

**Audubon California
California Native Plant Society
California Wilderness Coalition
Center for Biological Diversity
Defenders of Wildlife
National Parks Conservation Association
Natural Resources Defense Council
Sierra Club**

February 12, 2015

James G. Kenna
State Director, California State Office
Bureau of Land Management
2800 Cottage Way
Sacramento, CA 95825

Kevin Hunting
Deputy Director
California Department of Fish and Wildlife
1416 Ninth Street
Sacramento, CA 95814

[BLM CA DFW Agreement@blm.gov](mailto:BLM_CA_DFW_Agreement@blm.gov)
docket@energy.ca.gov

Re: DRECP NEPA/CEQA; Comments on Draft Agreement by and between the Bureau of Land Management and the California Department of Fish and Wildlife

Dear Director Kenna and Deputy Director Hunting:

On behalf of the undersigned organizations, we are writing to comment on the Draft Agreement by and between the Bureau of Land Management (BLM) and the California Department of Fish and Wildlife (CDFW) (hereinafter “Durability MOU”) issued in conjunction with the draft Desert Renewable Energy Conservation Plan (“DRECP”). We acknowledge the efforts by the BLM and CDFW in drafting this agreement and are supportive of the concept of ensuring lasting protections on BLM land to provide mitigation needed to off-set impacts to species from activities that would be covered under the DRECP and to meet federal and state endangered species conservation and recovery requirements for any California Natural Community Conservation Plan (“NCCP”) and/or Federal Habitat Conservation Plan (“HCP”) that would be adopted as part of the DRECP.

The current version of the Durability MOU represents an important step forward in the effort to provide lasting protections on BLM land, including a menu of tools the BLM may use to provide more “durable” protections on BLM Conservation Lands and a commitment to keep the protections for BLM Conservation Lands in place for the duration of the impacts for which those lands provide compensatory mitigation. Durability MOU at Section D.2.c.i. However, despite these significant steps forward, there are a number of issues in the Durability MOU that must be

addressed and resolved before this agreement is finalized if the agencies intend to rely on this agreement to satisfy state and federal legal requirements as part of the DRECP.¹

I. The Need for Clear, Meaningful Integration of the Durability MOU with the Draft DRECP and Draft Implementation Agreement

The Durability MOU is essential for the DRECP to move forward. Most importantly, given the scale of the DRECP it is clear that mitigation, conservation and recovery actions will be needed on public lands in order to meet the requirements of a valid NCCP and HCP. Indeed, the DRECP cannot continue in the absence of strong, effective and enforceable protections for natural communities and covered species on public lands.

Unfortunately, the draft Durability MOU is written as if a revised final MOU would be signed at the time of the approval of the DRECP, and the document does not make it clear how the terms of the MOU will be integrated or used in the implementation of the DRECP. For example, this MOU and its commitments are not mentioned anywhere in the current draft of the DRECP and the draft MOU is not integrated with the recently released draft Implementation Agreement (“IA”).

Recommendation: The relationship between the Durability MOU and the other DRECP decision documents including the IA should be clarified in a supplemental draft DRECP.

II. Relationship of the Durability MOU to the DRECP Plan-Wide Biological Goals and Objectives versus the Step-Down Biological Goals and Objectives

Throughout the Durability MOU, the responsibilities of the BLM and DFW as they pertain to “Plan-Wide Biological Goals and Objectives” and “Step-Down Biological Goals and Objectives” appear at different points in the agreement. In Sections 2 and 3, the BLM makes various commitments as they relate to “Biological Goals and Objectives,” but the only discussion of “Plan-Wide Biological Goals and Objectives” appears in Section 3.d. In that section, CDFW states that it will confer with the BLM if the BLM proposes actions inconsistent with the Plan-Wide Biological Goals and Objectives. Thus, it appears that the use of the term “Biological Goals and Objectives” in the MOU in terms of the BLM’s commitments actually means only the “Step-Down Biological Goals and Objectives” and not the “Plan-Wide Biological Goals and Objectives.” As a result, the MOU is unclear and, as discussed more fully below, inadequate. Because the NCCPA requires that an NCCP plan must “provide for the conservation” of covered species within the Plan Area and not within only a portion of the plan area, the DRECP must be designed to meet all of the “Plan-Wide Biological Goals and Objectives” not only the “Step-Down Biological Goals and Objectives.” If the draft DRECP fails to provide for the conservation of covered species within the Plan Area by meeting all of the Plan-Wide Biological Goals and Objectives, then the Department of Fish and

¹ While the DRECP is structured to provide for the take of listed species under California law through an NCCP, the comments in this letter are just as relevant if the take of listed species under California law was sought through the issuance of a 2081 permit under the California Endangered Species Act.

Wildlife will be required to find that the draft DRECP does not meet NCCPA requirements and cannot be the basis for a take permit under the NCCPA.

Recommendation: The Durability MOU, and the Draft DRECP, must be revised to require the achievement of DRECP Plan-Wide Biological Goals and Objectives, not only to the Step-Down Biological Goals and Objectives; further, any commitments for conservation on BLM lands must be sufficiently robust and durable to meet those conservation and recovery goals as well.

III. The Durability MOU Will Not Support Achievement of the NCCP “Provides for Conservation” Standard.

The NCCP Act requires that an NCCP “provide for conservation” of all the covered species. California Fish and Game Code Section 2835. However, the Durability MOU appears to be based on a less than “provides for conservation” standard because it is designed only to meet the Step-Down Biological Goals and Objectives rather than Plan-Wide Biological Goals and Objectives.² Indeed, based on a review of the draft DRECP, the DRECP NCCP Reserve is not currently designed to achieve the conservation standard for covered species plan wide. Instead, the draft DRECP uses a novel concept of Step-Down Biological Goals and Objectives, which have been linked to be “proportional” to the Covered Activities.

The use of a “proportional” conservation standard in the draft DRECP (and the Durability MOU) is inconsistent with the “provides for conservation” standard in the NCCPA in two distinct ways. First, for a species that exists exclusively within the DRECP plan area, the DRECP must provide for all of the measures necessary for the species’ recovery within the plan area. Merely contributing to the species’ recovery is inadequate if the species occurs entirely within the plan area. Second, under the proposed step down/proportional framework, the magnitude of the contribution to the species’ recovery is determined, primarily, by the impacts of covered activities within the DRECP plan area. However, the NCCPA does not limit conservation measures to address only the impacts of the covered activities. Rather, the NCCPA takes a far more expansive view of conservation measures, which includes, but is not limited to taking into account the impacts of covered activities on the covered species.

Under the plain text of the NCCPA, conservation means recovery, and an NCCP is required to contain measures that are sufficient to achieve recovery within the plan area. This requirement is clear from several statutory provisions that require the Department to make specific findings that establish recovery as the goal of an NCCP, and require the NCCP to contain specific measures to “conserve” the covered species within the plan area to achieve that goal. See Cal. Fish & Game Code §§ 2805(h) (Plan “shall identify and provide for those measures necessary to conserve . . . within the plan area”); 2805(d) (defining conservation as recovery); 2820(a)(4) (requiring Plan to contain “measures in the plan areas . . . “as needed for the conservation of species”); 2820(a)(6) (requiring plan to contain “specific conservation measures that meet the biological needs of covered

² This letter does not include any comments regarding the sufficiency of the DRECP’s biological goals and objectives. Those comments will be submitted in separate letters.

species”); 2835 (authorizing the Department to issue a take permit for a covered species if they find that the covered species’ “conservation and management is provided for in a [Plan]”).

Because the NCCPA defines conservation with respect to species’ status, as opposed to the covered activities’ impacts, an NCCP’s conservation measures must account for all reasonably foreseeable impacts, such as those associated with other activities in the plan area that threaten species and habitats, including climate change. The Draft DRECP suggests, however, that the plan will not provide for sufficient measures to achieve recovery if a species is imperiled by non-Plan impacts. This approach is not legally defensible because it ignores the NCCPA’s focus on recovery. NCCPs cover species that are listed as endangered and threatened under the CESA, fully-protected species, and other imperiled species; non-plan factors will have always contributed to those species’ decline because the species were already listed or otherwise in need of protection when the NCCP was created. If an NCCP does not account for non-plan impacts, the NCCPA’s goal of conserving and recovering species would be impossible to achieve in most cases.

Recommendation: If the DRECP is intended to fulfill the requirements of the NCCPA, the concept of Step-Down Biological Goals and Objectives must be rejected in the Draft DRECP and the Durability MOU and a the draft DRECP must be revised to meet all Plan-Wide Biological Goals and Objectives.³

IV. Terms and Plan Elements Must Be Clarified

Throughout the Durability MOU, there are critical terms that are undefined. This leaves the reader questioning what the BLM and CDFW may be referring to in several sections and whether the two agencies have the same understanding of the terms of the MOU. These terms include, but are not limited to: “DRECP Natural Community Conservation Plan (NCCP)”, “Step-Down Biological Goals and Objectives”, “DRECP NCCP Reserve Design”, “BLM lands used for compensatory mitigation”, and “NCCP Conceptual Plan-Wide Reserve Design”. When the reader refers to the draft DRECP for clarity of these terms, no such clarity is provided as these terms are used in an inconsistent manner. As noted above, while the Durability MOU is written as if it would be signed at the time of the approval of the DRECP, it is unclear how this MOU will be integrated or used in the DRECP. For example, this MOU and its commitments are not mentioned anywhere in the current draft of the DRECP. The recently released draft Implementing Agreement mentions the Durability MOU, but, unfortunately, also fails to clarify these issues or cure many of the shortcomings in the MOU. We intend to comment further on the draft Implementing Agreement as well as the need to integrate the IA, DRECP and a revised Durability MOU to meet the required legal standards.

Recommendations: The provision of various “errata” information at this stage, including a definition section for the draft MOU, would provide a better explanation of these terms, correct where these terms are used incorrectly in the MOU and draft DRECP, and would assist the public in

³ The undersigned groups will provide specific comments on the substance of the Biological Goals and Objectives in subsequent comment letters.

commenting on the draft DRECP. However, due to the extensive irregularities and confusion created by the lack of definitions and inconsistent use of these terms, a revised supplemental draft MOU and Draft DRECP area needed.

V. The Length of the Durability Commitments Must Be Corrected

The Durability MOU contains conflicting and unclear statements about the duration of the durability tools to be used on BLM lands. In Sections D.2.a and D.2.B.i – iii, and Section 3.c.i – ii, the BLM appears to be stating the conservation commitments in land use designations will last only as long as the DRECP NCCP (e.g., “The DRECP NCCP expressly assumes that the current protective land use designations . . . for BLM Conservation Lands will remain in place for at least *the duration of the DRECP NCCP* . . .” (Section D.2.a.; emphasis added)). However, in Section D.2.c.i, the Durability MOU contains the statement that the “BLM intends that any such land use authorizations will, to the extent consistent with law and regulation, be valid for the *duration of the impacts* for which those lands provide compensatory mitigation.” (Emphasis added.)

Under the NCCP Act, an NCCP must provide for “the creation of habitat reserves and long-term management of habitat reserves” or conservation measures. Cal. Fish & Game Code § 2820(a)(3); see also Cal. Fish & Game Code § 2810(b)(2) (An NCCP Implementation Agreement must contain “[p]rovisions for establishing the long-term protection of any habitat reserve or other measures that provide equivalent conservation of covered species.”) This requirement is not limited to compensatory mitigation, but to all components of a conservation strategy in an NCCP, including the NCCP reserve. Under all previously approved NCCPs, CDFW has interpreted the NCCP Act to require “permanent” conservation of the reserves in the form of fee acquisition or permanent easements with endowments or other long-term commitments put in place to ensure adequate management of these reserves. Because the draft DRECP proposes to rely on conservation commitments on public land that are managed under a multiple use mandate, in order to meet the minimum state legal requirements, the durability commitments by the BLM must last *at least* as long as needed to ensure conservation and recovery of the covered species—not only the duration of the proposed Plan and not only the duration of the impacts of the covered activities.

Recommendation: The Durability MOU must be revised to clearly require that the BLM commitments for managing all conservation lands consistent with the DRECP NCCP must be valid for the duration needed to conserve and recover covered species within the Plan area.

VI. The MOU Is Inadequate because it Would Allow BLM to Remove Conservation Designations on Lands Needed to Meet the NCCP Conservation Standards

Sections D.2.a and D.2.b.iii state that protective land use designations on BLM lands (e.g., NLCS, ACEC, Wildlife Allocation, and wilderness) may only remain in place for the duration of the DRECP NCCP. As discussed above, in order to meet the NCCPA standard the duration of these designations on public land cannot be limited to the length of the DRECP NCCP permit, but must be linked to the conservation and recovery of covered species in the California Desert. While BLM has the authority to administratively change some land use designations (e.g., ACEC and Wildlife

Allocations)⁴, the MOU needs to clarify that the BLM will only change land use designations of Conservation lands designated pursuant to DRECP in the future if those changes are consistent with the conservation purpose under NCCP Act and conservation and recovery of the covered species.

Recommendation: The Durability MOU should clarify that the BLM will only change land use designations of Conservation lands designated pursuant to DRECP in the future if those changes are consistent with the conservation purpose under NCCP Act and conservation and recovery of the covered species.

VII. The Description of the Use of the Durability Tools in Section 2.c. Need Refinement and Clarification

Section D.2.c.i outlines three “Durability Tools” that the BLM has stated it may use to ensure that BLM Conservation Lands will be provided with long-term protections: (1) Title V Rights of Way; (2) permits, leases or easements granted pursuant to 43 U.S.C. §2920; and (3) leases granted pursuant to the Recreation and Public Purposes Act (RPPA). The Durability MOU also currently limits the use of the Durability tools referred to in Section 2.c to only those BLM Conservation Lands used for “compensatory mitigation” (Section 2.c.) and for only those projects built on BLM land (Section 2.c.i). We appreciate that the BLM and CDFW have identified these tools as appropriate for providing more “durable” protections and agree that these tools have merit. Indeed, we believe that this section of the agreement represents significant progress in the effort to secure more lasting conservation commitments on BLM lands to address the impacts of projects.

However, in reviewing this section, there are a number of issues that need to be clarified in the next iteration of this draft MOU. First, the Durability MOU is unclear as to when the durability tools will be finalized in relation to the final decision on a specific renewable energy project. Section D.2.c.i. discusses the three durability tools, but it is silent as to when an individual durability tool would be finalized with respect to the approved Covered Activity. In order to ensure that the protections provided by these tools will be implemented in a timely manner, the durability tool and any associated analysis required under the National Environmental Policy Act (NEPA) should be completed at the same time that the Covered Activity is approved. Second, the Durability MOU also fails to articulate the specific terms and conditions associated with each durability tool. Third, for the use of Section 2920 permits, leases and easements, the Durability MOU should state that the use of easements under Section 2920 is explicitly authorized under Title III of the Federal Lands Policy and Management Act (FLMPA). Fourth, the MOU must clarify the conditions under which a land withdrawal will be sought from DOI for purposes of fulfilling the BLM’s commitments to protect BLM Conservation Lands and identify a firm commitment from BLM and DOI to a timeline for implementing the withdrawal process. In Section D.2.c.i, the agreement states that in the event the DOI implements a land withdrawal, pursuant to Title 43 U.S.C. § 1714, for BLM

⁴ BLM does not have the authority to administratively change other designations (e.g., existing wilderness, NLCS, and WSAs), but that is not at issue here given that the existing wilderness, NLCS, and WSA designations are part of the baseline and including them in the reserves does not provide any new or additional conservation within the DRECP.

Conservation Lands, the BLM may not need to use the above-discussed three durability tools. However, this section is silent as to what uses the land withdrawal may apply to (e.g. mining, motorized recreation, transmission corridors, livestock grazing, etc.).

Recommendation: Section D.2.c.i. shall be revised to: (1) clarify that the implementation of the use of the various tools and any associated analysis required under NEPA should be completed at the same time that the Covered Activity is approved; (2) articulate the specific terms and conditions associated with each durability tool; (3) state explicitly that easements under Section 2920 are authorized under Title III of the Federal Lands Policy and Management Act (FLPMA); and (4) clarify that any DOI land withdrawal pursuant to Title 43 U.S.C. § 1714 for BLM Conservation Lands will include a withdrawal from all incompatible uses and, if used solely to provide for “compensatory mitigation” for project impacts to species and habitats on public lands, will include a commitment for renewal so that the withdrawal will last at least for the duration of the Covered Activity’s impact to species and habitats on public lands.

VIII. Use of Durability Tools on BLM Conservation Lands For Some Projects Results in Inconsistent Commitments.

As noted above, currently the Durability MOU limits the use of the Durability tools referred to in Section 2.c to only those BLM Conservation Lands used for “compensatory mitigation” (Section 2.c.) and for only those projects built on BLM land (Section 2.c.i). With respect to the limitation on the use of the tools outlined in Section 2.c only for projects built on BLM land, that distinction greatly limits the utility of this MOU as most of the lands identified in the DRECP within the Development Focus Areas are private, not public lands. There does not appear to be any rationale for limiting the use of these tools to projects on BLM land only, and it results in inconsistent conservation commitments within the Reserve. However, the Durability MOU very specifically states that those tools are to be used for “BLM Conservation Lands included in the DRECP NCCP Reserve . . . [for] compensatory mitigation.” Thus, the Durability MOU appears to divide BLM Conservation Lands into two categories: lands used for compensatory mitigation and DRECP NCCP Reserve lands **not** used for compensatory mitigation. The Durability MOU then provides that the longer-term protections apply only to the compensatory mitigation lands, leaving the non-compensatory mitigation lands in the DRECP NCCP Reserve open to changes in designation at any time and certainly after the NCCP permit expires in 2040.

The NCCPA does not provide a two-tiered standard for the length of commitments made for NCCP Reserve Lands. Indeed, the NCCPA does not distinguish between “compensatory mitigation” lands in a reserve and non-compensatory mitigation lands in a reserve. Instead, the length of the commitments made to protect NCCP reserve lands are applied equally to every acre in an NCCP Reserve.

Therefore, the current structure for utilizing the tools will not provide conservation commitments that meet the NCCP Act standards. While we would like to see the use of the tools expanded to cover impacts from projects on private lands within the DRECP, for those projects covered under

the NCCP Act standards the length of the conservation commitments must be tied to species conservation and BLM would need to commit to renewing these tools to ensure a longer duration for the use of these tools than is currently provided in the statutes and regulations. For example, if withdrawals are made to support conservation commitments on public lands, DOI and BLM would need to ensure that the withdrawals will continue to be renewed so long as the lands are needed to support conservation and recovery of covered species under the Plan.

Recommendation: The Durability MOU must be revised to clarify that BLM must apply the tools outlined in Section D.2.c to all BLM Conservation Lands within the DRECP NCCP Reserve and may use the durability tools in Section D.2.c to provide needed conservation for impacts of projects on both public and private lands within the DRECP Plan area. However, the Durability MOU must also clarify that if any of the tools or a DOI land withdrawal, pursuant to Title 43 U.S.C. § 1714, are relied on to fulfill the NCCP Act requirements for the DRECP, BLM and DOI must make a commitment to renew the tools and the withdrawals so long as the lands are needed to support conservation and recovery of covered species under the Plan.

IX. Clarify When the Protective Terms and Conditions in Section D.2.c.iii Will Be Used for Rights-of-Way

Section D.2.c.iii states that for rights-of-way granted on BLM Conservation Lands, these rights-of-way will include terms and conditions that will “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment” and “require compliance with State standards for public health and safety, environmental protection, and siting, construction and operation, and maintenance of rights-of-way for similar purposes if those standards are more stringent than the applicable Federal standards.” Further, this section states that for purposes of achieving the above terms and conditions, the NCCPA’s requirements under Fish and Game Code section 2820(a) and (b) and Fish and Game Code section 2801(b) “will be protected through appropriate terms and conditions on any subsequent rights-of-way granted.” This section is important as it recognizes the California endangered species legal requirements as terms and conditions that must be followed in a BLM right-of-way. However, this section is confusing as to what “type” of right-of-way will include these terms and conditions. Is it all rights-of-way (both “conservation” rights-of-way and “development” rights-of-way) granted within BLM Conservation Lands within the DRECP NCCP Reserve? Is it only for “conservation” rights of way, as discussed in Section D.2.c.i.? Is it only for “development” rights-of-way? Clearly, the insertion of this type of term and condition into a conservation right-of-way granted, as discussed in Section 2.D.c.i., would make sense as it would prohibit actions on the land that would be inconsistent with the DRECP NCCP. However, it is unclear how such a term and condition would work for a development “right-of-way” granted on BLM Conservation Lands within the DRECP NCCP Reserve.

Recommendation: Section D.2.c.iii should be revised to clarify that all rights-of-way granted on BLM Conservation Lands with the DRECP NCCP Reserve include the above-discussed NCCP and California ESA language in the terms and conditions.

X. The Meet and Confer Requirements Undermine BLM's Conservation Commitments

Sections D.2.c.iv-v outline the process the BLM will follow when they receive an application for a project on BLM Conservation Land that is subject to one of the durability tools once they are implemented. Unfortunately, this process fails to provide any concrete commitments by BLM that they will either (1) deny an application that is inconsistent with unmitigable protected values or (2) for lands where the conservation values could potentially be mitigated, require mitigation ratios high enough to fully to replace the values lost by the approval of the project application—for example, at a minimum of 10:1—along with imposition of additional long-term protections on those substitute lands. For example, this section uses non-committal phrases such as: “BLM will confer with CDFW,” “BLM, in its discretion . . . , will consider the mitigation value of the lands,” BLM “may” use durability tools on substitute lands.” Indeed, it appears that all the BLM is committing to do is confer with CDFW about the impacts of a project; maybe make changes in a project, deny a project, or approve a project with no changes; maybe require additional mitigation; and if new “offsetting actions” are required, maybe use the durability tools on those new lands. Thus, not only does this agreement provide BLM discretion to approve projects on BLM Conservation Lands even if they are inconsistent with the NCCP, it appears to state that “substitute” Conservation Lands may receive even less “durable” protection than the original conservation lands. This language and the discretion reserved to BLM undermines the certainty and enforceability of promised conservation under the DRECP and renders the DRECP unable to meet the NCCP Act standards.

Recommendation: Sections D.2.c.iv-v must be strengthened to clarify that BLM will commit to deny project applications on BLM Conservation Land inconsistent with the DRECP NCCP. Further, this section should be revised to clarify that in the event that BLM approves a project in the BLM Conservation Lands which is consistent with the DRECP NCCP, and needs to mitigate for impacts to those Conservation Lands, the BLM commits to requiring mitigation at a ratio of at least 10:1 and providing that new mitigation lands will be included within the Reserve and will have the same level of “durable” protection as the lands where development was allowed. Finally, this section must clarify that CDFW must find that the BLM’s action(s) are consistent with the DRECP NCCP and in the event that CDFW finds that such actions are inconsistent, there is a permit suspension and revocation process in place consistent with the requirements of California Fish and Game Code Section 2820(c).

XI. Phase One Commitment Must Be Improved

Section D.2.d sets forth a provision in which the BLM agrees to apply the durability tools to a still-yet-to-be-decided amount of Conservation Lands as compensatory mitigation at some point after the approval of the DRECP Record of Decision and execution of the Durability MOU. We are very supportive of the concept of providing an upfront commitment of BLM Conservation Lands as a way of “jump-starting” or “front-loading” the DRECP Conservation Strategy and thus protecting against the DRECP falling behind in its conservation commitments. However, this section needs to be improved to require that the “front-loading” of Conservation Lands through the execution of the durability tools on these lands is not limited to only “compensatory” mitigation lands and instead

these tools apply to compensatory mitigation and non-compensatory mitigation Conservation Lands within the DRECP NCCP. In addition, this section must be revised to require that the agencies execute the durability tools on this set of “front-loaded” lands, including all associated completed NEPA, concurrent with the approval of the DRECP ROD and the execution of the Durability MOU. The current commitment by the BLM is simply that they will complete an Environmental Assessment for the tool(s) used on these “front-loaded” lands, not that they will actually complete the execution of the durability tools in any specific timeframe.

Recommendation: Section D.2.d must be revised to require that (1) the “front-loading” of Conservation Lands through the execution of the durability tools will occur on compensatory mitigation and non-compensatory mitigation Conservation Lands within the DRECP NCCP and (2) the durability tools on this set of “front-loaded” lands will be executed, including all associated completed NEPA, concurrent with the approval of the DRECP ROD and execution of the Durability MOU.

XII. Annual Reporting Must Be Expanded

Section D.4.b requires that BLM and CDFW provide annual written reports of all rights-of-way, permits, authorizations, and other approvals issued by BLM and CDFW for projects on and activities on or potentially affecting BLM Conservation Lands. While we appreciate that the agencies will make this information available, this is only one small part of the information necessary to ascertain whether or not the DRECP is achieving its intended outcomes and that the involved parties are carrying out their obligations under this plan. This section should be expanded to (1) include both quarterly reports and an annual report of all compliance and effectiveness monitoring of the DRECP and (2) ensure that such reports are made public by posting the information electronically.

Recommendation: Revise Section D.4.b to require both quarterly and annual reporting of compliance and effectiveness monitoring and to make the annual reports publicly available, including electronically.

XIII. The Dispute Resolution Section Must Be Clarified

Section D.5 sets forth a dispute resolution process that provides for disagreements to be incrementally elevated from the lowest level of the BLM and CDFW all the way to the BLM Director. According to Section D.5.b, the final “decider” of a dispute between the BLM and CDFW is the BLM Director. While it is clear that the ultimate decision-maker for the BLM would be the BLM Director, it is not appropriate for the BLM Director to make final determinations of issues involving interpretations of state law, particularly the NCCP Act. Indeed, the NCCP Act states that it is the decision of CDFW as to whether or not an NCCP permit should be suspended or revoked. Cal. Fish & Game Code § 2820(c). Further, CDFW must suspend or revoke an NCCPA permit if the continued take of a species would result in jeopardizing the continued existence of the species. Thus, Section D.5 must be revised to clarify that while the BLM shall be the final decision-maker for BLM issues, it is the Director of CDFW who makes the final decision regarding

compliance with the NCCP Act. Therefore, for issues involving compliance with the DRECP's NCCP, the final decision-maker, in the event of a dispute between BLM and CDFW, must be CDFW.

Recommendation: Section D.5 must be revised to clarify that for issues involving compliance with the DRECP's NCCP, the final decision-maker, in the event of a dispute between BLM and CDFW, must be CDFW.

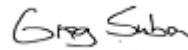
XIV. Conclusion

Thank you for the opportunity to provide our analysis and recommendations for the draft Durability Agreement. If you have any questions, please do not hesitate to contact us. Our organizations will be providing further detailed comments on the Draft DRECP and its supporting documents either individually or collectively by the February 23rd deadline. If you have any questions or comments about this letter, please contact Kim Delfino, Defenders of Wildlife, at (916) 201-8276 or kdelfino@defenders.org.

Sincerely,



Garry George
Audubon California



Greg Suba
California Native Plant Society



Ryan Henson
California Wilderness Coalition



Lisa Belenky
Center for Biological Diversity



Kim Delfino
Defenders of Wildlife



David Lamfrom
National Parks Conservation Association



Helen O'Shea
Natural Resources Defense Council



Barbara Boyle
Sierra Club