



SAN GORGONIO CHAPTER

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*Regional Groups Serving Riverside and San Bernardino Counties: Big Bear,
Los Serranos, Mojave, Moreno Valley, Mountains, Santa Margarita, Tahquitz.*

April 21, 2009

Via Email and Federal Express

California Energy Commission
Attn: Paul Kramer, Project Manager
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

DOCKET

07-AFC-5

DATE APR 21 2009

RECD. APR 21 2009

Re: **Reply to the Commission's Request for Comments on the Revised Committee
Schedule for the Ivanpah Solar Electric Generating System, 07-AFC- 5**

Dear Mr. Kramer:

On behalf of the Sierra Club's San Gorgonio Chapter, this letter responds to both staff's and the applicant's status reports concerning the Commission's March 20, 2009, request for scheduling proposals. The Sierra Club provided opening comments on April 10, 2009, requesting that the Commission not commence evidentiary hearings until the BLM issues its FEIS and the Fish and Wildlife Service concludes formal consultation.

1. The Sierra Club Supports Staff's Analysis in its Scheduling Recommendation and its Call for the Applicant to Provide All Outstanding Documents

We write in support of staff's specific request that the applicant finalize all of the outstanding necessary documents prior to the Commission moving the proceeding forward. Staff was clear that these missing documents must be provided "in sufficient detail to describe the proposed project, support the assessment of the potential impacts and identify the necessary mitigation measures to avoid or lessen impacts below significant."¹

Similarly, we generally support staff's proposal that the Committee issue the PMPD after the BLM and staff complete the FEIS. While still out of synch with BLM, and the Sierra Club's recommended schedule, this approach attempts to adhere to the memorandum of understanding between the BLM and Commission.² Pursuant to the MOU, the agencies agreed to issue a joint PSA/DEIS and then a joint DEIS/FSA. We understand the parties deviated from that aspect for this particular project; nevertheless, the MOU's objective that each agency coordinate its environmental review and permitting processes with the other must still be achieved.

¹ Staff's Status Report No. 8, at p. 3 (April 15, 2009).

² Memorandum of Understanding between the Department of the Interior and the California Energy Commission Staff Concerning Joint Environmental Review for Solar Thermal Power Plant Projects (2007).

In support of its revised schedule, staff outlined several project realities that will likely slow the schedule anyway and which support an argument that the Committee should simply build in extra time now. The realities concern: (1) the sheer volume of significant information needed from the applicant for the FSA/DEIS; (2) the complexity of the proceeding; (3) the number of agencies and intervenors involved; and, (4) the intense public interest in the project.³ As a result, any attempt to expedite the proceeding in the manner requested by the applicant would likely backfire resulting in a longer and less predictable schedule down the road.

Based on these factors, staff pointed out that the PMPD could incorporate the BLM and CEC staff responses to comments received under both CEQA and NEPA. This process may delay the schedule somewhat, but could also result in a PMPD that more fully reflects analyses of feasible alternatives, cumulative impacts, and mitigation measures worked out during the public comment process, which in turn may ultimately expedite the committee's evidentiary hearings. Thus, while the Sierra Club still recommends that the Commission not commence evidentiary hearings until all agency review and permitting processes are complete, staff's approach generally achieves the same objective.

2. The Sierra Club Opposes the Applicant's Scheduling Recommendation and Its Failure to Provide Staff with Critical Planning and Mitigation Plans

The Sierra Club opposes the applicant's suggestion that the project proceed on the same schedule as "the Commission follows in every case."⁴ First, no two projects follow the same licensing trajectory; but more important, this case has no real precedent to follow. It has been 20 years since the Commission has licensed a large scale solar project.⁵ All parties are learning as they go. Speed over precision is not the goal here given the numerous complex and unique issues presented. For this reason, it is particularly frustrating that the applicant charges staff with asking it to "provide too much detailed design at this stage of the permitting process," while simultaneously asking for speeding resolution.⁶

Again, we request that the Committee schedule no further actions in this proceeding until the applicant provides staff with critical information such as a mitigation proposal, biological assessment and applications for an incidental take permit and streambed alteration agreement, among others.⁷ These outstanding documents cover the very issues that compelled the Sierra Club to intervene in the proceeding in the first place. Thus, the Sierra Club has an interest in securing a process that fully develops and resolves critical wildlife and habitat issues at this juncture, well before the project reaches the Committee. Of course, the only real avenue to a timely resolution of this project is the applicant's development and disclosure of these essential plans now, so that the agencies can complete their work.

It is unclear whether the applicant is asking the Committee to relieve it from providing the requested data, or whether it may simply refuse at a later date. In either case, the applicant invoked a faulty legal interpretation of the Commission's CEQA obligations by deeming CEQA documents purely "informational."⁸ Thus, according to the applicant, the administrative record

³ Staff's Status Report No. 8 at pp. 6-7.

⁴ Applicant's Status Report No. 8, at p. 5 (April 9, 2009).

⁵ <http://www.energy.ca.gov/siting/solar/>

⁶ Applicant's Status Report No. 8, at p. 3.

⁷ Staff's Status Report No. 8 at p. 4.

⁸ Applicant's Status Report No. 8, at p. 3.

need only “inform public agency decision makers and the public **generally** of the significant environmental effect of a project ...”⁹

In reality, CEQA has two basic purposes. First, as the applicant noted, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.¹⁰ The PSA, like a DEIR, is the “heart” of this requirement.¹¹ CEQA mandates that an EIR, or EIR-equivalent, be prepared “with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences.”¹² Further, in preparing an environmental document, **“an agency must use its best efforts to find out and disclose all that it reasonably can.”**¹³ Second, **CEQA requires agencies to avoid or reduce environmental damage when possible by requiring alternatives and/or mitigation measures.**¹⁴

Staff cannot satisfy CEQA’s purposes if the applicant refuses to provide staff with the information necessary to draft a CEQA-compliant document. And, staff has informed the applicant that that is exactly what is at risk of occurring here. As a result, the applicant’s recalcitrance could end in a protracted proceeding dependent upon staff obtaining data elsewhere, or staff simply submitting a poorly developed record to the Committee. Neither of these avoidable outcomes are acceptable.

Despite the foregoing, the applicant proposed a schedules where the Committee would hold the pre-hearing conference 15 days after issuance of the FSA/DEIS, and evidentiary hearings 15 days after that.¹⁵ It appears the applicant’s proposed schedule may be based upon a fundamental misunderstanding of the practical purpose of the Commission’s evidentiary hearings. According to the applicant’s status report, the Commission develops the administrative record at the evidentiary hearings for issues in dispute.¹⁶ This may be technically correct for parties seeking subsequent judicial review of the Commission’s decision. However, the fact is, the Committee functions more akin to a court, with staff the administrative body charged with developing the evidentiary record, then working to resolve, with other agencies, intervenors and the public, outstanding issues well before a project reaches the Committee’s consideration. Hopefully, this project will be no different. For the process to work as efficiently as possible, additional time will likely be necessary so that the parties and public can work to resolve issues in the CEQA/NEPA comment phases and during the FSA workshops.

In short, the Sierra Club has a strong interest in resolving its issues well before the proceeding advances to evidentiary hearings. Thus, we strongly urge the Committee to afford the parties and the public a full opportunity to develop and refine, through comments, responses to comments and workshops, the full array of feasible alternatives and mitigation required by law prior to commencement of the final proceedings.

⁹ *Id.* (emphasis in original).

¹⁰ 14 Cal. Code Regs. (“CEQA Guidelines”), § 15002(a)(1).

¹¹ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

¹² CEQA Guidelines, § 15151.

¹³ CEQA Guidelines, § 15144.

¹⁴ CEQA Guidelines, § 15002(a)(2) and (3). *See also Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400.

¹⁵ Applicant’s Status Report No. 8, at p. 8.

¹⁶ *Id.* at p. 5.

Respectfully Submitted,

Sid Silliman VL

Sidney Silliman
Sierra Club San Geronimo Chapter and Desert Committee

....To explore, enjoy and preserve the nation's forests, waters, wildlife, and wilderness.



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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APPLICATION FOR CERTIFICATION
FOR THE **IVANPAH SOLAR ELECTRIC
GENERATING SYSTEM**

DOCKET No. 07-AFC-5

PROOF OF SERVICE
(Revised 4/16/09)

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DECLARATION OF SERVICE

I, Violet Lehrer, declare that on April 21, 2009, I served and filed copies of the attached Reply, dated April 21, 2009. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

[www.energy.ca.gov/sitingcases/ivanpah]. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

_____ sent electronically to all email addresses on the Proof of Service list;

by personal delivery or by depositing in the United States mail at Sierra Club
85 Second St., Second Floor
San Francisco, CA 94105
_____ with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (**preferred method**);

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 07-AFC-5
1516 Ninth Street, MS-4
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I declare under penalty of perjury that the foregoing is true and correct.

Violet Lehrer