

COMMENTS OF THE LARGE-SCALE SOLAR ASSOCIATION (“LSA”)

ON THE RENEWABLE ENERGY EXECUTIVE ORDER S-14-08

MARCH 12th and 17th SCOPING WORKSHOPS

Docket Number: 09-Renew EO-01

Jeffery D. Harris
Brian S. Biering

Ellison, Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816-5905
Tel: (916) 447-2166
Fax: (916) 447-3512
Email: jdh@eslawfirm.com
Email: bsb@eslawfirm.com

March 31, 2009

Attorneys for LSA

**COMMENTS OF THE LARGE-SCALE SOLAR ASSOCIATION
RE: THE RPS EXECUTIVE ORDER S-14-08 SCOPING WORKSHOPS**

I. Introduction and Summary

The Large-Scale Solar Association (“LSA”) offers these comments in response to the March 12 and 17, 2009 public scoping meetings to discuss implementing Executive Order S-14-08, which, among other things, directs the State’s agencies to plan for and implement a 33% renewable portfolio standard (“RPS”) by 2020. LSA appreciates the opportunity to have participated in the Scoping Workshops and this opportunity to provide comments on the implementation of Executive Order S-14-08.

LSA represents ten of the nation’s largest developers and providers of utility-scale solar generating resources. Collectively, LSA’s members have contracted to provide over 5 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 actively 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.

As clearly demonstrated at the workshops, California can advance its renewable energy goals and Greenhouse Gas (“GHG”) reduction goals of AB 32, while simultaneously 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 resources and promoting the development of environmentally compatible renewable generating facilities.

However, delay is not an option. Deliberation over long-term policies to implement these goals should not be permitted to supplant or impede the progress that the Stakeholders have already made towards achieving these objectives. Meeting the State's ambitious goals will require not only developing a durable policy framework that provides the certainty needed to develop and finance large-scale solar generating facilities, but also a renewed commitment in the near term to expediting the completion of projects already in the permitting pipeline. LSA is pleased to offer the following comments.

II. Discussion

A. Projects That Are Currently In Permitting Must Be Allowed To Advance While The DRECP And Other Longer-Term Plans Are Pursued.

The process for permitting projects has proven to be complex and time-consuming. At the same time, S-14-08 requires the State's agencies to expend considerable time, energy, and resources to prepare the Desert Renewable Energy Conservation Plan ("DRECP"). In pursuing the DRECP, Renewable Energy Transmission Initiative ("RETI"), and alike, it is important that the agencies continue to advance projects that are in the permitting pipeline.

Long-term planning efforts must move forward, and LSA is committed to helping advance these important initiatives. At the same time, it remains important that agencies continue to process the permit applications that are in the permitting queue while the comprehensive planning efforts are completed. As discussed in Section II.F. below, existing law

provides at least one means of advancing projects in the permitting queue while long-term planning proceeds.

B. Expediting The Publication Of The First Draft Environmental Documents In Each Case Will Streamline The Renewable Siting Process.

State and Federal agencies must publish the first environmental document in a timely manner for projects currently in the permitting pipeline to have a reasonable chance of coming online.

For NEPA compliance, the first environmental document is the draft environmental impact statement (“DEIS”). For CEC-jurisdictional projects, the first environmental document is the Preliminary Staff Assessment (“PSA”). For projects that are not CEC-jurisdictional and do not trigger NEPA, a draft environmental impact report (“DEIR”) is the first environmental document.

The DEIS and the PSA are critical documents for advancing renewable resource siting. Moreover, publication of these first environmental documents allows the public to formally join the permitting process through review and comment.

To date, the agencies have struggled to publish the first environmental document for renewable energy projects in a timely manner. In order for an AFC decision to be issued within 12 months of the time an Application has been found to be “Data Adequate,” the Commission’s model AFC timeline indicates that the PSA should be issued by Day 150 (i.e., 150 days after the finding of Data Adequacy). There are currently four large scale solar applications pending before the CEC. As illustrated in Table 1, publication of the CEC’s first environmental document has lagged.

CEC Jurisdictional Projects	Status of First Environmental Document
Solar Thermal Project 1	338 Days to Publish the PSA
Solar Thermal Project 2	405 Days to Publish the PSA
Solar Thermal Project 3	329 Days and Counting (No PSA to date)
Solar Thermal Project 4	173 Days and Counting (No PSA to date)

Given that the CEC’s statutorily mandated 12-month process contemplates publication of the PSA on or about Day 150, the solar thermal projects in the permitting queue are clearly lagging. The State needs to do better.

The PSA and the DEIS are merely the first step in the environmental review process. It is well established that a draft EIR does not need to be an exhaustive treatise on every subject,¹ does not need to be encyclopedic² and does not require perfection.³ An adequate draft EIR is one that "reasonably sets forth sufficient information to foster informed public participation and to enable the decision maker to consider the environmental factors necessary to make a reasoned decision." Regardless of whether an agency is preparing an EIR, PSA, or DEIS, the document is a draft and should be treated as such.

For projects in the permitting queue to advance in a timely manner, it is important to take the first important step that triggers public review and comment – publication of the first environmental document. While work continues to advance on the DRECP, the agencies must

¹ See State CEQA Guidelines, Section 15151.

² Id., at 15006(o)

³ Id., at 15151

be mindful of the need to advance projects in the permitting queue by focusing on timely publication of the PSA and DEIS.

C. The Renewable Energy Action Team (“REAT”) Must Protect the State’s Interest in a Strong In-State Solar Industry by Adopting Balanced Mitigation Strategies Comparable to Those Already Used by Other Western States.

Without significant in-state generation, California will not likely meet its GHG reduction and RPS goals. From an economic perspective, California will lose the economic stimulus effect if renewable projects locate outside California.

In other Western States, projects on federal land pay a mitigation fee established by the BLM and other federal land management agencies. The fee is a per acre fee that varies between \$500/acre to \$700/acre, depending on the habitat value of the lands proposed to be used for renewable generation. These mitigation fees are then used for the acquisition and enhancement of habitat to the benefit of the affected species. These permitting processes utilized in other Western States provide regulatory certainty, cost certainty, and avoid potential land speculation compared to states that require land acquisition alone. Furthermore, this approach, when compared to piecemeal acquisition of mitigation lands by individual project developers (the paradigm currently in effect in California), permits more thoughtful approaches to land conservation through strategic acquisition of contiguous lands and the establishment of corridors through the actions of a single planning entity. Thus, a fee based approach not only facilitates the development of renewable generation sites, but also permits a more robust approach to conservation planning.

California has yet to develop a similar mitigation program for California renewable development. Instead, to date, some have suggested that California project developers should

acquire land for mitigation when such land is simply unavailable. Moreover, some have suggested that California projects should have to mitigate impacts at ratios as high as 5:1. For a 4,000 acre project, this would mean that solar developers would have to acquire and endow 20,000 acres as mitigation. It would be an understatement to say that this approach to mitigation has a chilling effect on development. First, this volume of land is simply unavailable. Second, even if the land were available, the cost of acquiring so much land would render most projects uneconomic.

As industry leaders, LSA's member companies are interested in setting the bar high to protect California's environment while pursuing the State's RPS and GHG goals. The issue is quite simply whether California will impose so many additional burdens that projects will not be able to advance within California, leaving California as an importer of renewable energy that must compete for renewable resources with the rest of the WECC states.

D. The REAT Process Should Closely Mirror the Natural Communities Conservation Planning Model's Emphasis on a Voluntary, Collaborative and Transparent Process

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 "Natural 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 and conservationists who are integral to fulfilling the two fundamental purposes of S-14-08: streamlined renewable development and comprehensive species protection.

E. REAT Should Carefully Evaluate The DRECP Schedule In Light Of Statutory Guidance

The presentation at the Scoping Workshops entitled “Renewable Energy in California: Implementing the Governor’s Renewable Energy Executive Order” shows a two year schedule for completing the DRECP. It is not clear whether this is the schedule proposed by the REAT, or whether this schedule is merely illustrative. If it is the proposed schedule, it may not be feasible.

To meet a two-year deadline the proposed schedule arranges certain important steps outside of the typical planning sequence. In the typical NCCP planning process, the first step is to develop and sign a Planning Agreement.⁴ The Planning Agreement defines the role of the parties, defines the goals and objectives of the Plan, and sets forth the initial planning activities. The Planning Agreement leads to the selection of a steering committee, selection of an independent scientific panel and formation of a stakeholder advisory group. Once the scientific panel is formed, it will in turn set standards and guidance for data collection and analysis.

⁴ Ca. Fish and Game Code § 2810.

The schedule presented at the workshop seems to show the selection of the steering committee, independent scientific panel and the stakeholder group to occur before the Planning Agreement is developed and signed. This would be a mistake. The purpose of the Planning Agreement is to define the role of the parties, which would be compromised if the three primary working groups are selected before the Planning Agreement is executed.

The schedule also shows data compilation and analysis underway before the Planning Agreement is executed, before the Independent Science Panel is formed and before the Independent Science Panel has formed its recommendations. While LSA appreciates the need to get to work on the Plan as quickly as possible, REAT is putting the cart before the horse. REAT should not begin to collect and analyze data before criteria and standards have been established.

F. The Gnatcatcher NCCP May Provide a Model for Continuing to Process Applications in The Permitting Queue During the Development of the DRECP

California Fish and Game Code § 2810(c)(8) requires the NCCP planning agreement to provide for an interim strategy to develop resources while the NCCP is being formulated.

Specifically,

The [NCCP] 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 [CEQA] 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 . . . 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 interim process allows permits in the permitting queue to advance during plan development. A good example is the 1993 Coastal Sage Scrub (“CSS”) NCCP, which provided for an “interim strategy.” Under a rule adopted by the U.S. Fish and Wildlife Service for a previously adopted NCCP for the Gnatcatcher, the loss of up to five percent of the existing CSS was allowed in the areas that were developing NCCP plans. This rule allowed development to proceed on approximately 12,000 acres of CSS habitat. REAT should consider promulgating a similar rule for lands within the DRECP planning area to allow projects in the permitting pipeline to advance.

G. Solar Development Opportunities Exist Outside The Lands Covered By the DRECP.

There are many other areas in California outside the Mojave Desert that are suitable for solar development. Because many of these lands are privately owned and there is no federal nexus, solar developers encounter the added burden of a Section 10 Habitat Conservation Plan (“HCP”) under the federal Endangered Species Act. According to the USFWS representative who testified at the Sacramento Workshop, a Section 10 HCP requires 3-5 years.

The HCP time requirement will stifle solar development in many good locations in California. A mechanism is needed to provide a Federal nexus for a Section 7 consultation when there are no federal permits. One possibility would be to designate the Department of Energy to sponsor Section 7 consultations when no other federal agency is available. Solar developers should be allowed to fully mitigate solar projects on private land anywhere in California by paying into a solar mitigation fund for the reasons previously cited.

H. REAT Should Not Spend Significant Staff Time On A Developer Handbook

Creation of a “developer handbook” is not a good use of the agencies’ limited time and resources. Of course, the agencies have tremendous knowledge and insight that should become part of the public process. Rather than spend time working on a “handbook,” it may be more efficient and effective for the agencies to develop a short check list of the recommended site selection criteria and permit application milestones.

III. Conclusion

LSA appreciates 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.

By 

Jeffery D. Harris
Brian S. Biering
Ellison, Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816

March 31, 2009

Attorneys for LSA