

**Audubon California * Center for Biological Diversity
Defenders of Wildlife * Sierra Club**

November 17, 2009

Sent via U.S. Mail and electronic mail

California Energy Commission
Dockets Unit, MS-4
1516 Ninth Street
Sacramento, CA 95814-5512

DOCKET	
09-RENEW EO-1	
DATE	NOV 17 2009
RECD	NOV 17 2009

Re: Docket No. 09-Renew EO-01
Desert Renewable Energy Conservation Plan Draft Planning Agreement

Dear Sir/Madam:

On behalf of the undersigned organizations, we are writing to provide our comments on the draft planning agreement for the Desert Renewable Energy Conservation Plan (DRECP) as required by Executive Order S-14-09 and to highlight what we believe are critical elements for a successful conservation plan. Our organizations strongly support renewable energy production and utilization in California while protecting its unique and sensitive resources including, in particular, the California Desert Conservation Area (CDCA). As such, we strongly support the creation of a long-term, landscape-scale Natural Community Conservation Plan/DRECP. In order to maximize the likelihood of a strong, collaborative DRECP, we believe that the following issues must be addressed:

- 1. The DRECP permitting issues must be clarified to ensure that this plan will be permitted as a Natural Community Conservation Plan.**

The DRECP must be created and approved as a Natural Community Conservation Plan (NCCP) pursuant to California Fish and Game Code sections 2800, et seq. The NCCP Act is the only conservation planning statute in current law that sets forth strong standards for conservation, independent science, collaboration, and public participation. The current version of the DRECP Planning Agreement raises three permitting issues that must be resolved:

- a. The ability of the California Energy Commission (CEC) to issue NCCP take authorization, and commensurate assurances, to project applicants must be clarified and resolved.***

The planning agreement states that the CEC will not receive an NCCP permit pursuant to Fish and Game Code Section 2835. Instead, it appears that the Department of Fish and Game (DFG) will approve the DRECP as an NCCP without issuing a 2835 permit to the CEC, but then the CEC will issue take authorizations under the Warren-Alquist Act consistent with the DRECP. In addition, the planning agreement states that the "in-lieu" permit issued by the CEC consistent with the

DRECP will include “assurances” provided to project applicants pursuant to Fish and Game Code Section 2820(f).

We do not believe that under the current reading of the Warren-Alquist Act (Public Resources Code Section 25500) that the CEC has the authorization to issue an “in-lieu” NCCP permit. And, without the authorization to issue an “in-lieu” NCCP permit, the CEC does not have the authority to provide “assurances” pursuant to Fish and Game Code section 2820(f). While the Warren-Alquist Act provides for the issuance of “in-lieu” permits, this authorization to issue such permits is limited to only those permits “required” by law. Public Resources Code Section 25500. This limitation on the CEC’s “in-lieu” permitting ability to only those permits “required” by law makes sense as it is unlikely the Legislature intended to grant the CEC the overly-broad ability to issue *any* kind of permit issued under local or state law.

Unlike the California Endangered Species Act (“CESA”) “take” permit (Fish and Game Code Section 2081), which is a mandatory permit for any project resulting in the “take” of a listed species, the NCCP Act and its “take” permit are voluntary. Projects that result in the “take” of a listed species are not required to receive an NCCP take permit. Rather, they are required to receive a CESA take permit. Thus, the Warren-Alquist Act’s granting to the CEC the ability to utilize the certification process as an “in-lieu” permit extends only to CESA, not to the NCCP. Therefore, in order to utilize the NCCP and its assurances provision, the planning agreement must be revised to require the CEC apply for and receive an NCCP permit pursuant to section 2835 before it can issue any NCCP take authorization or assurances to project applicants.

- b. The CEC’s ability to override NCCP requirements raises questions regarding the ability of DFG to issue an NCCP permit based on the certainty that the DRECP’s conservation goals, objectives and measures will be carried out.***

Under the Warren-Alquist Act, the CEC may certify an energy project inconsistent with local, state or federal law (to the degree allowed by federal law) as long as it makes a finding of public necessity. Public Resources Code Section 25525. Therefore, the CEC may permit a renewable energy project even if it is inconsistent or undermines the DRECP. We would question the biological and legal basis of any NCCP based upon a permitting body authorized to approve projects inconsistent with state law. Despite the CEC’s promises of never over-riding existing endangered species law, the fact remains that the Warren-Alquist Act allows for such an over-ride should the CEC decide to invoke it. Thus, it is unclear how DFG could issue an NCCP permit based on the commitment of an agency to carry out a conservation strategy through its certification process when the agency is allowed to override the NCCP permit requirements when approving projects. This authorization to permit projects inconsistent with the NCCP Act or CESA raises serious questions as to whether DFG’s findings that the DRECP meets the standards of the NCCP Act, including the certainty of the implementation of the conservation strategy, are rational and not arbitrary or capricious. At a minimum, the CEC must receive an NCCP permit pursuant to Fish and Game Code Section 2835, but we believe that this issue may require a legislative remedy that clarifies that the CEC cannot override the requirements of CESA or the NCCP when certifying energy projects.

- c. ***The DRECP Planning Agreement must clarify the relationship of the Bureau of Land Management (BLM) to the NCCP and provide that the BLM is adopting the DRECP as a BLM program.***

The DRECP Planning Agreement states that the BLM will not be an applicant for an NCCP permit. It also states that the BLM “intends” to incorporate the NCCP public input process into any process it *may* use to prepare a document under the National Environmental Policy Act (“NEPA”) or the Federal Land Policy and Management Act (“FLPMA”). The sum total of the BLM’s commitments in the planning agreement are maybe to do a plan amendment and NEPA document. This hardly adds up to any kind of solid commitment by BLM to do anything other than what it is already doing. Indeed, it appears that there is no commitment being made by the BLM to carry out the conservation strategy set forth in the DRECP (and upon which an NCCP take permit will be based). Given that the vast majority of land within the DRECP planning area is owned and managed by the BLM, it is unlikely that DFG can permit the DRECP as an NCCP without more definitive commitments by the BLM that it will make the necessary land use plan changes and it will adopt the DRECP as a BLM program. Therefore, we strongly suggest that the planning agreement is revised to clarify and bolster the BLM’s commitment to the DRECP.

2. **The DRECP planning goals need to be clarified to clearly articulate the NCCP standards of providing for the recovery of covered species and the conservation of ecosystems within the planning area.**

The planning agreement states that the goal of the DRECP is the “provide for the conservation and management of Covered Species, which means that the DRECP will ensure the implementation of measures that will contribute to the survival and recovery of Covered Species.” Planning Agreement at p. 7. The planning agreement’s description of what “provide for the conservation and management of Covered Species” as defined in the last clause of the above-articulated sentence is inaccurate and does not reflect the definition of “conservation” contained within the NCCP Act. Fish and Game Code Section 2805(f) states:

‘Conserve,’ ‘conserving,’ and ‘conservation’ mean to use, and the use of, methods and procedures within the plan area that are necessary to bring any covered species to the point at which the measures provided pursuant to [CESA] are not necessary, and for covered species that are not listed pursuant to [CESA], to maintain or enhance the condition of a species so that listing pursuant to [CESA] will not become necessary.

Thus, the NCCP Act definition of conservation requires the use of all methods and procedures within a plan area necessary to recover a covered species or ensure that a covered species will not be listed as endangered or threatened. This standard is broader and more protective than the incremental “contribute to survival and recovery.” Therefore, we would urge the DRECP planning agreement use the actual definitions of conservation found in the NCCP Act rather than reinterpretations of law that do not fully reflect what is required in the NCCP Act.

3. The desert counties must be brought into the planning process as full plan participants as soon as possible.

In addition to the Renewable Energy Action Team (“REAT”), the DRECP should include the relevant desert counties as plan participants. We are concerned that the DRECP, as currently envisioned by the state and federal agencies, does not include the desert counties as plan participants in the beginning stages of the DRECP. Instead, the planning agreement sets forth a vague “on-ramp” provision that allows for the counties to adopt the DRECP and/or incorporate other counties plans’ into the DRECP. The counties are critical to this process as they permit wind and solar photovoltaic (PV) projects on non-federal land and they are essential to putting together larger conservation strategies for species such as the Mohave ground squirrel. Indeed, the counties are essential for covering all of the land necessary for providing ecosystem conservation and for meeting renewable energy goals. Therefore, we urge the REAT to work with the desert counties to make them signatories to the planning agreement and participate as full plan participants. Without the counties as signatories to the DRECP, we question whether the DRECP will meet the NCCP “ecosystem conservation” standards without the inclusion of private lands into the plan.

4. The DRECP planning agreement must clearly articulate a stakeholder process that is balanced, transparent, and collaborative.

The DRECP should create a balanced Steering Committee comprised of the plan participants (as discussed above) as well as other interested parties such as conservation non-profit organizations, tribes, and representatives of the renewable energy industry. This Steering Committee should follow the format used by Steering Committees in other NCCP planning efforts such as the Contra Costa County NCCP.

The DRECP should set forth a comprehensive process for public participation, including public workshops, availability of information, and making Steering Committee meetings and other technical meetings largely open to the public. We believe an open, transparent process will lead to greater success and less opposition to a final product.

We are concerned that under the current proposed structure for the DRECP, most of the development of the plan will occur within the state and federal agencies with the agencies issuing products for review and comment by interested parties. This kind of one-sided approach affords only limited opportunity for the development of a collaborative plan as interested parties are asked only to react to products, but not allowed to develop them along the way.

We strongly urge that the planning agreement is expanded to set forth a broad, balanced and collaborative stakeholder process. Our undersigned organizations are interested in participating in this Steering Committee.

5. The interim process for permitting projects must be articulated more fully in the planning agreement.

During the negotiations over the revision to the NCCP Act (embodied in SB 107), there was a great deal of discussion about the issue of interim development since it presented a significant problem in the development of NCCPs in Southern California. See Natural Resources Defense Council, “Leap of Faith: Southern California’s Experiment in Natural Community Conservation Planning” (1997).

The NCCP Act presently requires that the fish and wildlife agencies review discretionary projects that potentially conflict with the preliminary conservation objectives in the planning agreement. This review must occur prior to, or as soon as possible after, the project application is deemed complete pursuant to Government Code Section 65943. The wildlife agencies must recommend mitigation measures or project alternatives that would help achieve the preliminary conservation objectives of the NCCP. As part of the interim development review process, these wildlife agencies must take into consideration the information developed by the independent scientific review process created by Fish and Game Code Section 2810(b)(5). See Fish and Game Code Section 2810(b)(8).

The draft planning agreement fails to meet the interim process requirements set forth in Fish and Game Code Section 2810 as the draft agreement does not require anything or commit any agency to do anything. Instead, the interim permitting section (Section 8.9 of the draft planning agreement) is rife with qualifying language such as “intends,” “reasonable efforts,” and “request and encourage.” In addition, the interim process fails to set forth how the independent science recommendations will be utilized by the agencies in the review of interim projects.

We do not intend that the interim permitting process create any unnecessary delays for renewable energy projects. However, we do believe that this process needs to be more clearly articulated and done so with language that sets forth unequivocal commitments by the participating agencies as required by the NCCP Act.

6. The draft planning agreement must include a provision that allows for the consideration of interim take of covered species.

California Fish and Game Code Section 2810(b)(8) provides that “[a]ny take of candidate, threatened or endangered species that occurs during the interim period shall be included in the analysis of take to be authorized under an approved plan.” The current draft planning agreement includes nothing regarding the analysis of interim take. Thus, in order to comply with Fish and Game Code Section 2810(b)(8), the parties must include a provision in the planning agreement that requires the analysis and incorporation of interim take into the DRECP.

7. The draft planning agreement list of covered species should be expanded.

Based on a review of the Exhibit B, the draft list of covered species, we recommend the following additional species are added to the covered species list:

Crissal Thrasher (*Toxostoma crissale*)
LeConte's Thrasher (*Toxostoma lecontei*)
Lucy's Warbler (*Vermivora luciae*)
Mountain Plover (*Charadrius montanus*)
Snowy Plover – The interior population, which is a species of special concern.
All CNPS list 1B and 2 plants that occur within the planning area.

8. The DRECP needs to be led by a full-time director who has experience in complex conservation planning efforts.

The DRECP will be an ambitious conservation plan that will require tremendous effort to complete by the end of 2012. In our experience, the best way to ensure that such a complex and difficult

planning effort will succeed is to appoint a leader who can work on this project on a full-time basis. In addition, this person should have past experience in these kinds of complex conservation planning efforts – ideally, someone with NCCP experience and experience in leading complex negotiations across agencies and organizations. We understand that current agency personnel are already stretched thinly to cover the myriad of resource issues facing California. Therefore, we strongly urge that you consider hiring someone to lead this effort who can spend all of their time focused on producing a solid, science-based collaborative plan within the current outlined schedule.

Conclusion

We would like to meet with you to discuss further the issues we have raised in this letter. Thank you for the opportunity to provide you with our comments. Our goal is to assist the state and federal agencies in the development of the best possible DRECP in a timely manner that provides effective, long-term protective policies for preserving our biological resources in the California Desert and provides for the timely development of renewable energy projects.

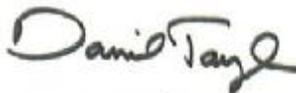
Sincerely,



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Defenders of Wildlife

/s/

Ileene Anderson
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Dan Taylor
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/s/

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Cc: Karen Scarborough, Undersecretary
California Natural Resources Agency

Karen Douglas, Chair
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