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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

Petition For Amendment for the
BLYTHE SOLAR POWER PROJECT

DOCKET NO. 09-AFC-6C

**NEXTERA BLYTHE SOLAR, LLC'S
REPLY BRIEF TO COLORADO
RIVER INDIAN TRIBES OPENING
BRIEF**

In accordance with the Committee direction at the evidentiary hearing held on November 19, 2013, NextEra Blythe Solar, LLC (NextEra Blythe Solar) files this Reply Brief to address issues raised by the Intervenor Colorado River Indian Tribes (CRIT) in its Opening Brief filed on November 27, 2013.

INTRODUCTION

As the Committee appropriately instructed the parties, the action before the Commission is whether or not to approve NextEra Blythe Solar's Petition For Amendment (Petition) to convert the Approved Project from a 1000 MW solar trough project to a 485 MW facility that uses photovoltaic technology (PV). As described below, the Opening Brief filed by CRIT incorrectly asserts that the Commission should treat this Petition as an opportunity to reconsider every aspect of the original Final Decision. While NextEra Blythe Solar disagrees with this assertion, we have nevertheless worked collaboratively with CRIT to jointly propose several Condition of Certification changes that address key CRIT concerns. This Reply Brief addresses the appropriate environmental baseline, the legal support for the analysis and mitigation proposed for cultural resources, and the BSPP's compliance with all applicable laws, ordinances, regulations, and standards (LORS).

ENVIRONMENTAL BASELINE

It is unrefuted that the Committee is considering the Petition and the Petition only. The evidentiary burdens are governed by Commission Regulation Section 1769. As the

Committee has previously directed, each party bears the burden of proof for presenting evidence that is specifically related to the amendment, the scope of which includes changing the technology from solar trough to photovoltaic technology (PV). The use of the different technology would result in a reduction in the electrical output of the facility from 1000 MW to 485 MW and reconfigured use of the site reducing the footprint from 7,030 acres to 3,975 acres. The electrical transmission line and route will remain unchanged. Therefore, unless 1) there is a change of law, ordinance, regulation or standard (LORS); 2) there is new scientific information that is relevant and was not available to the parties at the time of the original evidentiary hearings; or 3) the evidence is related specifically to the change in technology or reduction in the footprint; the evidence or arguments are not relevant. This is also consistent with CEQA's provisions on the scope of preparing a subsequent EIR.¹

The CRIT Opening Brief suggests to the Commission that the Commission should reopen all conclusions made for the Approved Project because the CRIT was not fully engaged in the original proceeding. CRIT admits that it was contacted, admits that it signed the Programmatic Agreement, but claims that the consultation at both the federal and the state level was insufficient. CRIT further claims that this insufficiency requires the Commission to allow it to revisit the findings in the Final Decision without meeting the standard set above. The Committee must apply the law fairly and avoid decisions that are arbitrary and capricious. CRIT's late intervention in these amendment proceedings and its alleged failure to participate in the original proceedings should not be grounds for the Commission to expand the scope of review beyond what is fair and outlined clearly in the Commission's own regulations.

Additionally, CRIT claims in its Opening Brief that NextEra Blythe Solar is required to commit to building the original project in order for the Commission to focus the scope of its review on the change in impacts. This contention is clearly not supported by any of the CEQA Guidelines or case law which clearly set out the standards for review as a subsequent EIR, where the environmental baseline is the Approved Project.² It is correct that the Commission must make new findings of override for unmitigatable impacts, but the Commission can and should rely on many of the same reasons outlined in the Final Decision to support findings of override. The requirement to make new findings of override for the Modified Project does not change the scope of the proceeding. CRIT does not present any new facts about the extent of cultural resources or the significance of any cultural resource, sacred site, or prehistoric trail, which were not previously analyzed in the proceedings for the Approved Project.

¹ Public Resources Code Section 21166, CEQA Guidelines 15162 and 15163. See also *Black Property Owners Association v. City of Berkeley* 22 Cal. App. 4th 974; *Benton v. Board of Supervisors* 226 Cal. App. 1467.

² Ibid.

NO IMPERMISSIBLE DEFERRAL OF ANALYSIS/MITIGATION

In its Opening Brief, CRIT incorrectly claims that the Commission is engaging in impermissible deferral of analysis and mitigation, which is prohibited by CEQA. Specifically, CRIT relies on *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal. App. 4th. 48 and *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal. App. 4th. 1344. CRIT cites these cases to support its contention that Staff incorrectly deferred analysis of cultural resources impacts. However, a close examination of the cases reveals that the analysis conducted by Staff and NextEra Blythe Solar is significantly different than the analyses rejected by the courts in *Madera* and in *Berkeley Jets*.

Madera Distinguished

In *Madera* the court rejected an approach whereby specific sites were evaluated prior to certification of an EIR by a cultural resources consultant and found to be eligible for listing on the California Register of Historical Places (California Register). The EIR relied on the study and confirmed that the sites were eligible for listing on the California Register.³ The EIR went on to conclude that the project being considered by Madera County may cause a substantial change in the significance of the sites resulting in a significant impact under CEQA.⁴ The EIR then included a mitigation measure that the Court found objectionable. The mitigation measure required further analysis to “verify” the data potential and integrity of the site. Specifically, the mitigation measure included the language “If it is verified that the site is a historical resource for the purposes of CEQA, the qualified archaeologist shall review all existing documentation and make recommendations as to the appropriate course of action.”⁵ The Court found that the specific language of this mitigation measure could “undo the findings of the EIR” that the sites would be eligible for listing.⁶ In addition, the Court noted that the EIR stated that the mitigation measure would reduce the impacts to “less than significant”.⁷ The Court rejected the defendant’s argument that the mitigation measure would not “undo the findings of the EIR” but would focus on the aspects of the site and not its significance. The Court’s finding was based specifically on the language of the mitigation measure which permitted further study and analysis to “undo the findings of significance of the EIR.” The suite of mitigation contained in the Conditions of Certification for the BSPP does not permit the findings to be undone.

First, the Commission should review Staff’s comprehensive list of impacts and mitigation by site contained in Exhibit 2001, Cultural Resources Table 4, at pages 4.3-104 through 4.3-111. For every site, Staff has assumed eligibility but rather than allow additional work

³ *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal. App. 4th. 48, page 78.

⁴ *Ibid.*, page 78.

⁵ *Ibid.* pages 79-80.

⁶ *Ibid.*, page 81.

⁷ *Ibid.*, page 80.

to be performed in the field to reverse that finding, the Conditions of Certification require data recovery, which is a specified form of mitigation for a site that is eligible for listing on the California Register.⁸ The EIR in *Madera* allowed a future study to change the status of a site from “eligible” to “ineligible and to then define the action necessary and, the Court concluded this was a deferral of analysis and mitigation contrary to CEQA. In stark contrast, none of the Conditions of Certification allow the project owner to conduct further study that could reverse an eligibility determination and avoid data recovery, which is the specific mitigation for the site being treated as eligible for listing on the California Register. The only decision related to eligibility and mitigation that would be made by the Compliance Project Manager (CPM) during compliance for the Modified Project would be for ***previously undiscovered and unanticipated finds made during construction***. Therefore, the Committee should find that the Conditions of Certification, which are substantially the same as the original project, do not constitute deferral of analysis or mitigation as was encountered in *Madera*.

For the Committee’s benefit, we have outlined below the amount of cultural resources literature review and field studies that have been completed to support the Approved and Modified Projects.

Berkeley Jets Distinguished

In its Opening Brief CRIT also incorrectly relies on the principles articulated in *Berkeley Jets*. In *Berkeley Jets* the Court rejected the failure of the Port of Oakland to quantify the health impacts on the surrounding community from emissions of an airport expansion. Unlike CRIT’s assertion, the case does not stand for the blanket prohibition on assuming an impact may be significant. The Court applied the widely held principle that an agency should prepare a “good faith reasoned analysis” to respond to conflicting information generated by the public.⁹ In *Berkeley Jets*, the Port failed to inquire with the Bay Air Quality Management District (District) to solicit methods for conducting a health risk assessment and more importantly failed to use the methods employed for consideration of expansion of the San Jose Airport, even though the Port was using the same consultant to prepare the EIR for its action and was aware and rejected using the methodology with no basis.¹⁰ While the Port relied on “assuming significance” to justify its lack of good faith effort to analyze and disclose potential health impacts to the public, the Court held:

Much information of vital interest to the decision makers and to the public pertaining to toxic air contamination was simply omitted. In other instances, the information provided was either incomplete or misleading. The dispute in this regard goes beyond a disagreement of qualified

⁸ CEQA Guidelines section 15126.4 (C).

⁹ *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal. App. 4th. 1344, page 1371.

¹⁰ *Ibid.*, pages 1368 and 1371.

experts over the reasoned conclusions as to what the data reveals. The EIR failed to acknowledge the opinions of responsible agencies and experts who cast substantial doubt on the adequacy of the EIR’s analysis of this subject. The conclusory and evasive nature of the response to comments is pervasive, with the EIR failing to support its many conclusory statements by scientific or objective data. These violations of CEQA constitute an abuse of discretion. The Port must meaningfully attempt to quantify the amount of mobile-source emissions that would be emitted from normal operations conducted as part of the ADP [Airport Development Plan], and whether these emissions will result in any significant health impacts.¹¹

So the Court in *Berkeley Jets*, did not invalidate any assumption of significance as suggested by CRIT, but rather said an assumption of significance does not excuse the CEQA requirement of a good faith reasoned analysis. For the Committee’s benefit, we have outlined below the amount of cultural resources literature review and field studies that have been completed to support the Approved and Modified Projects.

Project Approval Phase	Effort	Description	Date
Approved Project Licensing			
	Records Search for Blythe Solar Power Project (BSPP or Proposed Project)	Records search of 8005-acre Proposed Project (including CEC archaeological buffer) plus one-mile buffer	January 2009
	Proposed Project footprint and gen-tie line field surveys	Class III intensive pedestrian survey of 8005-acre Proposed Project footprint (including CEC archaeological buffer) and 14-mile generation tie line	March-June 2009/October 2009
	Built environment field survey	Built environment survey of 7,030-acre Proposed Project footprint plus 0.5-mile CEC built environment buffer	May 2009/October 2009
	Geotechnical boring monitoring	Monitoring of ground disturbance for geotechnical boring work	July-August 2009
	Supplemental Survey for Alternative BSPP Project	Class III intensive pedestrian survey of 1,320 acres that were not part of original Proposed Project	April/May 2010

¹¹ Ibid., page 1371.

	Supplemental Survey for t-line re-route	Class III intensive pedestrian survey of 2.3 miles of potential transmission line reroute	May 2010
	Supplemental survey for gen-tie realignment	Class III intensive pedestrian survey of 4.2 miles of proposed generation tie realignment	April 2011
	Proposed Project Alternative records searches	Records searches of 8 potential Alternative Project Sites (Blythe Disturbed Lands, Blythe Reconfiguration, Chuckwalla Valley, East of Lancaster, El Centro, Johnson Valley, Blythe Reduced Acreage, Blythe Revised Layout)	December 2009/January 2010
Approved Project Compliance			
	Magnetometry survey	Magnetometry survey and ground-truthing of 1-acre sample area	September 2010/February 2011
	Phase 1a data recovery	Data recovery on Phase 1a sites under Conditions of Certification 6, 7, 10 and 11	November-December 2010
	Phase 1b data recovery	Data recovery on certain Phase 1b sites under Conditions of Certification 7, 8, 9, 10, and 11	July 2011
	Ground penetrating radar survey	Ground penetrating radar survey and ground-truthing of 2.47 acres	July 2011
	Monitoring of desert tortoise fence installation, road grading/grubbing, laydown area grading/grubbing	Per the CRMMP, archaeological and Native American (Agua Caliente) monitoring of ground disturbance within 300 feet of prehistoric sites, within geoarchaeologically sensitive areas, within 1,000 feet of CA-RIV-3419, and during grading/grubbing of the access road	February-November 2011
	Monthly site visits	Monthly visits to document site condition	Through July 2012
	Fence repair monitoring	Monitoring of silt and desert tortoise fence repair	September 2011
	Fence repair monitoring	Monitoring of silt and desert tortoise fence repair	July 2012
	Monitoring of desert tortoise fence decommissioning	Monitoring of removal of silt and desert tortoise fencing	October-November 2012

This substantial effort shows that the project owner has performed thousands of hours of cultural resources related work on the BSPP site. The Staff performed an analysis that was hundreds of pages long, detailing each and every site currently known and anticipated. This thorough analysis is nothing like the cursory analysis rejected in *Berkeley Jets*.

However, there is more case law on point that demonstrates what the courts expect when it comes to an agency making a good faith effort at disclosure and analysis. For example, "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project, [t]he fact that

additional studies might be helpful does not mean that they are required.¹² A study, required by an agency, which “takes place over two winters could conflict with the requirement that EIR’s for private projects be prepared and certified within one year.”¹³ CEQA requires the EIR performed on a potential project to “reflect a good faith effort at full disclosure”, and does not “mandate perfection or the EIR to be exhaustive” and “will be judged in light of what was reasonably feasible.”¹⁴

The Staff Assessment clearly outlines the potential impacts to each and every known site and concludes such impacts would be significant, justifying mitigation. NextEra Blythe Solar agrees. Requiring additional study is just not warranted for this Petition which reduces impacts to cultural resources.

Lastly, CRIT asserts that the Staff Assessment does not appropriately address avoidance. As the Commission is aware, it is important to note that while the Staff Assessment is an important environmental document it is not the equivalent of an EIR. The Commission regulatory process has been certified by the Secretary of Resources as a “certified regulatory program” pursuant to PRC Section 21080.5. While this determination does not exempt the Commission from compliance with the substantive requirements of CEQA, it does exempt the Commission from several of the procedural requirements. The purpose is to avoid redundancy by allowing a regulatory process such as the Commission’s to be the “functional equivalent” of an EIR process. However, comparison of the Staff Assessment to an EIR is not appropriate. The Staff Assessment is simply an independent analysis performed by Staff for use by the Commission. The combination of the Staff Assessment and all of the other evidence in the record including public comment is then used by the Commission to prepare a Final Decision. It is more accurate to compare the Final Decision to a Final EIR in a traditional CEQA setting except that the Final Decision must also include CEQA-related findings. Therefore, the Committee should consider and include the following description of avoidance incorporated into the design of the Modified Project.

CEQA requires that as part of the impact analysis conducted during permitting of the project, avoidance of known resources should be considered. Avoidance of known resources was clearly considered in the analysis of the Approved Project and was the primary driver in how NextEra Blythe Solar reduced/reconfigured the boundary of Modified Project. In reducing the project footprint by almost half, NextEra Blythe Solar succeeded in avoiding the majority of prehistoric cultural resources, including most notably a large cobble terrace feature which would have been impacted by the Approved Project. This avoidance employed during the permitting and design of the Modified Project, can and should be relied on by the Commission to comply with CEQA’s preference for avoidance

¹² *Gray v. County of Madera*, (2008) 167 Cal. App.4th 1099. (Quoting *Associated of Irrigated Residents v. County of Madera*, (2003) 107 Cal.App.4th 1383).

¹³ *Id.* (See also, Public Resources Code 21100.2, 21151.5; CEQA Guidelines 15108)

¹⁴ *City of Long Beach v. Los Angeles Unified School District*, (2009) 176 Cal. 889.

along with Condition of Certification **CUL-5** which speaks to ensuring that avoided resources would not inadvertently be impacted during construction:

11. All impact-avoidance measures (such as flagging or fencing) to prohibit or otherwise restrict access to sensitive resource areas that are to be avoided during ground disturbance, construction, and/or operation shall be described. Any areas where these measures are to be implemented shall be identified. The description shall address how these measures would be implemented prior to the start of ground disturbance and how long they would be needed to protect the resources from project-related impacts.

CEQA does not require that once a project has been approved, with a disclosure that additional subsurface resources may be impacted/mitigated during construction, avoidance need be re-evaluated for every unanticipated cultural resource site that might be encountered. Such a proposition would not only have untenable implications on construction schedule and cost, it would likely render a project unfinanceable. In addition, the Commission should consider that in an attempt to satisfy concerns raised by CRIT, NextEra Blythe Solar agreed to modify the Conditions of Certification specifically to allow in-situ reburial if authorized by BLM. NextEra Blythe Solar also testified that it would be amenable to avoiding new eligible sites found during construction if it could be easily done without interfering with construction cost and schedule.¹⁵

NextEra Blythe Solar has already avoided many sites by its reconfiguration, has agreed to a modification to Condition of Certification **CUL-5** to accommodate in-situ or onsite reburial if allowed by BLM, and through the development of the CRMMP will avoid those resources that can be easily avoided while meeting the overall project objectives. Therefore, the Commission can conclude that the preference for avoidance has already been implemented.

MITIGATION MEASURES ARE LEGALLY ADEQUATE

CRIT asserts that the Conditions of Certification require revision based solely on new information gathered as “lessons learned” from its involvement with the Genesis Solar Energy Project (Genesis). As explained by Mr. Kenneth Stein at the evidentiary hearing, nothing about the Genesis Project presented “new information” justifying a change to any BSPP Condition of Certification. In the Final Staff Assessment for the Genesis Project, CEC Staff concluded that during construction there was a high likelihood of uncovering the exact types of resources that were ultimately uncovered, and the Conditions of Certification and the CRMMP for that project prescribed a thoughtful and detailed process

¹⁵ 11/19/13 RT pages 122- through 126, Testimony of Kenneth Stein.

for addressing those resources; a process that proved to be successful upon implementation. To the extent that there was any lesson learned, it is that the CRMMP should contain more specific timeframes for treating resources discovered during construction so that future projects do not endure unnecessary construction delays. There is simply no other credible evidence in the record warranting a wholesale rewrite of the Conditions of Certification to address CRIT's opinion. Staff also agrees that the Conditions of Certification do not need to be rewritten to address any alleged pitfalls from their implementation for Genesis.

BSPP COMPLIES WITH ALL APPLICABLE LORS

CRIT also asserts that the BSPP will not comply with certain federal LORS – an assertion which lacks any support in the record.

First, CRIT incorrectly asserts that the BSPP will not conform with the federal California Desert Conservation Area Plan (CDCA), which is implemented by the Bureau of Land Management (BLM). This assertion omits the unrefuted fact that the BLM amended the CDCA to specifically authorize the development of a solar electrical generating facility and associated transmission line in its Record of Decision (ROD) issued on October 22, 2010 for the same lands encompassing the Modified Project. That existing CDCA plan amendment is and will remain in effect and is not part of BLM's separate review of the proposed amendment to NextEra Blythe Solar's existing Right of Way Grant.¹⁶ The issuance of that ROD and associated ROW Grant by BLM to allow development of a solar generating facility on its land is irrefutable evidence that the BSPP complies with federal land planning LORS.

Second, CRIT argues that the Modified Project would also conflict with BLM visual classifications. The Commission similarly need not consider this argument because BLM has authorized the specific use of the site for a solar electrical generating facility and associated transmission line pursuant to its 2010 ROD without any change or amendment to BLM's visual resource management classification for the relevant area, and no further review is proposed by BLM for the Modified Project.¹⁷

CONCLUSION

NextEra Blythe Solar has worked diligently and cooperatively with Staff and CRIT to accommodate reasonable requests. However, CRIT's requests for wholesale changes to

¹⁶ See Notice of Intent to Prepare an Environmental Impact Statement for the Blythe Solar Power Project, Riverside County, CA, 78 Fed. Reg. 53,778 (Aug. 20, 2013).

¹⁷ *Ibid.*

the Conditions of Certification are unreasonable considering the Modified Project significantly reduces cultural resource impacts across the board. The Commission should reject CRIT's arguments regarding the scope of the proceedings and the assertions of deficient analysis and mitigation. The Modified Project will reduce impacts in every area and should be approved.

Dated: December 3, 2013

A handwritten signature in blue ink, appearing to read "Scott A. Galati", with a horizontal line extending to the right from the end of the signature.

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