

Thank you for your comment, Peter Weiner.

The comment tracking number that has been assigned to your comment is SolarS50613.

Comment Date: July 15, 2008 18:10:32PM
Solar Energy Development PEIS
Comment ID: SolarS50613

First Name: Peter
Middle Initial: H
Last Name: Weiner
Organization: Paul, Hastings, Janfosky & 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: Second solar PEIS scoping comments letter (signed PDF version) (7-15-08).pdf

Comment Submitted:

Please find attached comments submitted by Peter H. Weiner of Paul, Hastings, Janosky & Walker LLP on behalf of the Center for Energy Efficiency and Renewable Technologies (CEERT), the Solar Energy Industries Association (SEIA), and the Large-scale Solar Association (LSA). [See Attachment.](#)

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

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

July 15, 2008

70681.00002

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: Additional 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”), the Solar Energy Industries Association (“SEIA”), and the Large-scale Solar Association (“LSA”). These comments are in addition to those we provided on behalf of CEERT and other members of the solar energy industry via letter dated June 18, 2008, and via the public scoping meetings on June 19 (Sacramento) and June 25, 2008 (Salt Lake City).

At the outset, we wish to emphasize a theme that underlies all of our comments: the solar energy industry is committed to promoting and conducting solar energy development in an environmentally responsible manner (including in a manner that assists the nation in its fight against global climate change). While many of our public lands possess characteristics that make them suitable for the production of clean, renewable energy, many also are rich in sensitive species, fragile ecosystems, and other important environmental features that must be identified and protected. The first challenge is to identify where and how these two things—solar energy development and environmental protection—can most effectively coexist. The second challenge is to do that in an expeditious but careful manner. We look forward to assisting BLM and DOE in this endeavor.

The Energy Policy Act of 2005, Pub. L. 109-058, and other federal and state mandates and policies require substantial increases in renewable energy to meet climate protection, fuel diversity, and other policy objectives. These priorities require that BLM District Offices

BLM/DOE
July 15, 2008
Page 2

possess adequate resources and personnel to ensure the successful development and implementation of the BLM's application review process, as well as the timely completion of the PEIS and of site-specific environmental reviews. We strongly encourage BLM to ensure that BLM District Offices have sufficient staff and other resources to meet these needs. Moreover, since such processing will require substantial input and resources from various federal and state agencies, including the U.S. Fish & Wildlife Service and equivalent state agencies, we recommend that BLM work to establish an interagency task force that will bring the agencies' collective resources and expertise to bear on applications for solar energy development.

I. Reversal of the Moratorium

As an initial matter, we applaud BLM and DOE for deciding to end the moratorium, or "freeze," on new right-of-way applications for solar energy development during the preparation of the PEIS. We appreciate immensely your willingness to listen to and consider our and others' concerns about the moratorium, and to act quickly on the basis of those concerns. We appreciate both your need for staff and your need for the assistance of other agencies in these matters. We are confident that this dialogue is just the beginning of a productive relationship between the solar energy industry and the agencies.

II. Now that BLM and DOE have lifted the moratorium on new right-of-way applications during the preparation of the PEIS, the agencies should set forth reasonable, consistent, and transparent criteria for processing those applications and currently pending applications.

As we stated above, we sincerely appreciate BLM's and DOE's decision to lift the moratorium on new solar energy development right-of-way applications during the time the PEIS is being prepared. As we explained in our earlier comments, a two- to three-year moratorium on new applications would have caused uncertainty, discouraged capital investment in solar energy, and caused delays in meeting state, regional, and federal clean energy goals and mandates. Allowing pollution-free solar energy development to proceed during the preparation of the PEIS will ensure that solar energy can substantially contribute to existing and future climate protection efforts, and that it can become an increasingly attractive and feasible alternative to fossil fuel-based electricity sources.

We also suggested in our earlier comments that "BLM and DOE should commit to processing existing right-of-way applications in an expeditious manner using reasonable, consistent and transparent criteria." June 18, 2008 Comment Letter at 3. Now that the freeze on new applications has been lifted, it will be important for BLM to develop

BLM/DOE
July 15, 2008
Page 3

reasonable, consistent and transparent criteria for processing existing *and* new applications (without, of course, unnecessarily delaying the processing of existing applications).¹

In particular, BLM should develop and publish criteria and procedures that tailor the right-of-way application process to solar energy development. To accomplish this, such procedures should:

- Separate genuine plans for development from mere speculation. Specifically, the procedures should ensure against “speculating, controlling, or hindering development of solar energy on public lands,” BLM Solar Energy Development Policy (Instruction Memorandum No. 2007-097) at 5, and appropriately implement BLM’s right-of-way regulations requiring that grantees be “[t]echnically and financially able to construct, operate, maintain, and terminate the use of the public lands,” 43 C.F.R. § 2801.10(b). The procedures should bar speculation by imposing strict, detailed, and enforceable requirements on right-of-way applicants, including an earnest money requirement, , detailed development proposals (particularly for applications involving large acreages), presentation of and adherence to development schedules, and so on.
- Accept applications on a first-to-apply basis, not through competitive leasing, and base rental costs on fair market value that accounts for rents for other renewable technologies and uses.
- Identify the areas for which BLM will accept new applications (i.e., all BLM lands? Only non-special management areas?). It may be appropriate to indicate especially sensitive areas where development is limited by other resource management plans and, if possible, where development may be questionable in the absence of approved conservation plans.
- Provide a timeline for processing right-of-way applications (we realize this timeline must be flexible to accommodate case-by-case differences, but discrete milestones will provide applicants and BLM staff more useful guidelines). The BLM’s Memorandum of Understanding with the California Energy Commission, for example, provides a very useful joint timeline.

¹ We understand that BLM and DOE may be in the process of preparing guidelines for processing existing and new right-of-way applications. We request that the agencies provide an opportunity for public review of, and comment on, any draft guidelines. We also are aware that, on July 3, 2008, BLM issued guidance for processing solar energy Plans of Development (“PODs”). We believe this guidance is a useful step in establishing solar-specific application procedures. We urge BLM and DOE to consider the additional procedures and points we have made here and in our earlier comments.

BLM/DOE
July 15, 2008
Page 4

- Provide a period, following submittal of a right-of-way application, for the applicant to verify the accuracy and reliability of the mapping and other preliminary data used to prepare the application. Such preliminary data may suggest that an area is suitable for solar energy development while actual slope, solarity, or other conditions do not support such development.
- State with particularity the issues to be included in any environmental review under the National Environmental Policy Act (“NEPA”) and the criteria for evaluating them.
- Clearly explain how applications will be subject to best management practices (“BMPs”), mitigation measures, and any other restrictions developed in the PEIS.
- Allow project-specific NEPA reviews to use data generated in the preparation of the PEIS, as appropriate.
- Provide detailed plans for coordinating with state renewable energy development and transmission initiatives.

III. Further PEIS scoping comments

A. BLM and DOE should closely coordinate with RETI, the WGA, and other state and regional 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 Competitive Renewable Energy Zones (“CREZs”) based on proven economic interest, ascertain which of those zones are suitable for development, and expedite permitting and develop detailed transmission plans for projects in appropriate CREZs.

Similarly, the Western Governors’ Association (“WGA”), through its Western Renewable Energy Zone (“WREZ”) initiative, is actively working to develop “secure, reliable, diverse, affordable and environmentally sound energy,” including 30,000 megawatts (“MW”) of clean energy. As part of this effort, WGA seeks to study and develop new transmission corridors and facilities. Individual states also have adopted Renewable Portfolio Standards (“RPS”) and other policies to promote renewable energy development.

BLM/DOE
July 15, 2008
Page 5

The PEIS, and BLM's and DOE's solar energy programs generally, have much to gain from closely cooperating with RETI, the WGA, state RPS programs, and similar initiatives, and everything to lose from ignoring them. Aside from 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.

B. BLM should closely coordinate with the U.S. Fish and Wildlife Service, the California Department of Fish and Game, and other State wildlife and natural resources agencies to maximize both solar development and the responsible protection of environmentally sensitive lands.

As BLM and DOE noted in the May 29, 2008 Notice of Intent, many BLM lands have been designated “special management areas” because they contain environmentally sensitive resources.

In some cases, solar energy development may not be at odds with the purposes or concerns for which a given special management areas has been established. In such cases, a blanket prohibition on solar energy development does not make sense where various tools and mechanisms can allow development to occur without adversely impacting protected resources. These tools and mechanisms include, for example, federal Habitat Conservation Plans (“HCPs”) and state equivalents (for example, California Natural Communities Conservation Plans (“NCCPs”)); private conservation easements; and partnerships with the U.S. Fish & Wildlife Service and equivalent state agencies. Through these and other mechanisms, BLM and DOE can identify effective mitigation strategies for development in special management areas. These strategies could include, among other things, minimizing new road construction; wildlife and plant stipulations, mitigation, and monitoring requirements; desert plant mitigation banks; stormwater management; the process and requirements for plans of development; and appropriate reclamation and bonding requirements. It is our understanding that some existing Regional Management Plans, including the West Mojave Plan, were developed with no consideration of the possibility for solar energy development. While amendment of such plans may take more time or further analysis, the PEIS, in coordination with appropriate wildlife agencies, can certainly begin the inquiries necessary for such changes.

As we noted in the introduction, since such processing and review of right-of-way applications and PODs will require input from various federal and state agencies, including the U.S. Fish & Wildlife Service and equivalent state agencies, we recommend that BLM work to establish an interagency task force that will bring these agencies' resources and expertise to bear on applications for solar energy development.

BLM/DOE
July 15, 2008
Page 6

It bears repeating that the solar energy industry is interested only in the *responsible* development of public lands. Where development and resource protection are incompatible, protection must prevail. But in cases where development can occur with restrictions that effectively protect sensitive resources, particularly in consultation with other expert agencies, such development should be allowed. Only the coordination and dedicated resources of all agencies with jurisdiction over these matters can eliminate stumbling blocks for better solar energy development and better protection of sensitive species and the natural resources on which they depend.

C. The PEIS should account for changes that may require amendments and further NEPA review, and it should allow for site-specific decisions that do not fit within its framework.

In our June 18, 2008 comment letter, we explained that the PEIS and the decisions to which it gives rise must be part of a dynamic land use management process. There may be changing needs, goals, mandates, or environmental conditions (such as climate change) at the time BLM prepares an RMP or EIS. To remedy this problem, BLM and DOE should be prepared to revise the PEIS and/or amend its land use plans.

In this letter, we wish to elaborate on the possibility for change in solar energy technology. The PEIS is intended to guide solar energy development on BLM lands for twenty years. If the PEIS is to be a useful document over such a long period, it should account for the fact that solar energy technology certainly will change and improve over time. By "account for," we mean that the PEIS should neither implicitly or explicitly prescribe nor preclude the use of any particular technology.

We also mean that the PEIS should explicitly recognize that as technology changes, so, too, may the suitability of certain lands for solar energy development and the environmental issues and consequences associated with such development. During the public scoping meetings, Doug Dale gave a presentation regarding existing and emerging solar energy technologies. We did not interpret this presentation as a view by BLM or DOE that solar energy technology necessarily will be limited to the technologies presented, and indeed this is unlikely. For example, it may be possible in the future to site solar energy facilities on lands that have more significant slopes than currently would be feasible. If that eventuality came to pass, many lands previously unreviewed or excluded by the PEIS might be suitable for consideration for development. Alternatively, solar energy technology may cover less land surface or consume less water, thereby changing the development restrictions needed to protect sensitive resources. BLM and DOE should recognize the potential for these and other significant changes and be willing to amend the PEIS, and any decisions resulting from the PEIS, accordingly.

Finally, regarding our comment in our June 18, 2008 letter regarding the PEIS's need to account for climate change, we wish to add that the PEIS should not just recognize the changes that global climate change may bring to the aspects studied, but also capture both

BLM/DOE
July 15, 2008
Page 7

the benefit that solar development can bring to slowing the pace of climate change and the benefit of furthering state renewable portfolio standards and greenhouse gas requirements.

D. BLM and DOE should establish procedures to ensure ongoing coordination between the agencies and the solar energy industry during the preparation of the PEIS.

The solar energy industry and other stakeholders have valuable information and perspectives regarding the challenges and opportunities facing solar energy development. It is the industry's objective to inform the agencies' preparation of the PEIS to ensure that it is, above all else, a useful document. The best way to do that is to ensure that BLM, DOE, and stakeholders have consistent and productive coordination during the time the PEIS is being prepared and land use plans are being amended. Ideally such coordination would, at a minimum, build on the agencies' extremely helpful website and make use of workshops like those provided during the current scoping process.

The solar energy industry has made great effort to take advantage of the opportunity to comment during the public scoping comment period. We are hopeful that, as preparation of the PEIS gets underway, this is the first step in an ongoing and productive partnership among solar developers, BLM, DOE, and other stakeholders.

E. Other comments

Other issues are important and should be addressed as the final scope of the PEIS is developed.

1. The PEIS should allow for meaningful tiering in site-specific NEPA reviews.

The PEIS should set forth clear criteria for processing site-specific NEPA reviews in an efficient manner. Through the use of best management practices ("BMPs") and other means to minimize adverse environmental impacts, the PEIS can reduce the number and complexities of issues that must be addressed in site-specific NEPA reviews. In this regard, the PEIS will provide structure and a strong foundation for site-specific NEPA reviews. Moreover, the PEIS also should establish criteria for determining when two or more projects are "connected" actions under NEPA. In addition, the PEIS should specifically address opportunities to use tiering to avoid redundancy, reduce administrative burden, and streamline processing. Such opportunities may include model EAs and EISs (and model findings to be incorporated in EAs and EISs), and model MOUs with other federal agencies and state agencies. A PEIS is not a substitute for site-specific NEPA review, but its whole reason for being is to necessitate less subsequent review by resolving problems now.

BLM/DOE
July 15, 2008
Page 8

2. Right-of-way applications should be processed according to screening criteria on a first-to-apply basis, not through competitive leasing.

The solar industry is in a time of tremendous innovation and creativity, as the spirit of American invention is brought to bear against the problems of global warming and reliance on foreign fuels. At the same time, the industry has been beset, as BLM has recognized, with speculative interests. Among other things, such speculation has given the impression that there is an overall rush on federal public lands by solar energy companies when, in fact, the applications involving the largest number of acres, and even the large number of applications, are not representative of solar companies actually engaged in development.

Solar energy development is not at the appropriate stage for competitive leasing, which can disfavor concrete projects that promise technological, economic and environmental advancements. Applications should be screened to ensure technical and financial feasibility on a first-to-apply basis, rather than submitting them to competitive bidding. Rental costs similarly should be based on fair market value that accounts for rents for other renewable technologies and uses.

3. BLM should facilitate review of other federal lands for possible solar energy and transmission development.

The May 29, 2008 Notice of Intent for the PEIS indicates that BLM is restricting its review to BLM-managed lands. However, the PEIS should consider solar energy development on lands managed by other federal agencies, such as the Department of Defense and the U.S. Forest Service, particularly in the task of identifying new transmission corridors. Close coordination with other federal agencies will allow for non-BLM public lands to be considered for solar energy development, and may encourage those agencies to develop their own procedures and environmental reviews for analyzing such development. We discussed this issue more fully in our June 18, 2008 comment letter. We understand that including these lands also will require analysis of environmental impacts on those lands, but this level of analysis will avoid fatal flaws in subsequent transmission-siting projects. We also agree that the PEIS should consider and avoid significant adverse impacts on private conservation easements that adjoin federal lands under study in the PEIS.

4. The PEIS must include a robust alternatives analysis.

The PEIS must include a robust alternatives analysis. The proposed set of three alternatives may not be enough to allow a reasoned choice. BLM and DOE should consider studying alternatives that include, for example, different levels of development and/or different leasing and allocation systems. We note that the "Limited Development

BLM/DOE
July 15, 2008
Page 9

Alternative” proposed in the May 29, 2008 Notice of Intent may not be a feasible alternative now that the moratorium on new applications has been lifted.

BLM and DOE also should consider giving priority to solar energy development on lands that Congress and/or BLM have identified for disposal under the Southern Nevada Public Lands Management Act, Pub. L. 105-263 (1998), and similar authorities. Such consideration could be part of the PEIS’s alternatives analysis or simply a policy that, whichever alternative BLM and DOE select, the PEIS establishes for all BLM offices and land disposals.

5. BLM and DOE should be prepared to use the PEIS to amend all prior land use plans.

BLM and DOE should be prepared to use the PEIS to amend all prior land use management plans, including, for example, the BLM 2006 California Desert Conservation Area Plan, to account for the PEIS’s findings, especially given the absence from these earlier plans of any consideration of solar energy development. We discussed this issue more fully in our June 18, 2008 comment letter.

6. The PEIS should provide for a review period during the application process to ensure the accuracy of solar energy development suitability data.

The PEIS should create a procedure whereby applicants for rights-of-way have a period, following application submittal, to verify the suitability of an area for solar energy development. Such verification will test the accuracy and reliability of the mapping and other data upon which the PEIS and application are based. We discussed this issue more fully in our June 18, 2008 comment letter.

IV. Conclusion

Once again, we sincerely appreciate BLM’s and DOE’s decision to end the moratorium on new right-of-way applications for solar energy development. This decision ensures that solar energy will remain a viable alternative to nonrenewable sources of electricity, eliminates room for delay, and generally strengthens the role of the PEIS in evaluating and promoting solar energy development. We also appreciate the signal it sends—that BLM and DOE are willing to listen to stakeholders’ concerns and address them in a timely and thoughtful manner.

As we explained in our prior letter, the PEIS holds great promise for promoting solar energy development in an environmentally responsible manner, and enabling solar energy to achieve its promise as a major climate protection tool. Like BLM, DOE, and other stakeholders, the solar energy industry is only interested in development that maximizes clean energy production and minimizes adverse environmental impacts. Achieving this

BLM/DOE
July 15, 2008
Page 10

balance while furthering our growing need for clean, renewable energy will require a comprehensive, transparent, and flexible PEIS that makes site-specific NEPA reviews more efficient and provides a process for collaborating closely with other state and federal agencies and programs.

We hope that our comments assist you in preparing a PEIS that meets these goals. Thank you for your time and consideration.

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

BLM/DOE
July 15, 2008
Page 11

Frank ("Tex") Wilkins, DOE, frank.wilkins@ee.doe.gov

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

Ray Brady, BLM, ray_brady@blm.gov

Linda Resseguie, BLM, linda_resseguie@blm.gov

LEGAL_US_W # 59401574.3 70681.00002
07/15/08