

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:)

Application for Certification for the Ivanpah Solar)
Electric Generating System)
_____)

Docket No. 07-AFC-5

DOCKET	
07-AFC-5	
DATE	<u>DEC 29 2009</u>
RECD.	<u>DEC 29 2009</u>

**APPLICANT'S SECOND
PREHEARING CONFERENCE STATEMENT**

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On November 5, 2009, the Committee issued a Notice of Prehearing Conferences and Evidentiary Hearing. On November 23, 2009, the Committee issued its Revised Notice of Prehearing Conferences and Evidentiary Hearing. This Second Prehearing Conference Statement contains the requested information as follows.

1. *The topic areas that are complete and ready to proceed to evidentiary hearing.*

All topics are complete and ready to proceed.

2. *The topic areas that are not complete and not yet ready to proceed to evidentiary hearing, and the reasons therefor.*

All topics are complete and ready to proceed.

3. *The topic areas that remain disputed and require adjudication, and the precise nature of the dispute for each topic.*

Biological Resources requires adjudication. As stated in Applicant's First Prehearing Conference Statement, Applicant disagrees with the Desert Tortoise Compensatory Mitigation measures proposed by Staff (BIO-17). Applicant's letter of August 7, 2009 sets forth Applicant's position: 1:1 mitigation per BLM's existing programs is all that is required by federal and state law. The lands are not converted in perpetuity, as Staff argues. Instead, the Applicant has an obligation to restore the project site at the end of the right of way grant. BLM requires a bond to assure restoration. Moreover, while it is CDFG's policy preference, the California ESA does not require "acquisition" of mitigation property. Proposed mitigation measures must be "feasible" as that term of art is used in CEQA, and there is no showing that acquisition in the acreage required is feasible. In contrast, the Applicant's Comprehensive Settlement Proposal provides an additional 2:1 mitigation for a total of mitigation at 3:1. The Applicant's proposal at 3:1 clearly satisfies both federal ESA requirements and California ESA requirements.

Applicant also disagrees with the Staff's proposals on rare plants, both as to the proposed finding of significant impacts and the proposed scope of avoidance measures (BIO-18). The Applicant's Low Impact Design, among other Project design features, provides mitigation that avoids and minimizes potentially significant impacts. Applicant has proposed an alternative condition, BIO-18, providing a plan for avoidance and minimization of impacts to rare plants that would be focused on each of the applicable species. The Weed Management Plan (BIO-13) and the Closure, Revegetation and Rehabilitation Plan (BIO-14) may also require limited oral testimony.

Applicant also disagrees with the conclusion that the impacts to the Nelson's bighorn sheep and state waters are significant (BIO-19 and BIO 20). Nelson's bighorn sheep do not occur on site and there is no evidence supporting a finding of significant impacts on the Nelson's bighorn sheep. Notwithstanding these facts, Applicant has made initial contacts with the Society for the Conservation of Bighorn Sheep and communicated Applicant's willingness and commitment to work with the Society in installing one or more artificial water sources for Nelson's bighorn sheep, outside the regulatory process. Furthermore, the potential impacts to state waters are mitigated to less than significant via the measures incorporated into the Project's design, including the Low Impact Design, and via compliance with the Regional Water Quality Control Board's requirements. Further mitigation is not required in the absence of any significant unmitigated impacts to existing fish or wildlife resources.

Soil & Water Resources was a topic area identified in Applicant's First Prehearing Statement as requiring adjudication. In the interim, Staff and Applicant have worked closely to reach a consensus on the outstanding issues, and expect that no live witness testimony will be

required; however, pending resolution of this matter, we have reserved time below as a placeholder.

4. ***The identity of each witness sponsored by each party (note: expert witnesses must have professional expertise in the scope of their testimony); the topic area(s) which each witness will present; a brief summary of the testimony to be offered by each witness; qualifications of each witness; and the time required to present direct testimony by each witness.***

The Applicant's witnesses, their topic areas, a brief summary of their testimony, and their qualifications are set forth in the Applicant's pre-filed testimony filed on November 16, 2009 (Applicant's "Opening Testimony"), and additional Rebuttal witnesses, if any, will be identified in the Applicant's Rebuttal Testimony, to be filed on January 4, 2009.

As for direct examination, Applicant anticipates direct examination for the following subjects: Biological Resources, 60 Minutes; Alternatives, 35 Minutes; and Soil & Water, 30 Minutes (see notes in Section 3, above).

5. ***Topic areas upon which a party desires to cross-examine witnesses, a summary of the scope of such cross-examination, and the time desired for such cross-examination.***

Applicant anticipates cross-examination of other Parties as follows:

- CEC Staff: 120 Minutes
- Basin and Range Watch: 15 Minutes¹
- California Native Plant Society: 30 Minutes
- Center for Biological Diversity: 120 Minutes
- Defenders of Wildlife: No witnesses identified.
- Sierra Club: 75 Minutes
- Western Watersheds Project: 60 Minutes

6. ***A list identifying exhibits and declarations that each party intends to offer into evidence and the technical topics to which they apply (see following section on format).***

¹ Basin and Range Watch's testimony includes the title "Visual Resources". The Hearing Records on Visual Resources closed on December 14, 2009. Applicant believes that Ms. Cunningham's testimony is intended to be limited to Biological Resources and that Basin and Range Watch is not seeking to re-open the Hearing Record on Visual Resources. With this understanding, Applicant will not object to Ms. Cunningham's testimony as filed.

The Applicant's Exhibit List was attached to its Opening Testimony as Attachment 2 and any Rebuttal exhibits will be included in the Applicant's Rebuttal Testimony, to be filed on January 4, 2009. Declarations were attached to Applicant's pre-filed Opening Testimony.

7. *Proposals for briefing deadlines, vacation schedules, and other scheduling matters.*

Applicant believes the four days of hearings scheduled for January should be sufficient. Applicant recommends that optional Opening Briefing should be scheduled for 3 weeks after the last transcript of the evidentiary hearings are made available. Optional Reply Briefs should be due 10 days after the Opening Briefs are filed and served.

8. *For all topics, the parties shall review the Proposed Conditions of Certification listed in the Final Staff Assessment (FSA) for enforceability, comprehension, and consistency with the evidence, and submit any proposed modifications.*

Applicant in its Opening Testimony suggested improvements to certain Conditions of Certification. Staff and Applicant are working diligently to resolve any potential disagreements, and the Applicant expects most of these issues to be resolved through further discussions with Staff. Regardless of whether all of the issues are resolved, potential disagreements with Staff are not factual in nature, do not require adjudication, and can be addressed in briefings.

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The Applicant will provide whatever support the Committee needs to close the Evidentiary Record and finish Evidentiary Hearings by January 14, 2010.

December 29, 2009

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By: _____

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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on December 29, 2009, I served the attached *Applicant's Second Prehearing Conference Statement* via electronic and U.S. mail to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.



Karen A. Mitchell

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07-AFC-5

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