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DOCKET	
07-AFC-5	
DATE	<u>June 30 2009</u>
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June 30, 2009

Commissioner Jeffrey Byron, Presiding Member
Commissioner James Boyd, Associate Member
Paul Kramer, Hearing Officer
Ivanpah Solar Electric Generating System (07-AFC-5)
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Dear Commissioners Byron and Boyd and Hearing Officer Kramer:

The Commission accepted the Application for this Project on October 31, 2007. Although it has been six hundred eight (608) days since the Application was deemed complete, the Commission has not yet achieved the pivotal milestone in the proceeding -- the issuance of the Final Staff Assessment / Draft Environmental Impact Statement (FSA/Draft EIS). Even more disturbing, however, is that the Commission has not set the date by which the FSA/Draft EIS will be issued.

The Committee’s June 2, 2009 Scheduling Order states, “Staff files Final Staff Assessment/Draft Environmental Impact Statement (FSA/DEIS)” forty-five (45) days after “Staff notifies parties that all information necessary to finish the Final Staff Assessment/Draft Environmental Impact Statement (FSA/DEIS) has been submitted.” (Scheduling Order, P. 4.)

For the reasons discussed below, the Applicant requests that the Committee issue an order finding that the Staff shall file the FSA/Draft EIS forty-five (45) days from June 3, 2009, the date that the Staff notified the Applicant that no further data must be submitted in order for the two agencies to finalize and file the FSA/Draft EIS.

The Scheduling Order is precise in its direction. It states that the 45 day clock begins to run when the Staff informs the parties that all information necessary to finish the FSA/Draft EIS has been submitted by those parties. To be sure, the Staffs of the Commission and the BLM are busy working on the Draft EIS/FSA; however, for this informational document (not a decision document), Staffs have what they *need*. Specifically, the Applicant is a party and it was informed by the Staff, clearly and unequivocally, on June 3rd that all information necessary for the Staff to complete the FSA/Draft EIS had been submitted.

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As set forth in the attached Chronology, the Staff notified the Applicant on June 3, 2009, that it had all of the information that it needed to publish the FSA/Draft EIS. While the Staff have since retracted this position, creating new lists of information requests on both June 11th and June 24th, the fact remains that as of June 3, 2009, the Staff indicated that it had all information necessary to finish the FSA/DEIS.

The Scheduling Order did not state the 45 day clock would begin to run when the Staff completed its *analysis*. Instead the trigger is the submission of information to be analyzed by the Staff. Accordingly, the Staff's obligation to provide notice to that effect arose on June 3, 2009.

On June 11, 2009, the Staff contradicted its June 3rd statement that it had all of the necessary information from the Applicant. Specifically, on June 11th, in a telephone call with the Staffs, the CEC and BLM Staff informed the Applicant that they need *one (1)* more item, the "Revegetation and Restoration Plan" before they will start the 45 day clock to countdown to publication of the draft EIS/FSA. The fourth iteration of the Revegetation and Restoration Plan was filed on June 29, 2009. Therefore, based on Staff's statements, the latest possible date to begin the 45 day clock would be June 29, 2009.

Applicant also strongly objects to Staff's Status Report #10's improper, unjustified and unrealistic departures from the Scheduling Order, with respect not only to proposing workshops not envisioned by the Scheduling Order but also in diverging from the Scheduling Order's timing expectations. In marked contrast to this period of analysis of information contemplated by the Scheduling Order, Staff's Status Report #10 instead calls for *workshops* on the draft document. Workshops are simply not part of the Scheduling Order set forth by the Committee, and the Staff should not be seeking to revise the Scheduling Order to add workshops via a Status Report filing.

Additionally, Staff's Status Report #10 paints an incredibly unrealistic portrait of how this proceeding would advance. For example, the Staff calls for an FSA/Draft EIS in "Possibly late August" of 2009 and a Final Commission decision in January 2010, just 4 months later. (Staff Status Report #10, p. 4.) The Scheduling Order provides approximately 6 months between publication of the Draft EIS/FSA and the Final Commission Decision. With an FSA/Draft EIS "[p]ossibly in late August" 2009, a January 2010 Final Commission Decision is not realistic, given the time frames set forth in the Scheduling Order.

The Staff's statement of intent to hold "workshops" and the Staff's unrealistic schedule for the remainder of this proceeding after a "[p]ossibly late August" FSA/Draft EIS are symptomatic of the need for the Committee's to take back the reigns of this proceeding through an order starting the 45 day clock as of June 3, 2009.

With regard to what we hope are the remaining four (4) items in Staff's Status Report #10, we respond briefly as follows:

- Item 1: This is *NOT* an item that requires the submission of additional data pursuant to the Committee's Scheduling Order. Rather, Staff has received all of the information on stormwater they requested. Staff is re-engineering the project, using their own set of "assumptions." Nothing more is required from the Applicant. The 45 day clock runs when all information requested of the Applicant has been submitted. On May 27, 2009, and, in response to Staff's request for additional information, on June 2, 2009, the Applicant submitted all information on stormwater that Staff requested. On June 3, 2009, Staff indicated to Applicant that it had all of the information it needs for the FSA/Draft EIS. The Staff's stated desire to further analyze this data does not toll the 45 day clock that according to the terms of the Scheduling Order began to run on June 3rd.
- Item 2: This is a request for **ADDITIONAL** information after the Staff stated on June 3 that it had received all information requested from the Applicant. The Staffs again request additional information on closure of the facility. Neither the Commission nor the BLM will approve this conceptual closure plan. Rather, closure will be governed by the then-existing laws at the time of closure. As indicated in the June 3, 2009 conversation with Staff, this information was not needed to start the 45 day clock.
 - Significantly, the latest responsive filing is the *fourth* iteration of this Plan: (1) The Technical Basis Document was filed on July 22, 2008 as Data Response Set 2B; (2) An outline was filed on August 6, 2008 as Data Response Set 2C; (3) The First draft filed on January 28, 2009 as Data Response Set 2G; and (4) The Revised Plan submitted on June 29, 2009. Also note that this latest document is a *Draft Closure and Restoration Plan* that will be utilized at the time of site closure, some 30 to 50 years in the future.
- Item 3: This is *NOT* an item that requires the submission of additional data pursuant to the Committee's Scheduling Order. The 45 day clock runs when all information requested of the Applicant has been submitted. While Staff may wish to have a continuing dialogue with CDFG regarding Desert Tortoise mitigation, the Applicant has submitted all of the information that Staff requested from Applicant on this issue. Of course, CDFG is preempted by the CEC Commissioners as the decision makers on this State law issue, and CEC is not required to receive CDFG's recommendations before issuance of the FSA/Draft EIS. If CDFG has not addressed these issues in a timely manner, despite having 20 months to do so, this delay in interagency communication should not toll the 45 day period that again, according to the terms of the Scheduling Order, began to run on June 3rd.
- Item 4: This *NOT* an item that requires the submission of additional data pursuant to the Committee's Scheduling Order. This item, RWQCB review, is similar to item 3. While continued interagency communication may help the Staff to refine its analysis, this does not represent information to be submitted by the Applicant before the 45 day clock began to run. According to the terms of the Scheduling Order, this item should not have prevented the 45 day clock from starting on June 3, 2009.

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The Committee's June 2, 2009 Scheduling Order clearly states, "Staff files Final Staff Assessment/Draft Environmental Impact Statement (FSA/DEIS)" forty-five days after "Staff notifies parties that all information necessary to finish the Final Staff Assessment/Draft Environmental Impact Statement (FSA/DEIS) has been submitted." (Scheduling Order, P. 4.)

The conditions in the Scheduling Order to start the 45-day clock have been satisfied.

The frustration of the Applicant is rooted in this simple fact: the possibility that this Commission will approve this project in time for construction to begin in 2010 so that the project may fight for its portion of California's "fair share" of the federal Stimulus Act monies diminishes with each day that the start of the 45 day clock to produce a draft EIS/FSA is delayed.

Based on the Scheduling Order and the facts described herein, the Staff should have informed the parties and the Committee on June 3, 2009, that it had everything it needs to start their 45day clock for production of the draft EIS/FSA. The Committee should issue an order to confirm that the 45 day clock began to run on June 3, 2009.¹

Sincerely,



Jeffery D. Harris
Attorneys for Applicant

¹ The Applicant is cognizant of the fact that as a matter of law, the Committee lacks the authority to begin the BLM's NEPA process. However, there is no legal requirement for the Commission to "hold" (i.e., not publish" the completed joint document while the BLM's NEPA processes play forward. The completed document should be published forthwith. Among other things, prompt publication will give the public and parties more time to review the joint document. The Public Advisor and others have suggested that the public needs time to review the Staffs' work. More time with the document can only further this public interest.

ATTACHMENT A CHRONOLOGY

- January 15, 2009: Staffs email details *eleven (11)* items “necessary in order to complete our joint analysis and release a FSA/DEIS for ISEGS.”
- January 23, 2009: Eight days later in Status Report #6, the CEC Staff identified *twenty-one (21)* items it considered necessary to complete the FSA/DEIS.
- March 4, 2009: In Status Report #7, the Staff’s list of informational items included *thirteen (13)* items, including revisions of many items already submitted.
- April 15, 2009: In Status Report #8, Staff indicated they are waiting for *nine (9)* items. Two of those nine deliverables were not mentioned in the Staff’s initial, supposedly all-inclusive January 15th Table (US Army Corps Jurisdictional Determination and Groundwater Study).
- May 18, 2009: In Status Report #9, Staff identified *thirteen (13)* “deliverables” they require before publication of the FSA/DEIS.
- June 3, 2009: Via telephone the CEC Staff informs the Applicant *no more information is required: zero (0)*. Specifically, Applicant was informed that the CEC was not requesting that we submit any more information, and in conversation with BLM Staff, BLM Staff indicated to CEC Staff that BLM was not requesting any more information. CEC and BLM consultants would be running sensitivity models related to stormwater runoff, but they had the information from Applicant that they needed to run their own studies.
- June 11, 2009: In a telephone call with the Staffs, the CEC and BLM Staff inform the Applicant that they need *one (1)* more item, the “Revegetation and Restoration Plan” before they will start the 45 day clock countdown to publication of the draft EIS/FSA.
- June 24, 2009: In Status Report #10, Staff identified *four (4)* items they want before they will publish the draft EIS/FSA.

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Application for Certification for the IVANPAH)
SOLAR ELECTRIC GENERATING SYSTEM) Docket No. 07-AFC-5
_____))
_____)

PROOF OF SERVICE

I, Karen A. Mitchell, declare that on June 30, 2009, I served the attached *Letter dated June 30, 2009 to Committee regarding Start of 45 Day Clock for the FSA/DEIS* via electronic mail and United States 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



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV**

APPLICATION FOR CERTIFICATION
FOR THE *IVANPAH SOLAR ELECTRIC
GENERATING SYSTEM*

DOCKET No. 07-AFC-5

PROOF OF SERVICE
(Revised 5/27/09)

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