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DOCKET 07-AFC-1	
DATE	JUN 03 2008
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STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:) Docket No. 07-AFC-1
)
Application for Certification,) PROPOSED CONDITIONS OF
for the VICTORVILLE 2 HYBRID POWER) CERTIFICATION BIO-12 AND BIO-18
PROJECT)
by The City of Victorville)
_____)

At the evidentiary hearing on April 3, 2008, the Committee kept open the evidentiary record to allow continued discussion amongst the parties and other agencies regarding proposed Conditions of Certification BIO-12 and BIO-18. A workshop on the proposed conditions was held in the City of Victorville on April 28 and April 29, 2008 and continued by teleconference on May 5, 2008 and May 9, 2008. On May 15, 2008, CEC staff filed supplemental testimony including revised proposed conditions BIO-12 and BIO-18. The revised proposed conditions filed on May 15 are included in the Presiding Member's Proposed Decision (PMPD) issued on May 30, 2008.

Applicant has reviewed revised proposed conditions BIO-12 and BIO-18, as set forth in the PMPD. Applicant proposes certain modifications to proposed condition BIO-12, as set forth in the attached document, which also provides an explanation for each of the proposed changes. Applicant requests that CEC and other agency staff review the proposed modifications and consider a joint request to the Committee to modify condition BIO-12. Applicant concurs with condition BIO-18, as set forth in the PMPD.

Applicant is reviewing the PMPD in its entirety, and may have additional comments, which will be submitted prior to the deadline established by the Committee.

DATED: June 3, 2008

Respectfully submitted,



Michael J. Carroll
of LATHAM & WATKINS LLP

PROPOSED CONDITIONS OF CERTIFICATION

DESERT TORTOISE IMPACT AVOIDANCE AND MINIMIZATION MEASURES

BIO-12 The project owner shall incorporate all terms and conditions from the USFWS (2008a) Biological Opinion and the requirements identified in the final desert tortoise translocation plan submitted May 8, 2008, with the exceptions noted below in the Handling and Monitoring and Reporting sections, into the project's final BRMIMP. The BRMIMP will also include the mitigation measures identified in Biological Resources section 6.4 and Appendix H of the AFC (Victorville 2007a), responses to data requests (ENSR 2007d), and the Draft Biological Assessment (ENSR 2007b) unless they conflict with terms and conditions required in the Biological Opinion, final desert tortoise translocation plan, below, or elsewhere in the conditions of certification. In the case of an apparent conflict in mitigation measures, the project owner shall prior to completion of the final BRMIMP notify the CPM, who will confer with USFWS and CDFG, and then clarify and resolve the differences.

The revised final desert tortoise translocation plan shall be resubmitted after the BRMIMP is approved by the CPM, and shall be consistent with the requirements of the approved BRMIMP and of this condition of certification. If there are additional changes to the BRMIMP affecting the desert tortoise translocation plan, the CPM may require modification and resubmittal of the desert tortoise translocation plan to reflect those changes.

The project owner shall ensure the following measures are implemented:

FENCING

1. Fence the construction areas and permanent facilities with desert-tortoise-proof fencing prior to mobilization in undeveloped areas. Gate(s) shall be desert tortoise proof as well. Gate(s) shall remain closed except for the immediate passage of vehicles. High use gate(s) will be maintained and have monthly examinations.
2. The fences will be maintained and checked on a daily basis to ensure the integrity of the fence is maintained. The Designated Biologist shall be present onsite to monitor construction and determine fence placement during fence installation.
3. Following fencing, a trained tortoise biologist shall search the interior and exterior of the fenced area areas for tortoises.
4. Temporary fencing during construction along roads shall be installed at the direction of the Designated Biologist, and a biological monitor shall be

on call for wildlife issues. Limit fence encroachment into relatively undisturbed desert tortoise, Mohave ground squirrel, and burrowing owl habitat while minimizing the potential for animals becoming trapped on the road side of the fence. The applicant shall account for the fence encroachment acreage in the final habitat disturbance calculations and provide any resulting, additional compensation habitat that would be required. At road intersections, extend the main fence at right angles along the edge of the intersecting road for 30 feet to discourage desert tortoises from following the main fence line from directly crossing the intersecting road.

HANDLING

5. Collection, holding, and translocation of tortoises shall comply with the Desert Tortoise Council (1994, revised 1999) handling protocol (i.e., guidelines for Handling Desert Tortoises during Construction Projects prepared for the USFWS) that ensures their health and safety.
6. Tortoises shall be kept upright at all times **except during brief periods during processing** and handled in a secure but gentle manner to minimize stress including the possibility of voiding the bladder.
7. Tortoise burrows shall be excavated using hand tools under the supervision of the Designated Biologist. Excavations are permitted only prior to 12:00 noon and within the temperature guidelines established in the Biological Opinion. To prevent re-entry by a tortoise, all burrows in the construction zone that do not contain tortoises shall be collapsed.
8. Instruct all employees and contractors to look under vehicles and equipment for the presence of protected species prior to movement. No equipment will be moved until the animal has left voluntarily or it is removed by a biologist authorized to do so. Any time a vehicle is parked **in unfenced native habitat**, the ground around and under the vehicle will be inspected for desert tortoises and other wildlife before the vehicle is moved.
9. The Designated Biologist shall follow the Desert Tortoise Council guidelines for proper handling of desert tortoise. If a desert tortoise is observed in an active work area on the project site, whether above ground, **or** in a burrow, ~~or in an open trench~~, it will be left to move on its own. If this does not occur within 15 minutes, the Designated Biologist can remove and relocate the tortoise into undisturbed habitat (i.e., at least 1,000 feet outside of the transmission line right-of-way, in a temporary holding area, or permanent translocation site). Desert tortoises that are found above ground, **including in a trench**, and need to be moved from harm's way, shall be placed in the shade of a large, marked shrub **and**

Comment [AK1]: Tortoises can be turned upside down for brief periods without causing apparent stress or physical harm. Examining the underside of a tortoise permits the identification of individual morphological features, shell condition and injuries.

Comment [AK2]: The BO identifies temperatures within which tortoises can be handled. Further, closing traps prior to noon may preclude an active tortoise from entering its burrow to escape the heat. When temperatures exceed lethal thresholds during the day, and once a burrow has been identified as vacant, it would be better to close it then.

Comment [AK3]: All fenced habitat will have been cleared of tortoises.

Comment [AK4]: All tortoises should be removed from trenches.

Comment [AK5]: All moved tortoises will be continually monitored to ensure their safety. It is not necessary to mark shrubs under which a tortoise is placed, as the tortoise is likely to move and will be watched.

monitored to ensure their continued safety. All desert tortoises removed from burrows will be placed in an unoccupied burrow of approximately the same size as the one from which it was removed. If an existing burrow is unavailable, the Designated Biologist will construct or direct the construction of a burrow of similar shape, size, depth, and orientation as the original burrow. The exception to this is during work on the linear facilities during fall and early spring, and only when daily temperatures do not exceed lethal thresholds. In this situation, a tortoise removed from a burrow will be placed in the shade of a bush and monitored to ensure that it locates another of its burrows and is safe. The project owner shall monitor desert tortoises moved during inactive periods for at least two days after placement in the new burrows to ensure their safety. The Designated Biologist will be allowed some judgment and discretion to ensure that survival of the desert tortoise is likely.

Comment [AK6]: When temperatures during the day are sufficiently cool, there is no need to place a tortoise in a burrow. In fact, it will likely leave the burrow immediately. We agree that the construction of a replacement burrow is appropriate, but because finding a tortoise in a burrow is likely to be unexpected and the construction of a burrow could delay moving the tortoise, we suggest that the tortoise be moved first. Following that, an artificial replacement burrow can be constructed as time allows. This would meet the practicality of removing the tortoise from the construction area as well as providing a replacement burrow.

~~Notwithstanding the~~ The final desert tortoise translocation plan, submitted May 8, 2008, shall include the following item shall be completed and reflected in the revised plan:

10. No desert tortoises shall be handled or moved prior to Energy Commission licensing of the project. ~~Change the schedule on page 27 of the plan (i.e., delete May and June) and other references throughout to reflect this limitation.~~

Comment [L&W7]: Modification for clarification only.

Comment [L&W8]: This language is unnecessary, and because the pagination of the plan will change, it presents a cross-referencing problem.

MONITORING AND REPORTING

11. Report all encounters with federally-or state-listed species to the Designated Biologist, who will record the following information for the monthly compliance report: (1) species name; (2) location (global positioning system coordinates, narrative and maps) and dates of observations; (3) general condition and health, including injuries and state of healing; (4) diagnostic markings, including identification numbers or markers; and (5) locations moved from and to.

~~Notwithstanding the~~ The final desert tortoise translocation plan, submitted May 8, 2008, shall include the following items shall be completed and reflected in the revised plan:

Comment [L&W9]: Same as above.

12. Monitor survivorship of translocated tortoises for at least 18 months, and report the results in consultation with the CPM, CDFG, and USFWS. This work shall encompass monitoring in all four seasons and be timed to include two spring both major activity seasons, fall and spring. This will allow a meaningful assessment of spring emergence from burrows in consideration of the atypical fall translocation time. References to the

Comment [AK10]: Two spring seasons, in addition to the fall season when tortoises are initially moved, would equal 20 months, not 18.

previous 12-month monitoring period shall be changed to 18 months throughout the plan.

13. Tortoises fitted with transmitters shall be monitored at least every other week because most movement will likely occur shortly during the active seasons, and more frequently, as needed, following release and following hibernation after release due to unfamiliarity with the new location. Once tortoises become more established the frequency of for are moving shorter distances such that they are less likely to be lost, monitoring can be changed change to monthly. Approval of any change in monitoring frequency will be acquired from appropriate agencies monthly. Following translocation and a planned telemetry monitoring period of at least 18 months, transmitters shall be removed (page 25 of plan).
14. All other desert tortoises ~~observed~~ encountered while tracking translocated tortoises will be marked with identifying numbers and processed for recorded, but not handled, and general health parameters and identifying features will be noted. Their location using GPS will also be recorded. All translocated animals found during a dawn to dusk search will be monitored between September 2008 and April 2010, for 18 months, after which transmitters will be removed. If animals translocated tortoises are not located in the one-day monitoring, continue searching until they are located. This might require multiple days depending on the ease or difficulty in locating the animals (page 48 of plan).

Comment [AK11]: Every other week is probably inadequate for newly released, translocated tortoises. There is a high probability of losing them if they are not followed much more frequently, given their anticipated movements and the transmitting range. The same is true following hibernation, assuming that they are translocated in Fall 2008.

Comment [L&W12]: Recommend deleting cross-references to specific pages in the plan, as they are likely to change.

Comment [AK13]: Information on gender, size, and clinical signs will be gathered on tortoises at the translocation site, but they will not be handled. The latter would require a change in the BO and is unnecessary especially in the context of the information from the translocation effort that is anticipated from translocating so few tortoises.

Comment [AK14]: CEC agreed to 12 months in the workshop; CEC then determined that the time would be 18 months. Through April 2010 would be 20 months.

TRANSLOCATION SITE

15. The translocation site selected shall support suitable desert tortoise habitat, including appropriate cover and forage.
16. No sensitive biological resources, including other special-status species sensitive habitats or unique vegetation assemblages, shall be disturbed during translocation activities and site preparation, such as artificial/nest burrow installation and juvenile desert tortoise release pen construction.
17. Existing roads or pedestrian access where roads are lacking shall be used to transport desert tortoises to the translocation site and monitor translocation success.

Verification: At least 30 days prior to the start of any site or related facilities mobilization activities, the project owner shall incorporate the associated terms and conditions of this condition of certification into the project's BRMIMP, and implement them.

**STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 07-AFC-1
)	
Application for Certification,)	ELECTRONIC PROOF OF SERVICE
for the VICTORVILLE 2)	LIST
HYBRID POWER PROJECT)	
by the City of Victorville)	(revised May 30, 2008)
)	
_____)	

Transmission via electronic mail and by depositing one original signed document with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the following:

DOCKET UNIT

CALIFORNIA ENERGY COMMISSION

Attn: DOCKET NO. 07-AFC-1
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VICTORVILLE II HYBRID POWER PROJECT
CEC Docket No. 07-AFC-1

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VICTORVILLE II HYBRID POWER PROJECT
CEC Docket No. 07-AFC-1

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Transmission via U.S. Mail addressed to the following:

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DECLARATION OF SERVICE

I, Paul Kihm, declare that on June 3, 2008, I deposited a copy of the attached:

PROPOSED CONDITIONS OF CERTIFICATION BIO-12 AND BIO-18

with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the California Energy Commission. I further declare that transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service List above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 3, 2008, at Costa Mesa, California.



Paul Kihm