



State of California

The Resources Agency of California

Memorandum

To: Committee for the Victorville 2 Project (07-AFC-1) Date : May 15, 2008
Commissioners Boyd and Pfannenstiel
Hearing Advisor Raoul Renaud

From : Caryn Holmes *cyj*
California Energy Commission
1516 Ninth Street
Sacramento CA 95814-5512

cc: John Kessler, Misa Ward, Rick York, Tonya Moore (CDFG), Ray Bransfield (USFWS), Mary Dellavalle (RWQCB), POS list

Subject: **Supplemental Testimony on Conditions of Certification BIO-12 and BIO-18 for the Victorville 2 Project**

At the evidentiary hearing held on April 3, 2008 for the Victorville 2 Project, the Committee decided to keep the record open to allow completion of necessary changes to Conditions of Certification BIO-12 (DESERT TORTOISE IMPACT AVOIDANCE AND MINIMIZATION MEASURES) and BIO-18 (STREAMBED IMPACT AVOIDANCE AND MINIMIZATION MEASURES). This decision was made because a significant amount of new information warranted continued discussions among staff, agencies, and the applicant. Staff conducted a series of publicly-noticed workshops to reach resolution on the outstanding issues. The attached pages contain staff's revised conditions of certification that incorporate these changes.

In summary, BIO-12 has been revised to include and refine specific items regarding fencing, handling, monitoring and reporting, and the potential desert tortoise translocation land, which may not be chosen until after licensing. The previous version of BIO-12 was not organized by topic as in the revised version and contained redundancies with other parts of the Final Staff Assessment (FSA), the Biological Opinion, and the desert tortoise translocation plan. Staff has consolidated items by topic and eliminated unnecessary redundancies in part by incorporating the desert tortoise translocation plan by reference. Considering that this plan has not been finalized or approved by agencies, items that differ substantially from the plan or require emphasis have been retained. Additionally, conditions on the pending selection of the translocation land were added to avoid the possibility of additional off-site impacts to biological resources.

BIO-18 has been shortened significantly following the applicant's data presentation on impacts to jurisdictional waters at the workshop on April 28, 2008. The California Department of Fish and Game (CDFG) determined that only two washes would be affected, and the impacts would be extremely minor, and therefore, many of the original items in BIO-18 are no longer necessary. The pertinent impact avoidance and minimization measures were selected and reviewed with CDFG for inclusion in the revised BIO-18, and the Lahontan Regional Water Quality Control Board's concerns were addressed.

Staff requests that this information be admitted into evidence to replace the Conditions of Certification BIO-12 and BIO-18 originally presented in the FSA for incorporation into the Presiding Member's Proposed Decision.

Yours truly,

Caryn
Holmes

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CARYN HOLMES
Senior Staff Counsel

**Proof of Service List (Revised on 9/6/07)
filed with Original Document. Mailed from
Sacramento on May 15, 2008.)**

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 fenceline 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 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, 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, 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 and need to be moved from harm's way shall be placed in the shade of a large, marked shrub. 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 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.

Notwithstanding the final desert tortoise translocation plan, submitted May 8, 2008, 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.

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

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 seasons. This will allow a meaningful assessment of spring emergence from burrows in consideration of the atypical fall translocation time. References to the 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 after release due to unfamiliarity with the new location. Once tortoises become established the frequency of monitoring can be changed 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 while tracking translocated tortoises will be marked with identifying numbers and processed for general health parameters. 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, after which transmitters will be removed. If animals 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).

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.

STREAMBED IMPACT AVOIDANCE AND MINIMIZATION MEASURES

BIO-18 Except as specifically provided herein, the project owner shall not divert or obstruct the natural flow of, or alter the bed, channel, or bank of, or remove material from any drainage during construction and operation of the project. The project owner may use the existing roadway located at drainage D2 for the purpose of inspecting and maintaining the wastewater pipeline and transmission line but only during periods when the streambed is dry. The project owner may trench across drainage DI for the purpose of installing the wastewater pipeline.

The project owner shall implement the following best management practices and notification procedures:

- A. No debris, soil, silt, sand, bark, slash, sawdust, rubbish, construction waste, cement or concrete or washings thereof, oil or petroleum products or other organic or earthen material should be allowed to enter into or placed where it may be washed by rainfall or runoff into, waters of the state. When operations are completed, any excess materials or debris should be removed from the work area. The project owner should comply

with all litter and pollution laws. All contractors, subcontractors, and employees should also obey these laws and it shall be the responsibility of the operator to ensure compliance.

- B. Any equipment or vehicles driven and/or operated within or adjacent to the stream/lake should be checked and maintained daily, to prevent leaks of materials that if introduced to water could be deleterious to aquatic life.
- C. Stationary equipment such as motors, pumps, generators, and welders, located within or adjacent to the stream/lake should be positioned over drip pans.
- D. No equipment maintenance should be done within or near any stream channel where petroleum products or other pollutants from the equipment may enter these areas under any flow.
- E. The cleanup of all spills should begin immediately. CDFG should be notified immediately by the project owner of any spills and should be consulted regarding clean-up procedures.
- F. Raw cement/concrete or washings thereof, asphalt, paint, construction waste, or other coating material, oil or other petroleum products, or any other substances, which could be hazardous to aquatic life, resulting from project related activities, should be prevented from contaminating the soil and/or entering drainages. Any of these materials, placed within or where they may enter a drainage, by the project owner or any party working under contract, or with the permission of the project owner, should be removed immediately.
- G. Spoil sites shall not be located within a drainage, lake, or locations that may be subjected to high storm flows, where spoils could be washed back into the feature or where it will impact streambed habitat, or aquatic or riparian vegetation.
- H. The project owner shall notify the CPM and CDFG, in writing, at least five (5) days prior to initiation of project activities in jurisdictional areas as noted and at least five days prior to completion of project activities in jurisdictional areas.
- I. The project owner shall notify the CPM and CDFG of any change of conditions to the project, the jurisdictional impacts, or the mitigation efforts, if the conditions at the site of a proposed project change in a manner which increases or decreases the risk that a fish or wildlife resource may be substantially adversely affected by the proposed project. The notifying report shall be provided to the CPM and CDFG no later than seven (7) days after the change of conditions is identified. As used here, change of condition refers to the process, procedures, and methods of operation of a project, the biological and physical characteristics of a project area, or the laws or regulations pertinent to the project as defined

below. A copy of the notifying change of conditions report shall be included in the Annual Compliance Report.

- J. The project owner shall provide a copy of the Energy Commission Decision to all contractors, subcontractors, and the applicant's project supervisors. Copies shall be readily available at work sites at all times during periods of active work and must be presented to any personnel from CDFG or another agency upon demand.

Verification: No fewer than 30 days prior to the start of any site or related facilities mobilization activities, the project owner shall implement the mitigation measures above as required by the Energy Commission and CDFG. No fewer than 30 days prior to the start of work potentially affecting waters of the state or riparian vegetation, the project owner shall provide written verification (i.e., through incorporation into the BRMIMP) to the CPM that the above best management practices will be implemented and provide a discussion of work in waters of the state in Monthly Compliance Reports for the duration of activities affecting waters of the state or riparian vegetation.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE
STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION
FOR THE VICTORVILLE 2
HYBRID POWER PROJECT

Docket No. 07-AFC-1
PROOF OF SERVICE
(Revised 9/6/07)

INSTRUCTIONS: All parties shall 1) send an original signed document plus 12 copies **OR** 2) mail one original signed copy **AND** e-mail the document to the web address below, **AND** 3) all parties shall also send a printed **OR** electronic copy of the documents that **shall include a proof of service declaration** to each of the individuals on the proof of service:

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DECLARATION OF SERVICE

I, April Albright, declare that on May 15, 2008, I deposited copies of the attached Supplemental Testimony on Conditions of Certification BIO-12 and BIO-18 for the Victorville 2 Project in the United States mail at Sacramento, CA with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

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.



April Albright