

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the matter of:

Implementing the Renewable Energy
Executive Order S-14-08

Docket No. 09-Renew EO-01

**COMMENTS OF THE LARGE-SCALE SOLAR ASSOCIATION (“LSA”) AND THE
SOLAR ENERGY INDUSTRY ASSOCIATION (“SEIA”) ON THE RENEWABLE
ENERGY EXECUTIVE ORDER S-14-08 DRAFT BEST MANAGEMENT PRACTICES
 (“BMP”): DESERT RENEWABLE ENERGY PROJECTS**

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**COMMENTS OF THE JOINT PARTIES
RE: THE DRAFT BMP FOR DESERT RENEWABLE ENERGY PROJECTS**

I. INTRODUCTION AND SUMMARY

The Large-Scale Solar Association¹ (“LSA”) and the Solar Energy Industry Association² (“SEIA”) (collectively “Joint Parties”) offer these comments in response to the Draft Best Management Practices and Guidance Manual for Desert Renewable Energy Projects (hereinafter “BMP Recommendations”). Executive Order S-14-08 directs the State’s agencies to plan for and implement a 33% renewable portfolio standard (“RPS”) by 2020 and to develop BMP Recommendations. The Joint Parties appreciate the opportunity to have participated in the October 13th workshop on the RPS Executive Order, S-14-08 and are looking forward to participating in developing the Desert Renewable Energy Conservation Plan (“DRECP”).

The Joint Parties support the work called for by S-14-08. Advancing the State’s goal of increasing renewable energy and decreasing greenhouse gas (“GHG”) emissions is not inconsistent with protecting the State’s environmental resources. Environmental stewardship and GHG reduction goals can and should be aligned through policies that recognize an appropriate balance between the two. Both may be achieved through careful and integrated planning that takes into account both the complementary goals of protecting the State’s natural

¹ LSA represents eleven of the nation’s largest developers and providers of utility-scale solar generating resources. Collectively, LSA’s members have contracted to provide over 6 gigawatts (“GW”) of clean, sustainable solar power under contract to California’s load-serving entities (“LSEs”). Its members develop, own and operate various types of utility-scale solar technologies, including photovoltaic and solar thermal system designs. LSA, and its individual member companies, are leaders in the renewable energy industry, advancing solar generation technologies and advocating competitive market structures that facilitate significant integration of renewable energy throughout the western United States. LSA represents the interests of utility-scale solar development in California, Arizona, and Nevada, and also works to shape regional and federal policies that affect solar development.

² Established in 1974, the Solar Energy Industries Association is the national trade association of the solar energy industry. As the national voice of the industry, SEIA works to make solar a mainstream and significant energy source by expanding markets, removing market barriers, strengthening the industry and educating the public on the benefits of solar energy.

resources and promoting the development of environmentally compatible renewable generating facilities. To further these objectives, collaboration among the various stakeholders will be necessary.

As discussed in further detail below, the S-14-08 process should be more transparent than is contemplated by the BMP Recommendations. The conservation and renewable development communities must be more closely involved in development of the draft study areas for the DRECP. The draft BMP Recommendations are helpful in informing developers of work that should be done prior to filing applications, but certain aspects of the document require further vetting. For example, the direction to obtain a power purchase agreement (“PPA”) and a system impact study prior to filing an Application for Certification (“AFC”) is commercially unrealistic. In addition, the BMP Recommendations should not be adopted by the Renewable Energy Action Team (“REAT”) agencies and should remain an informational, guidance document. The DRECP and the BMP Recommendations should also be further clarified to not apply to projects that are currently in the permitting pipeline. These and other more specific comments on the BMP Recommendations are detailed below.

II. THE DRECP PROCESS SHOULD BE MORE TRANSPARENT

The MOU interpreting S-14-08 states that the REAT will use the Natural Community Conservation Plan (“NCCP”) process to implement the DRECP. The underlying premise of the NCCP statutory scheme is that the NCCP planning tool would be a voluntary, collaborative, and transparent process. Specifically, California Fish and Game Code § 2801(d) provides that “[n]atural community conservation planning promotes coordination and cooperation among public agencies, landowners and development proponents. . . .”

Similarly, Section 2801(j) emphasizes an open and “cooperative” approach to the NCCP process:

Natural community conservation planning is a cooperative process that often involves local, state, and federal agencies and the public, including landowners within the plan area. The process should encourage the active participation and support of landowners and others in the conservation and stewardship of natural resources in the plan area during plan development using appropriate measures, including incentives.

In furtherance of the goals of the NCCP process, the REAT should encourage a collaborative and transparent process. In this way, REAT will gain the perspective of developers, conservationists and all parties who are integral to fulfilling the two fundamental purposes of S-14-08: streamlined renewable development and comprehensive species protection.

The Joint Parties support the DRECP process, but are also concerned that the process is not sufficiently transparent. At the October 13 workshop, parties expressed concern about the selection of draft study areas for the DRECP. REAT’s intention to release draft study areas for public review in January 2010 provides little assurance that stakeholders will have a meaningful opportunity to review and comment on the study areas.

At the most fundamental level, the transparent process must identify and allow for comment on: 1) where the study areas are located; 2) the criteria for selecting the study areas; and 3) the process for final selection and appeal of study areas.

It appears that the process currently contemplated by the REAT for releasing the initial Conservation Strategy will effectively preordain the study areas without allowing full public comment on the criteria for selecting those areas for consideration in the first place. Before the list of study areas is narrowed, parties should be given the opportunity to comment on the criteria for selecting and eliminating study areas, and, in particular, should be given access to and the

opportunity to comment on the full range of candidate areas. As it is currently designed, the process will predetermine the outcome of the study areas before parties have an opportunity to provide any meaningful comment. To remedy this concern, the Joint Parties recommend that in December, REAT release an aggregate list of all study areas under review, instead of a more refined list of study areas that may have already been screened. Parties would then comment on the aggregate list and how to refine the selection of those study areas. REAT would then release a more refined list of study areas in January for further public review.

The formation of a small stakeholder working group, as discussed at the workshop, may also be cause for concern. Forming a small stakeholder working group to address specific aspects of the DRECP may help alleviate concerns about transparency. However, in order for the group to be effective, REAT should identify and allow comment on: (1) the criteria for selecting working group members; (2) the qualifications each member must possess; and (3) the scope of the working group's assignment.

III. JOINT PARTIES' COMMENTS REGARDING THE DRAFT BMP

A. REAT Should Identify How Siting For Projects With Currently Pending Applications Can Be Expedited And Expressly Limit The BMPs To Future Projects That Are Not Currently Under Review.

The process for permitting some renewable energy projects has proven to be complex and time-consuming. At the same time, S-14-08 requires the State agencies to expend considerable time, energy, and resources to prepare the DRECP. In pursuing the DRECP, Renewable Energy Transmission Initiative ("RETI"), and other programs intended to remove impediments to the State's renewable energy goals over the long term, it is critical that the State and local agencies

continue to focus staffing and resources on projects that are in the permitting pipeline today consistent with the Energy Commission's one year siting process.³

To take advantage of certain federal incentives, renewable energy projects must be more than "shovel ready" in 2010. For projects to qualify for the cash grant in lieu of the investment tax credit ("Cash Grant") under the American Recovery and Reinvestment Act ("ARRA"), those projects must actually commence construction in 2010. To commence construction, projects typically must have secured third party financing. A developer must put its financing arrangements into place well in advance of the permitting decision, but will only be able to finalize those financing arrangements once the permitting agency or agencies issues the final permitting decision. Ordering equipment and mobilizing to commence construction are, in turn, dependent on financing. Without exception, lenders require that all material project permits be final, and almost invariably require that those permits be non-appealable.

According to guidance provided by the Department of the Treasury, for purposes of the Cash Grant, "commence construction" means that a developer must have engaged in physical work of a significant nature at the project site; that is, for instance, beginning work on the excavation for the foundation. Preliminary work, such as clearing a site or test drilling to determine soil condition, by contrast, does not constitute the beginning of construction. If the work is being done on behalf of the developer by a contractor, physical work of a significant nature must have commenced under the construction contract. The Department of the Treasury's guidance offers a "safe harbor" for having commenced construction, of having expended more than 5% of the cost of the facility.

Commencement of construction, as defined above, must have occurred on or before December 31, 2010. While a developer may commence some work before a final permitting decision, commencement of construction (as defined) cannot begin without a final permit.

³ Public Res. Code § 25522; See also Energy Commission Guidance on 12 month siting process: http://www.energy.ca.gov/sitingcases/6-MONTH_12-MONTH_SPPE_PROCESS.PDF

Further, renewable energy equipment is highly specialized, and given the unique fabrication needs for these components, orders are often delayed. For many renewable energy projects, equipment can only be delivered and other physical activities commenced during certain periods of time in order to comply with environmental restrictions. For example, species relocation is a prerequisite for many sites, and may be limited to certain spring and fall temperature conditions.

There may also be significant constraints on the initiation of construction related to the implementation of mitigation requirements. For example, for those projects that require desert tortoise mitigation, relocation must occur before commencement of construction and is limited to Spring and Fall. Thus, as a practical matter, a decision in the Fall of 2010 too late for desert tortoise relocation - will mean that a project cannot “commence construction” by the end of 2010, thus disqualifying the project for a Cash Grant under ARRA.

In short, there is a significant amount of work that must take place in the time frame after the CEC issues a final decision and before the December 31, 2010, construction deadline. Failure to meet this deadline will create significant impediments for future renewable development in California and hinder California’s ability to achieve its renewable and GHG reduction goals.⁴ The Joint Parties are concerned that application of the BMPs to current projects may require additional analysis on issues that have already been resolved in a Staff Assessment. REAT should clarify what is meant by “future projects” in the discussion of the applicability of the BMP Recommendations. Future projects should exclude projects that have been deemed data adequate before the BMP recommendations are finalized.

While the purpose of the BMP Recommendations is to provide guidance for future development activities, REAT should explicitly recognize in the BMP Recommendations that it

⁴ A US DOE Loan Guarantee is a major federal action triggering NEPA. To prevent delays in project permitting, the agencies should coordinate with US DOE on CEQA-NEPA compliance to ensure these projects qualify for ARRA related funding.

will work to expedite projects with currently pending applications. On Page iii, the following language should be added at the end of the abstract: “The purpose of this BMP is to provide guidance for future renewable energy project applications. The REAT agencies will also work to expedite pending renewable energy project applications consistent with Public Resources Code § 25522 and the Energy Commission’s guidance prescribing a one year siting process.” REAT should also add this sentence to the end of the first paragraph on Page 1, and at the end of the third paragraph on Page 4.

The BMP Recommendations should also include requirements and deadlines for the permitting agencies. It would be useful for the BMPs to recognize areas in which the agencies will trim down processing time on very specific items within their process. The milestones are useful in this regard, but do not provide the needed level of specificity.

B. The BMP Recommendations Should Be Expressly Identified As A Guidance Document.

One stated purpose of the BMP Recommendations is to provide guidance to developers in how they may be able assist in expediting review of renewable energy projects. The Abstract, Executive Summary and other sections of the BMP Recommendations state that the BMP Recommendations do not change existing laws or regulations, but rather merely contain “suggestions” for developers.⁵ While in some places, the BMP Recommendations are properly characterized as non-mandatory guidance, other portions of the BMP Recommendations can be interpreted as imposing firm requirements on developers. For example, on Page 2, the BMP Recommendations state:

⁵ See Page 1 of the Draft BMP.

Ideally, for projects to be permitted in a time efficient manner consistent with the Executive and Secretarial Orders and the RPS, renewable energy developers should complete the following critical activities before they file applications with BLM, the Energy Commission and other lead agencies.

The purpose of this statement appears to be that developers should complete as many of the eleven siting milestones as possible in order for siting to be expedited. However, the statement could also be interpreted that expedited approval will be conditioned on fulfillment of the eleven points of guidance. If projects do not complete these activities, would they become lesser priorities of REAT? Such prioritization must be avoided, and to resolve this discrepancy, REAT should include the following sentence at the end of the sentence cited above: “Regardless of whether a renewable energy developer is able to complete some or any of the following pre-filing suggestions, the Energy Commission and lead agencies will still site all projects within their jurisdictions as expeditiously as possible within the one year siting process prescribed by Public Resources Code § 25522 and Energy Commission guidance.”

C. The State And Federal Agencies Should Accept The BMP Recommendations As An Informational Only Item, And Not Approve, Endorse Or Otherwise Ratify The BMP Recommendations.

The Joint Parties understand and appreciate that the staffs of the CEC and CDFG were required by the Governor’s Executive Order S-14-08 and more recent MOU to develop the pre-application guidance and the BMP Recommendations. While this undertaking is clearly required by the Executive Order, the BMP Recommendations properly acknowledges that:

The recommendations contained in the manual do not duplicate or supersede NEPA, CEQA, Warren-Alquist Energy Act and regulations, Federal Endangered Species Act, California Endangered Species Act statutes or other legal requirements. This document does not alter lead agencies’ obligations under NEPA, CEQA, or the Warren-Alquist Energy Act, nor does it mandate or

limit the types of studies, mitigation, or alternatives that an agency may require.

In order to avoid any misunderstanding as to the effect of the BMPs, the agencies should expressly recognize that the BMP Recommendations do not have the force of statute, agency regulations or agency decisions. The Joint Parties recommend that agencies receive the final Staff recommendations as an “informational” item at a publicly noticed meeting, but do not approve, endorse, or otherwise ratify the final draft. Further, the suggestion that DFG might analyze conformance with the BMPs to determine good faith of applicants is inappropriate. Rigid adherence to initial informal guidelines that are fully voluntary, have not been subject to specific and reasonably extensive public discussion, review and comment, and contain impracticable elements that are not specifically tailored to this purpose cannot reasonably be considered evidence of good faith compliance with any requirements.

D. Stakeholders Cannot Meaningfully Comment On The Guidance For Limiting Applications To Draft DRECP Study Areas Until The Study Areas Are Made Public.

On pages 2 and 8, the BMP Recommendations state that development should be limited to study areas proposed by the REAT team. Stakeholders cannot meaningfully comment on this requirement until the draft study areas are released to the public. As a general matter, California’s and the nation’s climate change and clean energy needs demand that renewable energy development not be precluded in any area that is environmentally suitable. Consistent with the comments above regarding the transparency of the S-14-08 process, the Joint Parties strongly recommend deleting this point of guidance until the draft study areas are subject to public comment.

E. The BMP Recommendations Should Clearly Distinguish Between Requirements Of Law And Policy Preferences.

Some of the BMP Recommendations are clearly requirements of law. For example, all developers have the obligation to ensure that their projects comply with CEQA, NEPA, ESA, and CESA, as applicable. These legal mandates are requirements of law, not policy. In marked contrast, some of the BMP Recommendations are simply policy preference. They are not required by statute or regulation, and this important differentiating factor must be made explicit.

The BMP Recommendations should be revised to clearly identify (1) the recommendations that are legal requirements and (2) recommendations that are based on policy preferences. The remainder of this section discusses some of the “recommendations” that should be clearly identified as policy preferences.

F. Requiring Execution Of A Power Purchase Agreement Prior To Filing An Application Is Unreasonable.

On pages 2 and 8, the BMP Recommendations state that renewable energy developers should execute a PPA for a project prior to filing an application for the project. As numerous parties commented at the October 13th workshop, this point of guidance will create a “catch 22” for renewable energy developers. While REAT and other regulatory agencies call for developers to execute PPAs to demonstrate project viability, utilities typically call for permits or other evidence of progress through the siting process to also demonstrate viability.

The blanket requirement for a PPA is inappropriate in the BMP. A PPA, or lack thereof, is simply not a relevant factor in consideration of a project’s environmental impact. In simplest terms, a PPA is completely unrelated to “timely processing of Desert Renewable energy project permits within the existing regulatory framework.” Moreover, even assuming that project “viability”

were a relevant consideration, the existence of a PPA is not, in and of itself, a bellwether of viability. While most projects will be financed and constructed on the basis of a long term PPA, execution of a PPA is not required in any absolute sense in order for a project to commence construction or for the project to be “viable.” A project can be developed as a “merchant” without a long term PPA in place. Furthermore, requiring a PPA as a condition precedent to even filing an application will necessarily increase the overall development period for every project. Typically permitting and negotiations for a long term PPA occur in parallel, not sequentially. Accordingly, the Joint Parties recommend refining the BMP Recommendations to delete any references to PPAs.

G. Completion Of A Transmission System Interconnection Study Or Any Other Action Outside The Control Of A Project Developer, Should Not Be Required Prior To Filing An Application.

On pages 2, 8, and 16, the BMP Recommendations direct renewable energy developers to submit a system impact study and approval by the California Independent System Operator Corporation (“CAISO”) prior to filing an application for the renewable energy project. The interconnection process is often one of the most time consuming elements in project development. The CAISO’s Large Generator Interconnection Procedures (“LGIP”) requires a minimum of 330 to 510 days to obtain a Large Generator Interconnection Agreement (“LGIA”). Actual timeframes for obtaining an LGIA are unpredictable and can exceed these minimum timeframes. The processing of interconnection requests is largely beyond the control of project developers.

The Joint Parties agree that filing an interconnection request before the application for a project is prudent project development practice. However, conditioning timely processing of an

application based on whether an interconnection request has been finalized is commercially unreasonable. REAT should revise the points of guidance #9 on pages 2 and 8 and the “Electricity Transmission” paragraph on page 16 to direct developers to file an interconnection request, but not require that developers obtain a completed system impact study and final approval from the CAISO.

Point of Guidance #9 on page 8 also states that “[t]he project site does not negatively impact ongoing transmission corridor planning.” It is unclear what is intended by this statement. This point of guidance poses a vague and potentially unreasonable standard. The Joint Parties recommend this sentence be deleted.

H. Biological Survey Protocols Should Be Uniform To Provide Greater Regulatory Certainty And Transparency.

At the October 13 Workshop, the REAT agencies suggested that responsible agencies would apply survey protocols on a case-by-case basis. The Joint Parties believe that a single, agreed to set of survey protocols, species by species, would create greater transparency so developers know exactly the number, nature, timing and scope of survey requirements. A case-by-case review would create regulatory uncertainty and may further delay the renewable energy siting process.

REAT also suggested at the October 13 Workshop that developers may stipulate that a species is present without analysis and go straight to a mitigation agreement if the developer is within the range of that species. The Joint Parties believe that this point of guidance will help streamline the process. The Joint Parties also recommend that the BMP Recommendations be clarified to include this proposal in the “Biological Resources” opening paragraph on page 30.

In addition, the decision of whether to proceed with a mitigation strategy absent analysis should rest with the project developer.

I. Guidance To Use Air Cooled Or Recycled Water Should Be Clarified As A Policy Preference, Not A Legal Requirement.

On page 23, the BMP Recommendations state that certain renewable facilities should be designed to use recycled water or utilize air-cooling. The Joint Parties recommend that this guidance be clarified as Energy Commission policy, and not an applicable law, ordinance, regulation, or standard (“LORS”). Specifically, REAT should state at the beginning of the point of guidance #1 on page 23, that “Consistent with Energy Commission policy, design biomass-fueled, solar and geothermal power plants to use air-cooled technology or recycled/impaired water for cooling.” In addition, the last sentence, which states that projects that use fresh ground water or surface water “would likely delay the permitting process,” should be rewritten so that a delay is not *pre-determined* by REAT. This sentence should read “may delay the permitting process.”

J. Williamson Act Contract Cancellation Should Not Necessarily Delay Permitting Timeframes.

Point of guidance #7 on page 2, #7 on page 8, #4 on page 17, and #5 on page 17 all state a preference for developers to not propose projects on lands covered by a Williamson Act contract. This policy preference should be deleted.

Many renewable energy projects can be developed consistently with the Williamson Act, and often, no amendment or cancellation of a Williamson Act contract is required. In many cases, lands covered by a Williamson Act contract may be the best lands for development and

will pose the least environmental impacts. If cancellation is desirable, contract cancellation is not necessarily a long or complex process as is suggested on page 17. Admittedly, there are financial ramifications for contract cancellation, but those fiscal issues are not, in and of themselves, environmental effects. The Joint Parties recommend deleting the policy preference for avoiding development on land covered by a Williamson Act contract.

IV. CONCLUSION

The Joint Parties appreciate the opportunity to comment on the Draft BMP Recommendations as well as the hard work of the Administration and the state and federal agencies in proactively addressing the complex issues associated with achieving a 33% RPS goal by 2020. The Joint Parties also look forward to participating in future stakeholder processes, including the review and refinement of draft study areas for the DRECP.

By: _____/s/_____

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