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California Desert and Solar Working Group

c/o Resources Legacy Fund
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December 3, 2009

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Re: Desert Renewable Energy Conservation Plan Draft Planning Agreement

Dear REAT:

Please accept and fully consider these comments on behalf of the California Desert and Solar Working Group. We are an informal working group formed earlier this year to examine ways to balance the need for timely development of utility-scale solar energy sources with the need to protect desert ecosystems, landscapes and species. Our group, which is currently focused on desert ecosystems and potential solar energy projects in California, includes representatives of solar energy companies, the electric utility sector, desert conservation groups, and environmental groups, supported by philanthropies.

We strongly support the preparation of 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 -- should 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.

In order to maximize the likelihood of a strong, collaborative DRECP, we believe the following issues should be considered and addressed in the final planning agreement.

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

The DRECP is intended to be a Natural Community Conservation Plan ("NCCP") pursuant to California Fish and Game Code §§ 2800, *et seq.* Since the NCCP Act contains the most comprehensive conservation standards in current law, we strongly support the DRECP as an NCCP. However, the current version of the DRECP Planning Agreement creates a need to clarify three issues.

a. The project approval and permitting relationship between the CEC, the Department of Fish and Game and individual project applicants must be clarified.

The NCCP Act states that the Department of Fish and Game must approve any NCCP (F&G Code §2820(a)). The NCCP Act also 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." Section 2820(f) then allows the department discretion in providing regulatory assurances to plan participants (which apparently may be persons, public entities, etc.) Finally, 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." These sections all raise issues that deserve clarification.

1. The Planning Agreement should state clearly that DFG will approve the NCCP, subject to participation by various agencies and any other person who may be a party to the Plan, but the approval itself must, by statute, be by DFG.

2. There must be an explanation of 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 does not obviously convey authority under the NCCP Act to prepare a planning agreement without local agency cooperation.

3. The Planning Agreement should clearly identify which agencies may be providing what level of regulatory assurances to which entities pursuant to Section 2820(f).

4. Fish and Game Code Section 2835 is not easily read in conjunction 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 question is how will the lack of a permit issued by DFG be read to further the NCCP's application, efficacy, and provision of clear assurances to the projects within its purview.

- b. There needs to be clarification in the planning agreement that the benefits of an NCCP cannot be given to projects inconsistent with the NCCP.***

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 § 25525.) Therefore, the CEC may permit a renewable energy project even if it is inconsistent or undermines the DRECP. We assume that is not your intent, but urge you to amend the draft planning agreement section on "Assurances" to clarify that the CEC will exercise its authorities, including any provision of "assurances" under Fish and Game Code § 2820(f), consistent with the DRECP. In addition, if the CEC and DFG will enter into an "implementing agreement," for the DRECP, the planning agreement should explain the role of that agreement.

- 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. (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. 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.

- 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 to “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 does not reflect the definition of “conservation” contained within the NCCP Act.

Fish and Game Code § 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 those methods and procedures within a plan area that are necessary to recover a covered species or ensure that a covered species will not be listed as endangered or threatened. This standard is not the same as the “contribute to survival and recovery of Covered Species” standard set forth in the draft planning agreement. Therefore, we would urge the DRECP planning agreement to refine the conservation goal in the draft planning agreement to reflect the definition of conservation found in the NCCP Act.

3. 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: 1) how it will sufficiently cover the ecosystems involved for purposes of the NCCP Act, 2) the role of the DRECP in relation to existing NCCPs and HCPs, and 3) the process by which counties, with or without an existing NCCP or HCP, or the military may become participants in the DRECP during or after its development.

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 REAT, as 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.

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

Fish and Game Code § 2810(b)(8) provides:

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, threatened, or endangered species.

The draft planning agreement, as currently written, contains an interim project processing section (Section 8.9 of the draft planning agreement) that does not reflect all of the provisions of subdivision (b) (8). Since the Act's requirements will apply to the Planning Agreement and the regulated community, more specificity rather than less will ensure an open and transparent consideration of the agencies' intentions in this regard. To that end, we request that the planning agreement include increased specificity about the inclusion of the independent science recommendations into the interim review process and clearly articulate that "take" of covered species by projects permitted in the interim period--before the final approval of the DRECP--will be analyzed and included in the final DRECP.

We do not intend to suggest that the draft planning agreement should be revised to create an interim review process that creates unnecessary delays for renewable energy projects. We believe that, properly implemented, the existing process for permitting projects pursuant to section 2081 of CESA or by Certifications by the CEC would be the appropriate process for also addressing the NCCP Act's requirements for interim project review. However, we do believe that it is important for the planning agreement to outline an interim review process that includes more detail about how the interim review process will meet the requirements of Section 2810(b)(8). For example, while the interim review process should be informed by the analyses and information prepared for the DRECP, it should appropriately reflect the level of analysis and information that will be prepared for the DRECP over time. Early in the development of the DRECP, when the analyses and information prepared for the DRECP are likely to be relatively general and incomplete, they may not provide meaningful guidance as to how an interim project may be inconsistent with preliminary conservation objectives of the DRECP. Attempting to use general or incomplete analyses and information is more likely to cause uncertainty and confusion in the permitting of interim projects. Later in the development of the DRECP, when more complete analyses and information are available and the DRECP conservation strategy takes shape, this information should be used by DFG to recommend mitigation measures and alternatives for interim projects that would help to achieve the DRECP conservation objectives.

The industry members of our group are concerned that process and requirements will change for permit applications as the DRECP process moves forward because consistency review standards will be more specific as further information becomes available and must be considered. Industry members are concerned that such changes in the permit process standards could cause delay and

could result in litigation risk if projects were then permitted that are not consistent with the standards set forth in Section 2810(b)(8). Greater certainty is desired, especially for those projects that have pending applications.

The environmental members of our group are concerned that precedent could be established in the permitting of interim projects that undermines the purposes of the NCCP Act and the important conservation objectives that can be achieved.

One interim step upon which we all agree is that the independent Scientific Panel should have an opportunity to review and provide recommendations related to the conservation strategy and the draft maps scheduled for issuance this year, *before the State publicly releases these maps*. While requiring scientific review of the maps prior to their public release will likely delay the release of the maps, we believe that it is a critical step in building the foundation for a science-based and legally-enforceable DRECP.

We would like to work with you on these issues to firm up the criteria and timelines for the DRECP interim review process in relation to the section 2081 permitting requirements and process.

We believe that this kind of detail is essential to ensure that projects seeking ARRA funding will receive an expeditious review of their permit applications and that the interim project review process will not undermine the effort to develop a long-term conservation strategy in the DRECP. To the extent that interim processes can be created that fulfill the requirements of Section 2810(b)(8) in an expeditious manner, we all benefit.

6. 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.

7. 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.

Sincerely,



Ilene Anderson
Center for Biological Diversity



Rainer Aringhoff
Solar Millennium



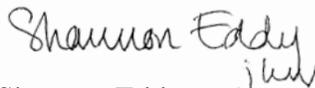
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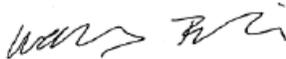
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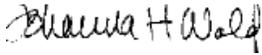
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