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Ms. Mary Dyas
Compliance Project Manager
California Energy Commission
1516 Ninth Street
Sacramento, California 95814

Subject: Comments on the California Energy Commission's Final Staff Assessment for the Proposed Blythe Solar Electric Generating Facility (09-AFC-06C)

Dear Ms. Dyas:

The U.S. Fish and Wildlife Service (Service) has reviewed the California Energy Commission's (CEC) Final Staff Assessment (FSA) Part B, docketed October 11, 2013, and participated in the November 12, 2013, workshop for the proposed Blythe Solar Power Project (BSPP), owned by NextEra Blythe Solar Energy Center, LLC. The BSPP, a parabolic solar trough facility originally planned for on approximately 7,043 acres, was licensed by the CEC in 2010. In June 2012, NextEra Blythe Solar bought the assets of the BSPP in bankruptcy court and filed a Petition to Amend with the CEC for the project in April 2013. These proceedings are part of the process to analyze the change in technology for the proposed project in the revised petition to amend the license.

The proposed modifications to the project include replacing the parabolic trough solar collection system and associated heat transfer fluid with photovoltaic panels. The BSPP project would be comprised of four phases designed to generate a total of approximately 485 megawatts (MW) (nominal) of electricity when completed. The first three units (phases) would consist of approximately 125 MW each. The fourth unit would generate approximately 110 MW. All four units would share an operations and maintenance facility, one on-site switchyard, access and maintenance roads, perimeter fencing, desert tortoise fencing, and other ancillary security facilities, and a 230-kilovolt (kV) generation-tie line. The transmission corridor is located in the center as described for the BSPP.

The primary concern and mandate of the Service is the protection of fish and wildlife resources and their habitats. The Service has legal responsibility for the welfare of migratory birds, anadromous fish, and threatened and endangered animals and plants occurring in the United States. As such, we are responsible for administering the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.); the Bald and Golden Eagle Protection Act, as amended (16 U.S.C. 668); and the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703-712). We recognize the need for development of renewable energy and the challenge of balancing solar energy development with conservation of natural resources in the southwest. We are working with local, State, and Federal agencies involved in

desert-wide regional planning to help achieve the various State and Federal renewable energy goals and policies guiding renewable energy programs in a manner consistent with the Service's mission.

We concur with CEC staff and the FSA that the proposed BSPP project would have significant impacts to biological resources. We are concerned with the suite of direct, indirect, and cumulative loss of abundance, distribution, and habitat function for a diversity of desert dependent species and avian species (e.g., resident, winter visitors, and migrants). The Service is also concerned with the multiple effects, as disclosed by the CEC, of photovoltaic panels (e.g., impact mortality, habitat loss, and attractant qualities of the site) on avian species. To date limited information exists on bird collisions at solar energy facilities to compare and understand the magnitude of risks for each technology type and few utility-scale photovoltaic, parabolic trough, and power tower projects are currently in operation. As incidental reports of collisions are becoming available from utility-scale photovoltaic and concentrating solar power facilities, we are noting impacts to multiple species including waterbirds, passerines, and raptors involving various project features, including solar panels or heliostats, evaporation ponds, fencing, distribution lines within the facility, gen-tie lines, and metal posts within the panel arrays before the panels are installed.

The BSPP is located near the Colorado River and agricultural area, a known migratory flyway and area that is also rich in resident bird diversity. The Service is concerned about the potential for birds to mistake the solar field for a waterbody ("lake effect") and that it could attract waterbirds moving through the area to the project site. While we recognize that the project's footprint has been reduced to 4,070 acres, thereby reducing some of the effects of habitat loss; it is unknown if this reduction will significantly reduce the attractant quality of the site or mortality rates due to project's location, industrial size, and cumulative effects from the McCoy project and other solar projects along the Interstate 10 corridor. Additionally, the project would include up to 8 acres of evaporation ponds adjacent to the photovoltaic fields that will also draw birds into the area where they may encounter a number of threats from project features. Many avian species are attracted to water sources, especially in the desert. In an effort to reduce the number of potential attractants, we recommend the evaporation ponds are removed (or effectively covered and camouflaged) from the proposed project.

Due to the limited information available on avian mortalities associated with different solar technologies, the Service recommends a robust mortality monitoring plan be developed and implemented to estimate the overall mortality of the project, identify potential avoidance and minimization measures, and as the basis for adaptive management. We recommend working with the Service, Bureau of Land Management (BLM), California Department of Fish and Wildlife (CDFW), and CEC to develop a Bird and Bat Conservation Strategy (BBCS) for the project that incorporates avian abundance and habitat use data with an analysis of site specific threats, a mortality monitoring component and further identifies risks and reduces/offsets impacts to avifauna and bats.

Bird and Bat Conservation Strategy

A BBCS should identify mortality risks and adaptive management strategies to reduce threats to avian species and bats. CEC's Condition of Certification Biology-15 (COC-BIO-15) addresses some of the key components of the BBCS and designates that the mortality monitoring will commence during the operational phase. Based on mortality reports from other facilities, the Service is concerned that avian mortalities and other impacts to wildlife will occur long before construction of a

project is complete. Consequently, we recommend that the BBCS and all associated permits be in place prior to beginning construction. The BBCS should include a scientifically robust mortality monitoring plan for the project that will be conducted by a third party, hired by CEC or the BLM. We recommend that this plan be developed in coordination with the Service, BLM, CDFW, and CEC. This plan should fully address and monitor construction-related mortalities of wildlife (including mammals, reptiles, and avifauna) at all project features (evaporation ponds, fencing, utility wires, and impacts with vehicles), photovoltaic presence (monitoring from first installation of panels), and operation. We recognize developing a robust monitoring plan for the construction period may be challenging, but there are cost-effective sampling methods that can be employed. We also recommend that carcass removal trials commence before construction and continue seasonally during the mortality monitoring period. Carcass removal and searcher efficiency trials are necessary to augment calculations for a statistically robust confidence interval for avian mortalities. We are aware that the scavenger community can change seasonally and we believe may vary depending on the project phase.

A robust adaptive management program should be specified in the BBCS that would address the need for additional information (i.e., offsite behavior or radar studies to determine at what scale birds may be attracted to the project) based on the extent of, and circumstances surrounding, avian and bat mortality at the site, and explore the most effective methods for avoiding and minimizing these impacts. We recommend removing the language "clearly attributable to the project" from COC BIO-15 (6a), which describes the triggers of the adaptive management program. The way this condition is currently written is contradictory to the evidentiary hearing discussion at which NextEra stated that in lieu of background mortality studies or control sites, they would assume that all project mortalities are related to the project. In addition, we recommend that any associated adaptive management triggers for COC BIO-15 (6) be based on greater than anticipated mortalities of any migratory birds.

The Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703, is a strict liability statute, meaning that proof of intent, knowledge, or negligence is not an element of an MBTA violation. The statute's language is clear that actions resulting in a "taking" or possession (permanent or temporary) of a protected species, in the absence of a Service permit or regulatory authorization, are a violation of the MBTA. The MBTA does not specifically authorize the incidental take of migratory birds.
The BBCS is not a surrogate for a take permit under the MBTA; therefore, it does not limit or preclude the Service from exercising its authority under any law, statute, or regulation, nor does it release any individual, company, or agency of its obligations to comply with Federal State, or local laws, statutes, or regulations. The Service recommends that the CEC conduct public workshops to present BBCS data collection results, discuss and evaluate suitable adaptive management measures, and determine if additional mitigation is required.

Bald and Golden Eagle Protection Act

Golden Eagles and Bald Eagles are protected under the Bald and Golden Eagle Protection Act (Eagle Act), 16 U.S.C. 668–668d. The BGEPA prohibits the take, among other prohibited actions, at any time or in any manner, of any Bald Eagle or Golden Eagle, alive or dead, or any part, nest, or egg thereof. The mountainous topography surrounding the Blythe project site supports territorial adult Golden Eagles, as well as subadults and non-breeding adult floaters. The area also has Bald Eagles, which are known to migrate across the desert to the Colorado River. Based on a review of the

project-specific data, our knowledge of the site in a regional context, and the life history of the species, the proposed project has the potential to impact Golden Eagles through the loss of foraging habitat. We recommend Golden Eagle breeding surveys specified in COC Biology-24 be conducted at the known eagle nests and surrounding areas for new nests in the McCoy mountains adjacent to the project site using the survey protocols established by Pagel et al. 2010. In particular, surveys should commence observations from mid-December through the end of January to have the highest potential to document territorial adults and floaters in the vicinity of nest sites, which could indicate occupancy. These surveys should continue for at least 3 years post construction. We recommend coordination with other project applicants that are currently collecting Golden Eagle data within the McCoy Mountains to minimize potential impacts to the species.

Proposed Compensation

Migratory birds are an important component of our national heritage and a trust resource for the Service. Birds are also important economic resources, given that they prey on numerous species that are considered pests (e.g., some insects and rodents) and generate income to communities through bird-watching. As described above, the unauthorized take of migratory birds is illegal under the MBTA and currently, there are no mechanisms under this law to authorize incidental take of migratory birds for a project such as this. However, we support CEC and NextEra in considering the implementation of measures to partially offset the adverse effects of the proposed action to migratory birds and their habitat consistent with State mitigation responsibilities. However, the proposed adaptive mitigation does not alleviate the responsibility to avoid impacts to migratory birds under the MBTA. Furthermore, without a clear assessment of bird use of the site and the level of harm the project may cause from direct and indirect effects to migratory birds, we do not have any basis to evaluate whether total impacts from the project could be adequately offset through other conservation measures.

Nonetheless, we support the COC BIO-15 requiring the development of a BBCS that will be supported by robust data, and look forward to collaborating with NextEra Blythe and other permitting agencies on developing an appropriate approach to conserve birds, including residents, winter visitors, and migrants. We consider the proposal to implement adaptive mitigation to fund measures that would conserve migratory birds on a regional basis as an important first step to offset the potential adverse effects of the proposed project and to improve the conservation status of migratory birds on a regional basis. We recommend that resources mentioned in COC BIO-15 (7) to benefit migratory birds be directed to the Sonoran Joint Venture (http://sonoranjv.org/) or the Migratory Bird Conservation Fund. The joint venture would help offset impacts to birds resident to the Sonoran Desert, and the conservation fund would benefit water birds that breed in more northerly latitudes and winter in the project area. The Sonoran Joint Venture is a multi-agency Federal, State and non-governmental partnership with the mission of conserving the unique birds and habitats of the southwestern United States and northwestern Mexico. In addition, the National Fish and Wildlife Foundation is another venue that would be well suited to direct conservation funding for migratory birds in the region of the project.

Desert Tortoise Compensation Criteria

Condition of Certification BIO-12 (COC BIO-12) details the qualitative criteria used to select desert tortoise habitat lands proposed to fully mitigate for habitat loss and potential take of desert tortoise. We recommend that criteria be consistent with the goals, objectives, and recovery actions described in the Services' revised recovery plan. Specifically, one of our recovery plan goals is to secure lands for habitat conservation that counters habitat loss and protects tortoise by strategic habitat acquisition of sensitive areas or areas within designated tortoise conservation areas (TCA). Therefore, we recommend adding language to COC BIO-12 that prioritizes land acquisition within the closest TCA, the Chuckwalla Critical Habitat Unit, within the Colorado Desert Recovery Unit.

We appreciate the opportunity to participate in the amendment proceedings for this proposed project. We will continue to work with BSPP, CEC, and other permitting agencies in addressing outstanding resources issues. If you have any questions regarding these comments or our recommendations, please contact Thomas Dietsch in our Division of Migratory Birds (thomas_dietsch@fws.gov or 760-431-9440, ext. 214) or Tera Baird in Ecological Services (tera_baird@fws.gov or 760-322-2070, ext. 217).

Sincerely,

Kennon A. Corey
Assistant Field Supervisor

cc:
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