#### **Consultation Efforts**

The Commission should recognize that the evidentiary hearings were opened for the limited purpose of tailoring Condition of Certification **CUL-1**. PSH contends that the purpose of the Condition of Certification is to attempt to address the impacts to the Native American community "solely" due to the visual intrusion of the towers on the landscape. CRIT's testimony and comments far exceed the scope of evidentiary hearings. PSH elected not to object to the testimony and comments at the evidentiary hearing out of respect to the tribal representatives. However, the question before the Commission should not be expanded beyond determining the contents of Condition of Certification **CUL-1**. Notwithstanding the limited nature of the inquiry, PSH provides the following brief responses to the arguments CRIT now asserts outside of the scope of the evidentiary hearings.

CRIT continually asserts that there was no government-to-government consultation yet has never acknowledged its participation in these and the prior proceedings. First, it is undisputed that the CRIT's then-Chairman signed the Programmatic Agreement (PA) for the Approved Project. It is also undisputed that the PA included reference to all of the conditions related to on-site impacts. However, CRIT wants the Commission to believe that it did not then understand that the Approved Project would involve mass grading in excess of 22 times the amount now proposed by the PSEGS. CRIT made no comments on that PA, on any of the Commission documents for the original proceeding, even though it was sent copies and notices and eventually executed the original PA. For this proceeding, BLM prepared a draft amendment to the previous PA and sent it to all tribes for comment.<sup>56</sup> No tribe, including CRIT, commented on the amended PA.<sup>57</sup>

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<sup>55</sup> PSH First Opening Brief, docketed 11/26/13 TN 201331.

<sup>56</sup> Exhibit 1081, page 2.

<sup>57</sup> Ibid. page 3.

CRIT claims simultaneously that it did not participate in the original proceedings, yet signed the PA. CRIT also claims that it has increased its participation in these proceedings because of the lessons learned from problems associated with the grading of the GSEP. CRIT became an intervener very late in the PSEGS amendment process. However, the date of intervention is not the first chance that CRIT had the opportunity to participate. As outlined in Exhibit 2001, pages 2-4 and 2-5, the CEC Staff met privately with CRIT and other tribes; CRIT was invited to participate and did participate prior to its intervention. While it is clear that the Commission processed the PSEGS as an amendment, PSH accepted several proposed modifications to the approved Conditions of Certification to address “on-site” potential impacts specifically because CRIT requested them to address the issues experienced at the GSEP. The idea that the Commission limited relevant discussion to address impacts from the PSEGS is inaccurate and directly contradicts the evidence in the record.

### CUL-1 Approach

The evidence in the record contradicts the claims contained in CRIT’s Opening Brief. Throughout the proceedings, CRIT has never offered any substantive input on the contents of Condition of Certification **CUL-1**, whether it is Staff or PSH’s original versions or modified versions that split the condition into **CUL-1A** and **CUL-1B**. Despite the voluminous testimony provided by CRIT and public comment provided by CRIT members, CRIT as an intervener produced little to no evidence to help guide the Committee in developing this condition. Most of the comment and the testimony offered by CRIT was directed to the perceived impacts to the land and did not specifically address potential mitigation of the visual impact to the landscape. As the Committee previously ruled against PSH that the impact to the landscape and the Native American community was significant, PSH is prevented from re-arguing that case here. This rule should apply to CRIT as well. The limited inquiry in front of the Committee is to develop the substantive requirements of **CUL-1**. There are only two competing proposals in the evidentiary record. CRIT rejected both in its Opening Brief and is unable to point to any evidence in the record supporting its opinion on either proposal. For the reasons outlined in our Opening Brief, the Committee should accept PSH’s proposal, not as full mitigation of the alleged impacts, but as a partial mitigation because Staff has failed to demonstrate, and CRIT has provided no evidence to demonstrate, that any of the activities described in CUL-1 fully mitigate the impact claimed by Staff and CRIT.

### Traffic and Transportation

Neither CRIT nor BRW have provided any evidence that the modifications to Condition of Certification **TRANS-7** are insufficient to mitigate the potential glare impacts to pilots to less than significant levels. CRIT is displeased by the fact that after a productive workshop at which PSH and Staff worked cooperatively to include a specific performance standard into Condition of Certification **TRANS-7**, Staff modified its opinion. Staff and PSH agree

that with the incorporation of the modifications to Condition of Certification **TRANS-7**<sup>58</sup> the impact is mitigated to less than significant levels. There simply is no contrary evidence on that ultimate conclusion.

### **Overriding Considerations**

CBD includes the following correct citation to case law relating to making a finding of override for significant impacts:

A mere finding that impacts are significant and unavoidable is no substitute for meaningful analysis of impacts or incorporation of feasible mitigation measures or alternatives. *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1370-71, (an agency can't "travel the legally impermissible easy road to CEQA compliance . . . [by] simply labeling the effect 'significant' without accompanying analysis.") The Commission must identify and analyze impacts and formulate mitigation measures in the environmental review and then adopt *all* feasible measures to reduce significant impacts to resources.<sup>59</sup>

CBD fails to point out that the facts of the *Berkeley* case are the polar opposite of the facts contained in the PSEGS record. In the *Berkeley* case, the Board of Port Commissioners for the Port of Oakland for the City of Oakland was considering approving an airport development plan for expansion of the Metropolitan Oakland International Airport. In that case, the Port did not conduct a health risk assessment because the Port contended that there was no scientifically proven protocol for preparing such a risk assessment and therefore determined that the impact was unknown.<sup>60</sup> The court determined that there was substantial evidence in the record that a scientific protocol did exist.<sup>61</sup> The Port ignored

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<sup>58</sup> Latest version is PSH's proposal docketed in August 15, 2014, TN 202928.

<sup>59</sup> CBD Opening Brief, page 11.

<sup>60</sup> *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1367-68.

<sup>61</sup> *Ibid*, page 1368, "Voluminous documentary evidence was submitted to the Port supporting the assertion that an approved and standardized protocol did exist which would enable the Port to conduct a health risk assessment. For instance, the Port was cited to eight studies performed by the EPA on TAC emissions from mobile sources, including an EPA study of TAC emissions generated from aircraft and related vehicular sources at Midway Airport in southwest Chicago.

The Port was also referred to a study prepared by Environmental Science Associates contained in the EIR for the San Jose International Airport. Environmental Science Associates is the same consulting firm that prepared the EIR in this case. In that document, the EIR relied upon an evaluative methodology in determining that emissions from the San Jose project would result in a significant effect on the environment if they caused a net increase of more than one percent of countywide mobile-source emissions.

At the public hearing prior to certification of the final EIR, the Port was also provided with a letter from an environmental consultant who was in the process of performing a study quantifying the exposure and associated risk

this evidence.<sup>62</sup> Then, after no analysis to disclose the magnitude of the impact was performed and no analysis of mitigation measures was undertaken, the Port simply assumed the impacts were significant and unavoidable and made a finding of override. It is this type of shortcut that the court held violated CEQA as cited by CBD. We do not dispute the CEQA violation in that circumstance.

We disagree with CBD's conclusion that the PSEGS record is similar in any way to the record in *Berkeley* for biological resources. Please see the discussion of all of the analysis and data that has been provided for avian impacts in the No Deferral of Analysis section of this Reply Brief.

In addition to the significant amount of data and analysis contained in the record to characterize the baseline conditions and estimate avian impacts, the record also contains significant mitigation measures. Condition of Certification **BIO-16a** provides funding of \$1.8M for use by the TAC to mitigate solar flux avian impacts. Condition of Certification **BIO-16b** provides extensive monitoring, adaptive management, and deployment of deterrent methods.

The record also contains Exhibits 1136, 1137 and 1138 which consider curtailment and demonstrate that curtailment would not be a feasible or an effective mitigation measure. This conclusion is supported by Staff and is unrebutted by any Intervener.

Therefore, CBD discredits the extensive amount of work and analysis that Staff and PSH have performed on PSEGS to claim that the facts of *Berkeley*, where scientific modeling protocols were ignored and where no analysis of potential impacts or mitigation measures were performed, are comparable to the PSEGS record. The Committee should summarily reject CBD's claim that there has been inadequate analysis or shortcutting to a finding of override.

As described in Exhibits 1124, 1125, and 1143 through 1146, the PSEGS solar thermal technology provides many benefits to the transmission system that cannot be provided by the PV Alternative. In addition, the PSEGS represents a significant investment that, if approved, can deliver clean renewable energy. In addition, as shown on Exhibit 1145, the PSEGS helps achieve the State's goals as outlined in the IEPR. Exhibit 1146

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from toxic compounds generated from both mobile and fixed sources at the Santa Monica Municipal Airport. The letter set out in great detail the regulatory guidance the consultant has received from numerous agencies, including the EPA's Office of Mobile Sources as well as the Office of Air Quality Planning and Standards."

<sup>62</sup> Ibid, page 1369, "While comments on the draft EIR should have alerted the Port to a need to consult with or, at a minimum, confirm its views with pertinent public agencies, the text of the final EIR contains virtually no reference to any material supplied by the public challenging the draft EIR's conclusion that no methodology or standards of significance existed for assessing the health risk from TAC exposure. In essence, it simply repeats the generic statement throughout the EIR's text that no adequate analytical tools are currently available for performing a health risk assessment for aircraft emissions."

demonstrates that the PSEGS solar tower technology provides the most promising future to realize TES and cost reductions. Exhibits 1148 and 1149 demonstrate the commercial value of TES will likely increase in California, by providing essential and valuable grid integration and reliability services in a future of high renewable energy penetrations. No other solar thermal projects are in the licensing phase at the Energy Commission or have a license that will be executed upon in the near future.<sup>63</sup>

No party has provided any contrary evidence. The only competing evidence was offered by Mr. Powers, who inaccurately contended that the PSEGS cannot incorporate meaningful TES in the future.<sup>64</sup> But as explained by Mr. Bruce Kelly, who has actually designed and worked at a facility with TES, the most likely need for TES in the future is for “load shifting” consistent with the need shown on Exhibit 1149 rather than exclusively for increasing the daily generation of the facility.<sup>65</sup> By Mr. Powers' own definition, the batteries he proposed in conjunction with PV technology would provide no hours or minutes of “storage” since no incremental energy generation is enabled in such instance.

As described in Exhibit 1003 and Exhibit 2003, the PSEGS will provide many economic impacts to the region including a large number of highly skilled and well-paying construction jobs. Table 6.2-1 of the Exhibit 1003 documents these benefits for completion of both phases. Additionally, Exhibit 6000, Testimony of Mr. William J. Perez, states that the PSEGS solar tower technology provides more economic benefits to the local workforce because it provides the most construction hours, the broadest range of skilled workers, and the most opportunity for apprenticeship training than either of the No Project (solar trough) or PV Alternatives.<sup>66</sup>

PSH has also provided Exhibits 1183, 1184, 1185, 1189, 1190, 1192 and 1193 which all show that it is imperative to combat climate change now. Authorizing construction of the PSEGS provides that primary benefit. Moreover, since the filing of the Revised Phasing Plan, Staff has removed its objection to the Commission making the necessary override findings.<sup>67</sup>

In addition, it is important for the Committee to note, as shown in the PMPD prior analysis, impacts for many environmental areas are reduced from the Approved Project. The PSEGS reduces the footprint by 572 acres over the Approved Project and associated habitat-related impacts, reduces grading from 4.5 million cubic yards to 0.2 million cubic yards, reduces water use from 300 AFY to 201 AFY, and removes millions of gallons of Thermanol from the site.

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<sup>63</sup> 7/30/14 RT page 130, Testimony of Charles Turlinski.

<sup>64</sup> 7/30/14 RT page 37, Testimony of Bill Powers.

<sup>65</sup> 7/30/14 RT, pages 63 and 64; pages 67 through 70; pages 72 and 73, Testimony of Bruce Kelly.

<sup>66</sup> Exhibit 6000, pages 3 through 4, Testimony of William J. Perez.

<sup>67</sup> Exhibit 1206 and 7/30/14 RT pages 195 through 197, Testimony of Roger Johnson.

As described in the Section of this Reply Brief entitled Infeasibility of Alternatives, we request the Committee articulate each reason supporting a Finding of Override and that each reason can independently support the finding.

## **CONCLUSION**

At the January 7, 2014 Presiding Member's Proposed Decision Conference (PMPD Conference), Commissioner Douglas summarized key points that are currently relevant in describing the perseverance it takes for a renewable energy developer in the current California regulatory climate.

In conclusion, I want to take a moment to thank the Petitioner for bringing this project to the Commission and for playing a critical role in helping the state meet its renewable energy and climate goals. Your willingness to think big, to pull together the technical expertise and financing needed for these projects, and to endure the frustrations, costs, and indignities of the permitting process, among all of the other challenges that you also face, is critical to the State of California in meeting its goals.<sup>68</sup>

The Committee should recognize that although disputes still remain, this Petitioner has worked cooperatively with the agencies and Intervenors. It has developed mitigation measures to respond to real issues and has considered mitigation measures when offered by others. PSH has not objected to a single data request. It worked diligently to answer the questions of the Committee at great expense in the face of risks to the project's viability.

As the Commission regulations require, the Committee must make its decision on the evidence in the record. To that end, the Committee should ignore articles and press coverage that largely sensationalize arguments and that ignore the facts and expert opinions in the PSEGS record.

PSH respectfully requests the Commission approve the PSEGS amendment. The PSEGS reduces impacts in many areas. PSH has worked cooperatively with Staff to minimize and/or mitigate the impacts associated with the change in technology to the extent feasible. The PSEGS is located in a BLM-designated Solar Energy Zone, is within the boundaries of the Approved Project, will utilize an existing LGIA that is important to the overall upgrades of the regional transmission system, and will deliver clean, renewable energy to California's ratepayers pursuant to approved PPA. Lastly, the Revised Phasing Plan ensures that near term impacts will be significantly less—roughly one-half. The record in this Amendment proceeding is robust and contains ample evidence to support the Commission's approval and necessary CEQA findings of override.

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<sup>68</sup> Transcript of the PMPD Conference held on January 7, 2014, page 23.

Dated: August 29, 2014

A handwritten signature in blue ink, appearing to read "Scott A. Galati". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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Scott A Galati  
Counsel to Palen Solar Holdings, LLC