



California Wind Energy Association

November 17, 2009

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

Re: Draft Planning Agreement -- Docket No. 09-Renew EO-01

Dear Sir or Madam:

The California Wind Energy Association (CalWEA) is a trade association comprised of over 20 wind energy companies, including wind project developers and operators, manufacturers and related vendors. CalWEA has reviewed the draft Planning Agreement proposed to govern the development and implementation of the *Desert Renewable Energy Conservation Plan* (DRECP), and respectfully submits the comments set forth below.

CalWEA has been following the REAT's activities since it was established in 2008. We have met with CEC and CDFG representatives, respectively, on several occasions to discuss the proposed DRECP, and on March 31, 2009, expressed in writing that we do not see a great advantage to our membership in securing coverage for wind development activities. A copy of those comments is attached. Moreover, we see considerable risk to our membership in that the primary driver for the DRECP is solar development, which has different siting requirements and – more importantly -- impact footprints from wind development. We have learned from prior experience that these differences are not always respected.

The DRECP clearly is intended to cover wind development. But it is entirely unclear how the DRECP can be used to provide incidental take coverage to wind. Neither wind developers, nor the counties with exclusive land use jurisdiction over wind, are applicants under the Planning Agreement. In fact, the sole applicant under the Planning Agreement is the CEC, which has no jurisdiction to offer incidental take coverage to wind. Without either the counties or the wind industry as participants or permittees, neither USFWS nor CDFG can issue incidental take coverage to wind, let alone make the requisite legal findings to support approval of an HCP/NCCP that covers wind. These issues arise also in connection with PV solar projects.

Adding to this uncertainty is that, although BLM will be a signatory to the Planning Agreement, it will *not* seek coverage under Section 10 of the Federal Endangered Species Act (FESA), and will proceed exclusively under Section 7 (which is subject to different legal and regulatory requirements). In fact, the *only* party that will receive federal incidental take authority under the DRECP is the CEC, whose jurisdiction is limited to thermal power plants, not wind or photovoltaic solar. Moreover, because of its permitting authority under the California Fish and Game Code, the CEC is limiting its coverage

under the DRECP to FESA, resulting in a situation in which the DRECP will not be used to provide incidental take coverage *to any party whatsoever* under the California Endangered Species Act (CESA). If this is the case, then why is the DRECP proposed to be developed as an NCCP at all?

Our most urgent concern is Section 8.9 of the Planning Agreement, which purports to require project proponents to consult with the REAT agencies to ensure that their projects “achieve the preliminary conservation objectives” of the DRECP and will not “preclude important conservation planning options or connectivity between areas of high habitat values.” On October 29, 2009, we submitted a letter to the REAT agencies expressing concern about the hasty publication of “go/no-go” maps which, under Section 8.9, would be elevated to the level of *de facto* regulation without any significant public or technical input. We presume the draft “Interim Guidance” and “Best Management Practices” would also be so elevated. Already, in Exhibit A of the Planning Agreement, the geographic boundaries of the DRECP planning area have been drawn inconsistently with the BLM’s California Desert District (CDD), excluding the San Gorgonio Wilderness Area, the western part of Joshua Tree National Park and certain desert portions of Inyo County, while including portions of several national forests and other areas not generally considered to be part of the desert nor containing the types of species, such as desert tortoise, that are the focus of the DRECP. The geographic boundaries of the DRECP planning area should be the BLM’s CDD, especially since the BLM is a party to this planning agreement.

We have a wide variety of other, more substantive questions about the DRECP. For example, the Planning Agreement is unclear as to the relationship between the DRECP and existing HCPs, some of which already provide coverage for wind (e.g., Coachella). How would the DRECP purport to provide a new or different regulatory structure in such areas in light of existing “No Surprises” assurances? How will the DRECP distinguish between wind and solar relative to siting, minimization and mitigation? Although the Planning Agreement indicates that the DRECP may provide coverage under the MBTA and the Bald and Golden Eagle Protection Act (which both now have independent permitting structures), is it possible to secure relief from California’s statutory “Fully Protected” prohibitions for covered activities? If (under Section 8.10.1) the Wildlife Agencies are willing to credit interim conservation efforts towards the requirements of the DRECP, then why would mitigation for specific projects (under Section 8.10.3) *not* be so credited? Does this mean that interim projects that fully mitigated prior to adoption of the DRECP will be required to provide *additional* mitigation thereafter?

Finally, the Planning Agreement states that public input will be limited to review and comments on circulated drafts, public workshops, and similar formal mechanisms. There is no proposal for the establishment of a stakeholders’ committee to provide ongoing input on technical issues related to wind or solar; review of administrative drafts of DRECP documents and supporting studies; or opportunities for active engagement with the REAT agencies. For an HCP/NCCP of this size, we view this as a major shortcoming that will undermine the legitimacy of the DRECP if it is ever adopted.

California Energy Commission
November 17, 2009
Page 3

We are happy to meet with you further to discuss these and other concerns. In the meantime, if you have any questions, please feel free to contact me directly.

Sincerely,

/s/

Nancy Rader
Executive Director