



December 4, 2009

***Sent via U.S. Mail and electronic mail***

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

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| <b>DOCKET</b>        |             |
| <b>09-RENEW EO-1</b> |             |
| DATE                 | DEC 04 2009 |
| RECD                 | DEC 04 2009 |

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

Dear Sir/Madam:

These comments are submitted on behalf of the Large-scale Solar Association (LSA) and the Center for Energy Efficiency and Renewable Technologies (CEERT), whose members include solar energy companies developing utility-scale solar energy projects in the California desert and elsewhere.

We appreciate the effort to prepare a Desert Renewable Energy Conservation Plan (DRECP) as a critical part of the effort to site renewable energy projects in the desert and provide for the conservation of the desert ecosystem. We believe the DRECP – once completed -- could lead to more certainty for project proponents as well as for conservation efforts and result in a more efficient permitting process for renewable energy projects that apply for permits after its completion.<sup>1</sup>

As indicated below, however, we have deep concerns that Murphy's Law<sup>2</sup> may apply, and that the existence of the DRECP Planning Agreement itself (and the information gathered pursuant to it) could have the unintended consequence of becoming a significant obstacle to otherwise desirable solar projects that are already in the permitting pipeline.

We cannot support a DRECP that introduces new permitting processes or subjects projects that are already well-advanced in the permitting process to new and as-yet undefined "consistency review" standards. Either result would introduce lengthy permitting delays at a critical time for renewable energy development, both in terms of availability of federal ARRA funding and for satisfying California's ambitious RPS and GHG-reduction goals. We note that

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<sup>1</sup> Although an NCCP is one method of achieving a landscape-level set of conservation and mitigation priorities, it is not the only method. If an NCCP becomes infeasible, we would urge the agencies to develop a similar landscape-level plan.

<sup>2</sup> Murphy's law is an adage or epigram that is typically stated as: "Anything that can go wrong will go wrong."—Wikipedia.

these standards would also apply to *transmission* projects, which are intended to be covered activities pursuant to Section 2.5.3 of the Planning Agreement.

In order to maximize the likelihood of a strong and effective DRECP that achieves its conservation goals without derailing or delaying existing proposed projects, we believe the Section 2810(b)(8) issues addressed below must be successfully resolved *before* the Planning Agreement is signed and the DRECP process moves forward.

**1. The interim process for permitting projects now in the pipeline must be articulated more fully in the planning agreement.**

The draft Planning Agreement contains an interim permitting section (Section 8.9 ) that deeply concerns those projects seeking ARRA funding. The Planning Agreement is a formal document under the Act and has certain regulatory consequences. Fish and Game Code § 2810(b)(8) provides:

“(8) The agreement shall establish an interim process during plan development for project review wherein discretionary projects within the plan area subject to Division 13 (commencing with Section 21000) of the Public Resources Code that potentially conflict with the preliminary conservation objectives in the planning agreement are reviewed by the department prior to, or as soon as possible after the project application is deemed complete pursuant to Section 65943 of the Government Code and the department recommends mitigation measures or project alternatives that would help achieve the preliminary conservation objectives. As part of this process, information developed pursuant to paragraph (5) of subdivision (b) of Section 2810 shall be taken into consideration by the department and plan participants. Any take of candidate, threatened, or endangered species that occurs during this interim period shall be included in the analysis of take to be authorized under an approved plan. Nothing in this paragraph is intended to authorize take of candidate, protected, or endangered species.”

This provision would suddenly subject projects in the pipeline to a whole new set of standards for permitting. These projects are diligently proceeding through a county or CEC process that will result in a Section 2081 incidental take permit or its in-lieu equivalent. To suddenly subject them to a new set of *preliminary* (not even final) conservation objectives, which did not exist at the time they filed for permits, could delay these projects by months or years. The “preliminary conservation objectives” are not subject to the rigors of regulatory adoption, yet have a direct and significant regulatory impact. Such a result would critically wound both California’s RPS program and efforts to achieve AB 32 GHG reduction goals. If this is the consequence of a draft planning agreement, we urge that the Planning Agreement must be modified to take into account the importance of pending applications and to plan around them.

The current provisions of the Planning Agreement only deepen our concern:

(1) Section 8.9 states that certain projects “may” be proposed prior to the completion of the DRECP. This statement in the subjunctive is wholly inappropriate, given the number of projects currently before the CEC, BLM, and local governments.

(2) Section 8.9.1 states that such interim project proponents should notify the REAT members and provide information. This section again is blind to the existing universe. The projects are already deep in the pipeline, and the REAT Parties already have this information. If this section is not to result in duplication of the worst sort, it must be amended to recognize the status of pending applications.

(3) Section 8.9.2 is the *most worrisome* section. It states that the agencies will then review the projects for consistency with preliminary conservation objectives “within any legally prescribed time periods.” and that the wildlife agencies then “intend to recommend what can only be assumed to be *new* mitigation measures or project alternatives that will help achieve the preliminary conservation objectives of the DRECP and that will not preclude important conservation options or connectivity between areas of high habitat values.”

The Planning Agreement thus confirms our worst fears that the preliminary conservation objectives stated in Section 6.0 of the Agreement will be used to subject these projects to new standards and new (possibly lengthy) reviews pursuant to Section 2810(b)(8) of the NCCP Act.

It is true that the objectives that now appear in Section 6.0 of the Planning Agreement are broad and general. That does not lessen our concern that they provide agencies with broad discretion to find inconsistencies and to recommend radical changes in projects already in the pipeline. But Section 2810(b)(8) goes further, because it requires a *rolling* standard of review based on the information later received pursuant to section 2810(b)(5). In other words, as the REAT gathers more information and the DRECP becomes more specific, there is no logical end to re-visiting the consistency review for these projects.

Finally, it is also true that the Act does not prohibit approval of projects that are found to be inconsistent with the preliminary conservation objectives. However, such a course of action could certainly lead to a finding that the inconsistency is a significant adverse impact under CEQA and/or NEPA, leading to litigation regarding the feasibility of alternatives and mitigation.

In short, it would be the ultimate in “unintended consequences” if the DRECP were to result in the failure of the very renewable energy projects that it is intended to facilitate. No Planning Agreement seeks to use existing developments (airports, gas stations, homes, farms) as the basis for conserving the unaltered environment. Nor should this Planning Agreement subject applications existing on the date of its signing to these additional requirements. Rather, the Planning Agreement should acknowledge and embrace these projects, which are fully subject to CESA and FESA, and adopt a plan that does not undermine any mitigation they implement. All of these projects are still subject to a Section 2081 incidental take permit (or its in-lieu equivalent) and its mitigation requirements, which should suffice during this interim period so long as the Planning Agreement explicitly takes these issues into account and eschews using these sites for conservation purposes.

## **2. An In-Lieu Fee Program Should Be Instituted**

We feel strongly that there must be a comprehensive mitigation scheme available to renewable energy projects, agreed upon by the relevant government agencies, that results in

an in lieu fee payable by all projects according to common criteria and consistent application of standards. For each project to be required to acquire disaggregated private parcels, many of which may not be of the highest biological value, is time-consuming, expensive (especially when landowners realize that their land is needed), and results in questionable ecological value. Rather, the agencies should consider the number of projects in the immediate pipeline, existing species and habitat plans, and a method of funding them through fees. We understand and agree with the concern that fees must be tied to specific, long term, significant, and sharply identified measures, not just payment into a pot. We also understand that the fees must “fully mitigate” impacts under CESA. But those are details easily developed by the agencies. The concept of an in lieu fee should be spelled out in the Planning Agreement in section 8.9.

### **3. The Authority to Adopt an NCCP (the DRECP) Must be Clarified.**

The DRECP is intended to be a Natural Community Conservation Plan (NCCP) pursuant to California Fish and Game Code (F&GC) §§ 2800, et seq. The current version of the DRECP Planning Agreement needs to clarify the statutory authority to adopt the DRECP.

A. The NCCP Act (F&GC §2820(a)) states that the Department of Fish and Game (DFG) must approve any NCCP. The Planning Agreement should state clearly that it is DFG that will approve the NCCP, even if the DRECP is to be developed cooperatively among the Renewable Energy Action Team (REAT) members and subject to participation by other stakeholders.

B. The NCCP Act (F&GC §2810) provides that the Department may enter into a planning agreement with any person or public entity, “in cooperation with a *local* agency that has land use permit authority over the activities proposed to be addressed in the plan.” It is not clear how an NCCP can legally be prepared without the participation of a *local* agency with land use jurisdiction pursuant to Section 2810. The fact that the CEC may preempt local land use jurisdiction or act as the functional equivalent of a local agency for land use purposes does not explicitly convey authority under the NCCP Act to prepare a planning agreement without *local* agency cooperation. We urge below that counties be added to the Planning Agreement. Section 2810 may paradoxically make it necessary to have county participation in order to have a valid NCCP. If it becomes infeasible to obtain county participation, the agencies may need to consider a conservation plan alternative to an NCCP that will still achieve many or all of the NCCP’s goals.

### **4. The Authority for Regulatory Assurances and Authorized Take Must be Clarified and made more specific.**

A. Fish and Game Code Section 2835 provides that the department may authorize “by permit” “the taking of any covered species whose conservation and management is provided for in a natural community conservation plan approved by the department.” The Planning Agreement must reconcile Section 2835 with the in lieu permits (Certifications) issued by the CEC. Presuming that the intent is not to issue DFG permits to individual projects, at least where the CEC issues in lieu permits, and presuming further that DFG will not be issuing a permit to the CEC itself, the Planning Agreement must articulate and clarify how Section 2835 the means by which the CEC in-lieu permit results in the provision of clear regulatory assurances to the projects within its purview.

B. Section 2820(f) allows the department significant discretion in providing regulatory assurances to plan participants (which may be persons, public entities, etc.) As indicated in the Planning Agreement (Section 3.2), the extent of these assurances depends on “the level of long term conservation” provided, as determined by DFG. (Please note that Section 3.2 does *not* state that the CEC has similar authority.) The Planning Agreement must clearly identify who will receive regulatory assurances and the level of regulatory assurances intended to be provided pursuant to Section 2820(f). If the regulatory assurances are insufficient, projects will not be able to proceed.

C. We assume that it is intended that only those projects that adhere to the DRECP’s provisions will receive the benefits of an NCCP. That concept is implicit in any NCCP. However, it may be useful to state that a project approval must be consistent with the NCCP in order to receive its benefits.

**5. The DRECP Planning Agreement should clarify the relationship of the Bureau of Land Management (BLM) to the NCCP.**

The DRECP Planning Agreement states that the BLM will not be an applicant for an NCCP permit. (Draft Planning Agreement at p. 10.) 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”). (*Id.*) On November 20, 2009, the BLM issued a Notice of Intent to prepare an environmental impact statement for the proposed DRECP and possible land use plan amendment (74 Fed. Reg. 60291-92) which indicates that the BLM will adopt the DRECP and its conservation strategy on BLM lands. The planning agreement should be updated to reflect the BLM’s role, given that the vast majority of land within the DRECP planning area is owned and managed by the BLM and the high likelihood that a significant part of the DRECP conservation strategy will occur on public land, BLM should. We believe that it will be necessary for BLM to amend its land management plans and to conform to the DRECP, and the planning agreement should indicate how the DRECP will be binding on BLM’s decision. This commitment is necessary in order for DFG to permit the DRECP as an NCCP.

**6. The desert counties and military should be brought into the DRECP planning process as full plan participants as soon as possible.**

In addition to the REAT, the relevant desert counties and the Department of Defense should be included as plan participants as soon as possible. We are concerned that the DRECP, as currently envisioned by the state and federal agencies, does not include the desert counties or the military as plan participants from the beginning of the DRECP. Instead, the planning agreement is silent on the issue of the military as a participant and provides for an “on-ramp” provision for the counties to adopt the DRECP and/or incorporate other counties plans’ into the DRECP. Draft Planning Agreement at p. 11. The desert counties are critical to the NCCP process as they permit non-CEC renewable energy projects (wind, solar photovoltaic, and solar thermal under 50 MW) on non-federal land and thus fill in a permitting gap currently not filled by the current DRECP plan participants. (Solar thermal projects over 50 MW on non-federal land are covered by the CEC’s participation in the plan.) In addition, the military is

also critical given the amount of land it owns and manages in the desert. Indeed, the counties and the military are essential if the DRECP is going to cover all of the renewable energy projects in the desert as well as 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 as soon as possible. We understand that eliciting county participation or military involvement may be difficult. To the extent that counties or the military are not part of the DRECP, we ask that the planning agreement indicate how it will sufficiently cover the ecosystems involved for purposes of the NCCP Act.

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

The DRECP should, as early in the process as is feasible, create a balanced Steering Committee comprised of the REAT well as other interested parties such as counties, conservation non-profit organizations, and representatives of the renewable energy industry. The DRECP Steering Committee should follow the format used by Steering Committees in other NCCP planning efforts such as the Contra Costa County NCCP.

In addition, the DRECP planning agreement should be revised to include a more comprehensive process for public participation, including making Steering Committee meetings and other technical meetings largely open to the public. We believe an open, transparent process will lead to greater success.

We are concerned that under the current proposed public process structure in the draft planning agreement, 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. In the long run, NCCP veterans have found that only a transparent process can lead to successful adoption of an NCCP.

We strongly urge that the draft planning agreement is expanded to set forth a broad, balanced and collaborative stakeholder process as described above.

**8. The DRECP should integrate, to the maximum extent practicable, Clean Water Act and California Streambed Alteration Agreement requirements into the plan.**

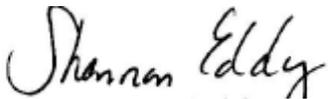
The draft Planning Agreement provides that plan applicants may seek permits under the Clean Water Act and Section 1600 of the Fish and Game Code. While the plan agreement contemplates other permitting needs, there is no indication that there will be any effort to attempt to integrate these permitting requirements in an effort to further streamline the permitting process. We strongly encourage the DRECP participants to integrate these other permit requirements into the DRECP process as impacts to desert water systems are expected. We believe that this integration would improve the “one-stop” shopping aspect of the DRECP. However, we offer this suggestion as a means of improving the “one-stop” shopping aspect of the DRECP, not to delay the DRECP process. If the integration referenced above would complicate and delay the process, we do not recommend it.

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

The DRECP is an ambitious conservation plan that will require tremendous effort. We believe that 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 stakeholders with broad acceptance from all parties. We understand that current agency personnel are already stretched to cover the myriad of resource issues facing California. Therefore, we strongly urge that the California Natural Resources Agency consider hiring someone, with the qualities outlined above, to lead this effort on a full-time basis. The appointment of such a leader does not diminish our call for a transparent process (above), but is part of achieving that transparency.

Thank you once again for the opportunity to comment on the DRECP Planning Agreement. We very much look forward to working with you toward adoption of a robust and effective DRECP that achieves important conservation objectives while facilitating the current as well as future renewable energy projects that California and the Nation need.

Sincerely yours,



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Executive Director  
Large-scale Solar Association



V. John White  
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cc: Michael Picker  
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