Thank you for your comment, Peter Weiner.

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First Name: Peter
Middle Initial: H
Last Name: Weiner
Organization: Paul, Hastings, Janofsky & Walker LLP
Address: 55 Second Street, Suite 2400
Address 2:
Address 3:
City: San Francisco
State: CA
Zip: 94105
Country: USA
Email: peterweiner@paulhastings.com
Privacy Preference: Don't withhold name or address from public record
Attachment: Solar PEIS scoping comments letter (6-18-08, signed PDF version).pdf

Comment Submitted:

Please find attached comments submitted by Peter H. Weiner, of Paul Hastings LLP, on behalf of the Center for Energy Efficiency and Renewable Technologies ("CEERT") and other members of the solar energy industry. See Attachment.

Paul Hastings
ATTORNEYS

Paul, Hastings, Janofsky & Walker LLP
Twenty-Fourth Floor • 55 Second Street • San Francisco, CA 94105-3441
telephone 415 856 7000 • facsimile 415 856 7100 • www.paulhastings.com

Atlanta
Beijing
Brussels
Chicago
Frankfurt
Hong Kong
London
Los Angeles
Milan
New York
Orange County
Palo Alto
Paris
San Diego
San Francisco
Shanghai
Tokyo
Washington, DC

(415) 856-7010
peterweiner@paulhastings.com

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**VIA OVERNIGHT MAIL &**
**PUBLIC COMMENT FORM (http://solareis.anl.gov/involve/comments/index.cfm)**

U.S. Bureau of Land Management
U.S. Department of Energy
Solar Energy PEIS Scoping
Argonne National Laboratory
9700 S. Cass Avenue – EVS/900
Argonne, IL 60439

**Re: Scoping comments for Solar PEIS**

To whom it may concern:

Please accept for consideration the following comments, which are submitted as part of the scoping process for the Solar Energy Programmatic Environmental Impact Statement ("PEIS") being jointly prepared by the U.S. Bureau of Land Management ("BLM") and the U.S. Department of Energy ("DOE"). These comments are submitted on behalf of the Center for Energy Efficiency and Renewable Technologies ("CEERT") and other members of the solar energy industry.

We applaud BLM and DOE for their leadership in helping to promote the development of solar and other renewable energy sources on federal public lands. We recognize the difficulty inherent in balancing myriad and sometimes competing considerations associated with solar energy development, a task made all the more challenging by your agencies' scarce resources.

The Solar PEIS represents a unique opportunity to comprehensively evaluate the benefits and environmental considerations associated with solar energy development on federal public lands. To make the most of this opportunity, the Solar PEIS must be, above all, a useful document: it must flexibly identify where solar energy development projects and associated transmission corridors can and should be located; it must make site-specific reviews of individual solar energy development projects more efficient; it must set forth a clear and meaningful process for coordinating with state programs and efforts; it must not hamstring near-term investment in solar energy projects; and it must set forth a process for dealing with new developments and changes.

Based on the May 29, 2008 Solar PEIS Notice of Intent, 73 Fed. Reg. 30,908, we are concerned that the Solar PEIS may not satisfy these important criteria. Our comments below are designed to ensure that it does.

## I. Comments

### A. It is inappropriate to freeze all new solar energy development applications during the preparation of the PEIS.

The NOI states that, "[a]s of the date of publication of this Notice, no new solar energy right-of-way applications will be accepted by the BLM until completion of the PEIS." 73 Fed. Reg. at 30910. The NOI conservatively estimates that the PEIS will be complete within 22 months. 73 Fed. Reg. at 30912. This time period does not account for any unexpected delays or judicial challenges to the PEIS or subsequent Record of Decision. In our experience it is reasonable to expect significant delays in the completion date.

Demand for clean energy is increasing, and will continue to increase during the time that BLM prepares the PEIS. Many state and local governments in the western United States have adopted or will adopt renewable energy goals or requirements, and they will look to solar energy to help meet them. Solar energy projects take substantial investment, both in terms of time and money, to plan, develop, and implement; a two-year (or longer) delay will seriously undermine both the certainty and opportunity that solar energy companies need to make their investments profitable. This uncertainty will, in turn, discourage capital investment in solar energy research and development, lead to unnecessary delays in new solar energy projects once the PEIS is complete, and make meeting time-sensitive renewable energy goals and mandates much more difficult.[1] These are precisely the hurdles the PEIS is designed to help overcome.

A bar on new solar energy development is legally unnecessary, economically devastating, and unwise from a policy perspective. Consistency and efficiency in environmental review and siting decisions—the benefits the PEIS promises for DOE, BLM, and applicants—can be achieved during the time the PEIS is being prepared; BLM need only ensure that new solar energy projects are consistent with BLM's existing policy on solar energy development and subject to site-specific review under NEPA in a manner that is consistent with the PEIS's goals and BLM's existing Solar Energy Development Policy (Instruction Memorandum No. 2007-097). As the NOI indicates, the PEIS is not intended to replace site-specific NEPA reviews, but to streamline them. 73 Fed. Reg. at 30,910. BLM still can process site-specific reviews, even if they are somewhat more comprehensive than post-PEIS reviews, during the time that it is preparing the PEIS. The

[1] The solar industry contemplates new filings as capital is available. New filings may also result if BLM's reaction to existing filings indicates a need to shift from one geographic area to another.

requirement to go through a complete NEPA process will deter many investors, but should be available for appropriate projects.

We recognize that BLM district offices are short on resources. We also understand the desire to prevent a land rush that could result in inconsistencies with PEIS determinations or transmission choices. But anyone filing applications during this time will know the risks they face, and deterring investment in solar energy for these theoretical concerns is, from our perspective, a poor policy choice. In addition, these considerations can be completely satisfied by a less-than-complete bar on new applications: for example, a freeze on new applications in Areas of Critical Environmental Concern ("ACECs") and other special management areas (e.g. roadless areas on forest service land, national monuments and parks, wild and scenic rivers, and wildlife refuges) would eliminate the more intensive environmental reviews and avoid adverse impacts to sensitive areas until BLM and DOE develop a programmatic approach to them in the PEIS. New applications for rights-of-way in non-sensitive areas could proceed, thereby mitigating some of the uncertainty and delay caused by the PEIS process and incentivizing applications in these non-sensitive areas.

### B. BLM should process existing right-of-way applications.

Regardless of the nature of any bar on new applications, BLM and DOE should commit to processing existing right-of-way applications in an expeditious manner using reasonable, consistent and transparent criteria. BLM has summarily rejected many of these applications on the vague ground that they propose development in environmentally sensitive areas, and many are tied up in settlement discussions that have made little progress. Rather than penalize applicants who submitted their applications in good faith and who may not, by virtue of a bar like that proposed in the NOI, have the opportunity to prove the merit and appropriateness of their proposals, BLM and DOE should work with existing applicants and the California Department of Fish & Game ("DFG") and the U.S. Fish & Wildlife Service ("FWS") to develop appropriate species and habitat protection plans, and any other necessary mitigation measures, to enable qualifying projects to proceed in an environmentally responsible manner.

### C. The PEIS must allow for appropriately-restricted solar energy development in environmentally sensitive lands.

The NOI for the Solar PEIS stated that the

> PEIS will not include lands within the National Landscape Conservation System, such as National Conservation Areas, National Monuments, Wilderness Areas, Wilderness Study Areas, Wild and Scenic Rivers, and National Historic and Scenic Trails. The PEIS also will not include lands that the BLM has previously identified in its land use plans as environmentally sensitive, such as Areas of Critical Environmental

> Concern or other special management areas, that are inappropriate for or inconsistent with extensive, surface-disturbing uses.

73 Fed. Reg. at 30,910.

First, we understand that the NOI's exclusion of the National Landscape Conservation System is an error, since such exclusion would include all of the California Desert Conservation Area, which covers roughly the entire southern third of California. We are hopeful that this error will be corrected.

Second, there is no basis for categorically excluding from possible solar energy development other environmentally sensitive lands. We are aware that many of these lands, such as Wild and Scenic Rivers and wilderness study areas, generally lack the physical characteristics necessary for large-scale solar development. But other such lands, particularly ACECs and "other special management areas," including lands covered by federal Habitat Conservation Plans ("HCPs") and state Natural Community Conservation Plans ("NCCPs")—lands that comprise substantial portions of the West—often do possess such characteristics.

Moreover, while there may be concerns associated with solar energy development in lands that are environmentally sensitive or that have been set aside for predominantly one use, such development is not necessarily at odds with those concerns. Not only is this concept implicitly reflected in BLM's multiple-use mandate under the Federal Land Policy Management Act ("FLPMA"), BLM repeatedly has allowed environmentally sensitive development to occur in ACECs and other special management areas, most recently in the 2006 West Mojave Plan ("WMP"). With the WMP, BLM created fourteen new ACECs and expanded several others to protect the federally-threatened desert tortoise and state-threatened Mojave ground squirrel. Rather than exclude all development in these areas,[2]

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[2] To the contrary, the Biological Opinion for the WMP states that "[d]evelopment, when wisely planned and properly managed, may occur in areas of critical environmental concern if the basic intent of protection of historic, cultural, scenic, or natural values is ensured." See U.S. Fish & Wildlife Service, Biological Opinion for the WMP, at 10-12 (January 9, 2006) (available at http://www.tortoise-tracks.org/documents/California%20Desert%20Conservation%20Area%20Plan%20Biological%20Opinion.pdf). This position is consistent with BLM policy, CITE, and BLM's other RMPs, see, e.g., Proposed RMP/Final EIS for the Southern Diablo Mountain Range and Central Coast of California at § 4.10.2.1 (available at http://www.blm.gov/ca/pdfs/hollister_pdfs/Proposed_Final_EIS_RMP/03_Table_of_Contents.pdf ("The designation of ACECs does not prevent appropriate land uses that are not detrimental to the unique features or values that receive special protection. Appropriate management plans would be developed to enhance the values for which the land received special designation, to minimize detrimental impacts, and to facilitate

the WMP limits development in some of them and requires that any development be subject to appropriate mitigation measures and best management practices ("BMPs").[3]

The same approach is eminently appropriate for solar energy development. The proponents of solar energy development—a broad array of solar energy companies, environmental groups, and environmentally conscious agencies and individuals—are committed to developing solar energy resources in a sustainable manner, such as through advanced design and placement of solar projects, development of HCPs, NCCPs, and other plans to protect threatened species and their habitats, and mitigation measures. Indeed, the California DFG, among other agencies with relevant jurisdiction, already has indicated its intent to be a cooperating agency in the PEIS process. With expert input from DFG and FWS (which BLM must ensure is closely involved in the PEIS process as a cooperating agency), BLM can use the PEIS to identify the unique concerns that may be raised by solar energy development in special management areas and to develop appropriate restrictions and BMPs to account for those concerns. Of course, these restrictions and BMPs should be tailored to each ACEC and other special management areas; for example, a 1% ground disturbance restriction might be appropriate in an ACEC containing high-quality habitat for a threatened or endangered species, but not in one where no or only low-quality habitat exists.

### D. The PEIS must be meaningfully integrated with state programs and initiatives.

A number of state programs and initiatives are actively working to promote solar energy development by proactively addressing some of the hurdles such development faces.

For example, the California Renewable Energy Transmission Initiative ("RETI") has been created to "help identify the transmission projects needed to accommodate these renewable energy goals, support future energy policy, and facilitate transmission corridor designation and transmission and generation siting and permitting." In particular, RETI seeks to identify Concentrated Renewable Energy Zones ("CREZs") based on proven economic interest, ascertain which of those zones are suitable for development, and

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mitigation. To ensure protection of unique features and values, appropriate protective measures for pre-development, development, and post-development activities would be incorporated into management plans on lands that have the potential to disturb resources.").

[3] Specifically, the WMP limits ground disturbance to 1%, or 13,000 acres, of the total acreage of several Desert Wildlife Management Areas ("DWMAs"), which are a subset of ACECs. See U.S. Fish & Wildlife Service, Biological Opinion for the WMP, supra, at 10-12. Pursuant to the initiatives being pursued by the California Department of Fish and Game, the PEIS should consider the possibility that the WMP may be amended to provide the same level of protection it does now, but with possible greater flexibility for solar development.

expedite permitting and develop detailed transmission plans for projects in appropriate CREZs.

The PEIS, and BLM's and DOE's solar energy programs generally, have much to gain from closely cooperating with RETI and similar programs. Besides the obvious benefits—sharing data, avoiding duplication of work—such coordination and collaboration will ensure that federal and state programs complement each other, and that the PEIS plays a valuable role in directing the future of solar energy development. In addition, RETI has the process advantage of including all pertinent stakeholders from government, environmental groups, and the solar industry.

### E. The PEIS must review possible solar energy and transmission corridor development on federal lands other than those managed by BLM.

The May 29, 2008 NOI appropriately recognized that lands administered by BLM may be suitable for large-scale solar energy development. However, the NOI categorically excluded from review other federal public lands: "Public lands withdrawn or set aside for use by another Federal agency over which the BLM does not have administrative jurisdiction will not be considered by BLM to authorize solar energy development." 73 Fed. Reg. at 30,909-10. The same is true for transmission corridors; BLM recognizes that the PEIS must "consider whether designation by BLM of additional electricity transmission corridors on BLM-administered lands is necessary to facilitate utility-scale solar energy development," 73 Fed. Reg. at 30,909; see also 73 Fed. Reg. at 30,911 ("The need to designate additional electricity transmission corridors on BLM-administered lands to facilitate utility-scale solar energy development will be considered."), but implicitly refuses to extend that review to lands that BLM does not administer, 73 Fed. Reg. at 30,909-10.

This approach squanders a unique opportunity to coordinate with other federal agencies to promote solar energy development on federal lands generally. As BLM is aware, many federal lands that may be suitable for solar energy development are administered by other federal agencies, including the Forest Service and the Department of Defense. Public lands administered by these agencies may be particularly important as certain parts of BLM lands are deemed unsuitable for such development.

Including federal lands beyond those managed by BLM will be especially important for transmission. To be feasible, new large-scale solar energy projects will require new transmission lines, and BLM, DOE, and other involved agencies and entities must have as much flexibility as possible in siting them. This will include flexibility to site transmission corridors on federal lands other than BLM-administered lands.

Ideally the PEIS should evaluate the possibility of siting large-scale solar energy projects and transmission corridors on all federal lands, not just lands managed by BLM. We

recognize, however, that such an effort likely required BLM and DOE to identify those agencies with jurisdiction over significant portions of public lands, such as the U.S. Forest Service and the Department of Defense, as co-lead agencies, and that it may be too late or otherwise prohibitively cumbersome to do that now. In that case, the PEIS should at least set forth a detailed process for coordinating with other agencies to expeditiously review the suitability of lands within their jurisdiction for solar energy development. BLM's January 3, 2008 Statement of Work for the PEIS implicitly recognized the need for, and benefits of, broad cooperation among federal agencies in promoting solar energy development; so should the PEIS itself. Moreover, the May 29, 2008 NOI explains that, beyond the PEIS itself, both BLM and DOE intend to develop and implement solar energy development programs. Such programs should include mechanisms for coordinating with other federal agencies' efforts to assess and promote solar energy development on lands within their jurisdiction.

In particular, BLM and DOE should: (1) identify which federal and states agencies have jurisdiction over public lands that may be suitable and important for solar energy development and transmission; (2) designate those agencies as cooperating agencies for purposes of the Solar PEIS; (3) establish a process whereby the criteria and procedures used in preparing the PEIS can be efficiently used by other agencies in preparing their own NEPA reviews; (4) establish a process whereby other agencies can use the results of the PEIS to inform their decisions to amend their own land use management plans (for example, where the PEIS identifies a necessary transmission corridor, part of which runs across National Forest System lands, BLM and DOE would affirmatively work with the Forest Service under established procedures to efficiently conduct NEPA review and make a decision on the corridor); and (5) encourage (and support efforts by the solar energy industry and other stakeholders to encourage) appropriate agencies to independently evaluate the suitability of lands within their jurisdiction for solar energy development and to develop their own solar energy programs.

### F. The PEIS must set forth clear criteria for processing project-specific NEPA reviews in an efficient manner.

In preparing the PEIS, BLM and DOE aim to determine whether to replace BLM's current Solar Energy Development Policy (Instruction Memorandum No. 2007-097). That Policy, while a laudable first effort to guide the processing of solar energy development on BLM lands, does not establish the detailed "environmental policies and mitigation strategies," 73 Fed. Reg. at 30,909, that are an intended outcome of the PEIS.

We support the agencies' intent to use the PEIS to produce clear, detailed environmental policies, mitigation strategies, and BMPs. To be useful for everyone involved, these policies must be uniformly applied across BLM district offices, allowing, of course, for site-specific differences. The agencies must also use the PEIS to establish uniform procedures for processing right-of-way applications, evaluating their environmental

consequences in NEPA reviews, and implementing development projects. Among other things, these procedures must:

- Separate genuine plans for development from mere speculation, and bar the latter, by imposing strict, detailed, and enforceable requirements on right-of-way applicants, including an earnest money requirement, presentation of and adherence to development schedules, and so on;
- Specify those portions of site-specific NEPA reviews that may be eliminated or truncated through tiering to the PEIS, including clear criteria where an Environmental Assessment rather than a full EIS will be appropriate;
- Establish guidelines for preparing site-specific NEPA reviews and making site-specific decisions in an expeditious manner;
- Establish standard BMPs and mitigation measures;
- Establish clear criteria for preparing supplemental NEPA reviews to account for changing conditions; and
- Establish clear criteria for assessing when two or more development projects are "connected" and thus require consolidated NEPA review.

### G. The PEIS must account for climate change and other developments that may require amendments and further NEPA review, and it must allow for site-specific decisions that do not fit within its framework.

As BLM is aware, the process of preparing and amending Resource Management Plans ("RMPs") and their associated NEPA analyses is designed to be a dynamic one. There is no way BLM, stakeholders, or other members of the public can anticipate every need, goal, mandate, or environmental condition at the time BLM prepares an RMP or EIS. To remedy this problem, FLPMA and BLM's regulations provide a process for amending RMPs to account for these changes.

In the PEIS, BLM should acknowledge the likelihood of change. A clear example is climate change. If, as expected, the American southwest grows warmer over the next few decades, species and habitats may shift, while the availability of water and sunlight may change. Areas that were suitable for solar energy development but had not yet been developed may become unsuitable, while others deemed previously unsuitable may become suitable. To make the most of the PEIS and the land use directives it produces, BLM and DOE must keep track of these changes, prepare new environmental reviews,

amend RMPs, and allow for flexibility in future site-specific decisions. These same steps likely will be required for other changes, including shifting priorities, technology improvements, and increasing demand for clean energy.

Of course, there may be specific (and meritorious) development projects that raise issues that, while novel, do not warrant new NEPA review or land use amendments. The PEIS should acknowledge the likelihood that such cases will arise and explain that they will be reviewed independently.

The May 29, 2008 NOI suggests a contrary approach, under which BLM would use the PEIS to make a decision regarding any and all proposals for solar energy development on BLM lands over the next twenty years. See 73 Fed. Reg. at 30,910 ("BLM will use the PEIS as the analytical basis for any decision it makes to amend an individual land use plan to respond to the potential for increased levels of solar energy development on BLM-administered public lands."). While it certainly makes sense to have proposals within the scope of the PEIS reviewed in light of that document, it is inevitable that some proposals will be meritorious but will not fit within the framework of the PEIS, and thus will require specialized consideration and environmental review. The NOI's blanket rule (that the PEIS apply to all solar energy development) presumably would bar these potential projects. Accordingly, the NOI and the PEIS need to account for the possibility that some proposals may not fit within the PEIS's framework and provide appropriate procedures for assessing them.

### H. The PEIS must include a robust alternatives analysis.

The May 29, 2008 NOI states that the PEIS will include a no action alternative, a "Facilitated Development" alternative, and a "Limited Development" alternative. One of NEPA's primary purposes is to facilitate a reasoned choice among alternatives, and this can be accomplished only where an agency studies a sufficient number of meaningfully different alternatives. We are concerned that three alternatives, as different as they are, may not meet this test. BLM and DOE should consider studying additional alternatives that, for example, include different management prescriptions, different BMPs and mitigation measures, and different levels of development. A more thorough consideration of alternatives will strengthen the PEIS.

For example, while the May 29, 2008 NOI suggests a "Facilitated Development" alternative and a "Limited Development" alternative, the two alternatives would result in different levels of development only by virtue of whether BLM would approve new applications for solar energy development. Other alternatives could seek to influence levels of development by adopting development-oriented or conservation-oriented mitigation measures and BMPs. Still other alternatives could consider the effects of competitive leasing versus a different system of right-of-way allocation (e.g., a first-come, first-serve system).

## I. Additional comments

Comments on two additional issues—the role of the PEIS in evaluating amendments to recent land use plans and the need for a monitoring period to verify the accuracy of suitability data—warrant comment.

The NOI states that the PEIS will be used to amend RMPs where appropriate. The RMPs subject to amendment by the PEIS and its associated Record of Decision must include BLM's 2006 California Desert Conservation Plan (also known as the West Mojave Plan) and any other RMPs whose management prescriptions may impact the development of solar energy on BLM-managed lands. Of course, this is not a request that BLM and DOE use the PEIS to reopen earlier plans, but simply that they evaluate all RMPs in light of the PEIS and amend RMPs where appropriate.

In addition, BLM and DOE should expressly provide for a monitoring period during which, following the submission of a right-of-way application pursuant to the PEIS and any amended RMP, the applicant and BLM can conduct necessary tests to verify the suitability for solar energy development of the area on which development is proposed. This will allow the applicant and BLM to verify the accuracy of the National Renewable Energy Laboratory data upon which the PEIS will have been based.

## II. Issues for which more information is required

In addition to the foregoing comments, we have several questions that we trust BLM and DOE will answer in the PEIS:

(1) What will be the criteria the PEIS will use to analyze the environmental and economic suitability of areas for solar energy development, and to analyze the effects of such development?

(2) What will BLM do with solar energy development applications in the event the Solar PEIS is challenged administratively or judicially, or in the event the PEIS is vacated and remanded to BLM?

(3) What will be the role of the Federal Regulatory Energy Commission ("FERC") in preparing and implementing the PEIS?

(4) What efforts will BLM and DOE make to ensure that the U.S. Fish & Wildlife Service, state environmental agencies, and other agencies are cooperating agencies in name and function under NEPA?

## III. Conclusion

We sincerely appreciate BLM's and DOE's efforts to comprehensively review their existing solar energy policies and to study the suitability of BLM-managed lands for the development of new, large-scale solar energy projects. Your agencies' plan to prepare a PEIS and to make relevant and appropriate amendments to RMPs, holds great promise for the future of solar energy.

For that promise to yield results, the PEIS must be a comprehensive, transparent, and flexible document that makes site-specific NEPA reviews more efficient, generates policies and practices that recognize the value of solar energy development and its ability to occur in an environmentally sustainable manner, and provides a process for collaborating closely with other state and federal agencies and programs. The comments we have provided are aimed at ensuring that the PEIS, and the larger solar energy programs of which it is part, meet these requirements.

Sincerely,

Peter H. Weiner/by MJS

Peter H. Weiner
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: Hon. Dirk Kempthorne
Secretary of the Interior
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Hon. Samuel W. Bodman
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue S.W.
Washington, D.C. 20585

James L. Caswell, Director
Bureau of Land Management
1849 C Street, N.W., MS 5660 MIB
Washington, D.C. 20240
Tel: 202-208-3801
Fax: 202-208-5242
James_Caswell@blm.gov

Lisa Jorgensen, DOE, lisa.jorgensen@go.doe.gov

Linda Resseguie, BLM, Linda_resseguie@blm.gov