

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

<b>DOCKET</b>	
<b>07-AFC-5</b>	
DATE	<u>MAY 22 2009</u>
RECD.	<u>MAY 22 2009</u>

**APPLICANT'S STATUS REPORT #9**

**For**

**THE IVANPAH SOLAR PROJECT**

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**I. THE COMMITTEE SHOULD ISSUE AN ORDER AS SOON AS POSSIBLE SETTING A SCHEDULE THAT ALLOWS THE IVANPAH SOLAR PROJECT TO BEGIN CONSTRUCTION IN 2010**

The Applicant thanks the Committee, the Parties, and all participants for their constructive contributions to the May 18, 2009 Scheduling Conference. The Scheduling Conference went a long way to creating a common understanding of the facts.

The facts are these:

- In order to qualify for significant federal funding from the federal stimulus program, the American Recovery and Reinvestment Act (the “Recovery Act”), renewable energy projects like the Ivanpah Solar Project must begin construction in 2010.
- Given the limitations likely to be placed on the relocation of Desert Tortoise, commencement of construction activities in 2010 will most likely be limited to the Spring and Fall seasons.
- In order to allow time for administrative appeals, judicial appeals, financing, construction contracting, mobilization, and all of the other potentially long lead time items that are prerequisites to the commencement of construction, the Commission must approve renewable projects like the Ivanpah Solar Project in late 2009 or early 2010 to have any chance of starting construction and securing California’s fair share of Recovery Act monies.
- Since the Ivanpah Solar Project is the first project in the California permitting queue, if it fails to meet the 2010 construction deadline, this means that every California renewable project will not qualify for federal Recovery Act funds.
- In order to satisfy its very closely related Greenhouse Gas (“GHG”) and Renewable Portfolio Standard (“RPS”) goals, California needs large-scale solar power plants to be

approved, constructed and operating. With thanks to CEERT, PowerPoints are not Powerplants. California must demonstrate its ability to license these important renewable facilities in a timely manner. The Recovery Act requires timely action in the short run; the states RPS and GHG goals require continued diligence even after the Recovery Act funding window closes.

- The lengthy permitting delays faced by renewable projects increase the cost of renewable energy by adding tens of millions of dollars in unnecessary permitting costs, adding hundreds of millions of additional construction costs due to the inflation in materials and labor, delaying new job creation in the Green Energy sector, and frustrating the State's ability to meet its RPS and GHG goals.
- This proceeding is at a dead stand still until the Staff publishes – or is required to publish – the FSA/DEIS.
- The FSA/DEIS is not a decisional document; it is an informational document. The FSA/DEIS is not the end of the review process; it is the next step in the CEC's detailed CEQA-equivalent Certified Regulatory Program and the first informational document in the BLM'S NEPA process. Perfection is not required.
- In their Status Report No. 8, dated April 15, 2009, Staff proposed a schedule that would have this proceeding not reach closure until "TBD + 375 to 405 days." "TBD" is the date in the future "to be determined" for the release of the FSA/DEIS. Staff stated on the record that "TBD" was at least 45 days after Staff – in its sole and absolute discretion – determines that it has "enough" information for the FSA/DEIS, an informational document.
- Assuming the best case outcome that the Staff were to say as of May 18, 2009, that in its sole opinion it had enough information to produce the informational FSA/DEIS,

assuming further the Staff's "minimum" 45 days to get from May 18, 2009 to the "TBD" to produce the FSA/DEIS, and further assuming the 375 to 405 days from "TBD" to the close of this proceeding, *Staff seeks 420 days to 450 days from the FSA/DEIS to complete this proceeding.*

- May 18, 2009 was Day 565 of this proceeding. If Staff is granted the additional 420 to 450 days to close out this proceeding, this Commission siting case will have taken 985 to 1,015 days.
- The request for 420 days to 450 days – from the FSA – to close out this proceeding makes a mockery of the Commission's 12-month statutory siting deadline.
- Fortunately, the Committee and the Hearing Officer offered a tabulation of schedules at the May 18, 2009 Scheduling Conference that demonstrates that this siting case can be completed in approximately 6 months from "TBD," the publication of the FSA/DEIS.
- As demonstrated in the annotated notes that Applicant provided commenting on the Committee's tabulation of schedules, the issuance of the FSA/DEIS on June 15, 2009, would allow for a decision in January of 2010, in time to qualify for the Recovery Act funding that the Governor, the Administration, and the Legislature seek for California's fair share of these one-time federal funds.
- When Governor Schwarzenegger signed Executive Order S-14-08 to streamline California's renewable energy project approval process and increase the state's Renewable Energy Standard to 33 percent renewable power by 2020 he stated: "But we won't meet that goal doing business as usual, where environmental regulations are holding up environmental progress in some cases. This executive order will clear the red tape for renewable projects and streamline the permitting and siting of new plants and transmission lines."

- How much is enough? How much information is enough to satisfy the requirements of CEQA and NEPA for the FSA/DEIS – *an informational document, not a decision document?*
- Who decides enough is enough? Who ultimately “determines” the “TBD”? The Committee via order directing the publication of the FSA/DEIS by a date certain.

The facts lead to one indisputable conclusion: Committee needs to issue an order as soon as possible setting a schedule that allows the Ivanpah Solar Project to begin construction in 2010.

## **II. SPECIFIC COMMENTS ON SCHEDULE ITEMS**

Again, Applicant greatly appreciates the Committee and the Hearing Officer’s efforts with the tabulation of schedules distributed at the Scheduling Conference. We believe that, on the whole, the tabulation represents a good start for a schedule that will allow for a decision in time for commencement of construction in 2010.

In terms of specific comments on the tabulation of schedules, Applicant would like to comment on the sequence of events between (1) publication of the FSA/DEIS and (2) the commencement of Evidentiary Hearings. The tabulation of schedules lists six items, accounting for 9 to 10 weeks of time between FSA and Evidentiary Hearings. We believe that this detailed list of items between FSA and Evidentiary Hearings should be revised and the overall timeframe shortened.

The normal course of events for the Commission is as follows:

- FSA filed as Staff testimony
- All Parties other than Staff file Opening Testimony (FSA + 2 weeks)
- Prehearing Conference (FSA + 3 weeks)

- Evidentiary Hearings (FSA + 4 weeks)

Applicant sees no reason to deviate from this standard practice.

“Rebuttal Testimony” is rare. If, however, the Commission decides to deviate from this typical Commission pattern above by inserting rebuttal testimony, we suggest that the Commission follow this sequencing:

- FSA/DEIS filed as Staff testimony
- All Parties other than Staff file Opening Testimony (FSA + 2 weeks)
- Prehearing Conference (FSA + 3 weeks)
- Rebuttal Testimony, All Parties (Optional; limited to issues set for hearing; FSA + 4 weeks)
- Evidentiary Hearings (FSA + 5 weeks)

Having Rebuttal testimony, if any, filed after the PHC is an efficient means of proceeding. The PHC will identify which issues require Evidentiary Hearings, narrowing the field of subjects that may be suitable for Rebuttal Testimony. Rebuttal Testimony is not offered as a matter of right, and thus the Committee is well within its prerogative to require such optional Rebuttal Testimony to be filed after the PHC.

### **III. STAFF’S CONSTANTLY GROWING AND SHIFTING DEMAND FOR MORE AND DIFFERENT “DELIVERABLES” MUST CEASE**

At the Scheduling Conference, the Applicant expressed frustration that the list of “deliverables” the Staff seeks before release of the FSA/DEIS has been changing and growing. This section documents the source of that sense of the bar being constantly raised.

On January 15, 2009 via email, the Staffs of the CEC and the BLM sent the Applicant a Table listing items that the Staffs stated they needed before the FSA/DEIS could be released (the “January 15<sup>th</sup> Table”). The email message accompanying the January 15<sup>th</sup> Table stated: “As a

result of our PSA Workshop, BLM and CEC have jointly prepared the attached table showing the technical reports and permit applications that are necessary in order to complete our joint analysis and release a FSA/DEIS for ISEGS.”

There were eleven items in total on the January 15<sup>th</sup> Table. Of those eleven items, only seven (7) were designated as “critical path items” and marked with an asterisk and this notation: “Critical path deliverables that must be available to BLM and the Energy Commission before they can complete the FSA and DEIS.”

Just eight days later, the Staff’s list grew.

On January 23, 2009, in Status Report #6, the CEC Staff identified twenty-one items it considered necessary to complete the FSA/DEIS. No explanation was offered for why the January 15<sup>th</sup> Table of 11, with only seven “critical path” items, grew to twenty-one in just eight days. The shifting information sands supported the Applicant’s sense that production of information was actually leading to request for more information, instead of satisfying the Staff.

On March 4, 2009, in Status Report #7, the Staff’s list of informational items included thirteen (13) items. At least one item on this new list had already been submitted. On January 28, 2009, the Applicant submitted the Closure, Revegetation, and Rehabilitation Plan. Instead of accepting the Applicant’s filing of this plan and “checking the box,” Staff chose to review and comment on the plan. It remained on the Staff’s list as missing data when, in fact, Staff wanted more than Applicant had provided on this plan that is typically developed post-approval.

On April 15, 2009, in Status Report #8, Staff indicated they are waiting for nine deliverables. Two of those nine deliverables were not mentioned in the Staff’s initial, supposedly all-inclusive January 15<sup>th</sup> Table (US Army Corps Jurisdictional Determination and Groundwater Study).

On May 18, 2009, in Status Report #9, Staff identified thirteen “deliverables” they require before publication of the FSA/DEIS. Given the materials submitted between the Status Report #8 and Status Report #9, the Applicant was surprised to see the list of deliverables once again grow.

The Applicant has long expressed its frustration at the moving target that is the list of items the Staff “must” have in order to produce the FSA/DEIS. With all due respect, Applicant believes that the Staff has confused items they “want with items they “must” have.

The Committee could look backward and try to recreate the morphing lists of Staff-requested deliverables. In the alternative, if the Committee examines the list of eleven items in the January 15<sup>th</sup> Table or the list of thirteen items set forth in Status Report #9 filed on May 18, 2009, the Committee will see that the items requested have been filed some time ago, have been filed (and in some cases re-filed in a second iteration), or will be filed (or re-filed) the week of May 25<sup>th</sup>.

In short, the Applicant is done. The Staff must deliver the FSA/DEIS.

#### **IV. RESPONSE TO STAFF’S CHARACTERIZATIONS OF THE STATE OF THIS CASE**

Applicant continues to work in a positive and productive interaction with the CEC and BLM in moving the Ivanpah Solar Electric Generating System (ISEGS) project through this joint licensing process. We reviewed with interest, and some disappointment the Status Report No. 9 issued by CEC on May 18, 2009. Staff paints a picture of huge and ongoing project changes that are the result of Applicant’s independent actions. While the project has evolved since the determination of Data Adequacy in October of 2007, the overall changes to the project description have been minor. Indeed, many of the purported “changes” are simply the result of the permitting process. Input from the Staff, the Applicant, and the Public in the permitting



process are intended to improve the project and further refine the project description. To characterize such project improvements and refinements that are the direct result of the permitting process as “changes” is simply incorrect. If the permitting process has not resulted in betterment and improvement as it should, why are we at Day 568 and counting?

The one significant change that Applicant made of its own volition was in its desire to progress from a conventional development that included detention ponds and significant grading, to a Low Impact Design philosophy that minimizes disturbance of the natural terrain and strives to preserve as much of the original vegetation as possible. While we understand and appreciate the Staff’s and BLM’s desire to understand the stormwater issues in great detail, it is important to remember that the Low Impact Design philosophy is more closely aligned with the greater vision of minimizing the potential impacts of renewable projects. If Low Impact Design philosophy and related efforts result in significant delays, the result may be to drive other applicants to more traditional, industrial grading and paving designs. Engineers can quickly and easily calculate flows for site, level, graded, and concreted. As a matter of public policy, the Commission’s actions should not push future applicants away from the Low Impact Design philosophy toward a more concrete solution.

CEC Staff included a detailed Table in Status Report No. 9 that mischaracterized as “Major Revisions to the Proposed Project” that could benefit from additional clarifications as to the status of the various points. We will address the table on a point-by-point basis in the order in which Staff presented the information.

<b>CEC’s Table of “Major Revisions”</b>	<b>CEC Staff Characterizations</b>	<b>Applicant’s Response</b>
Revision 1 5/9/08	Applicant changed heliostats from single hung to double hung mirrors effectively doubling mirror surface on a per-heliostat basis	This change occurred over a year ago and is not applicable to any current issues.

<b>CEC’s Table of “Major Revisions”</b>	<b>CEC Staff Characterizations</b>	<b>Applicant’s Response</b>
Revision 2 6/10/08	Revised stormwater drainage plans to include large detention basins and increased total project area to 4065 acres. In the stormwater plan Applicant identified areas of required grading. CEC and BLM requested supporting data to defend the storm water management plan	Typically in the CEC process, detailed (90%) grading plans are not required ahead of an FSA. However, Applicant submitted several Technical Memos and drawings to defend stormwater drainage plan.
Revision 3 3/25/09	<p>Number of heliostats changed from 214,000 to 280,000.</p> <p>Applicant changed stormwater management plan to LID and eliminated large detention ponds. CEC/BLM concerns include:</p> <ul style="list-style-type: none"> <li>a) Effect on Site Operations</li> <li>b) Heliostats may get washed away off site</li> <li>c) Impacts the stormwater flows and deposition downstream of site.</li> </ul> <p>CEC and BLM are concerned that assumptions used by Applicant are inadequate in terms of stormwater runoff, soil compaction, application of soil binders, and the fate of vegetation.</p>	<p>Applicant clarified that the number of heliostats to be deployed did not change, but added a footnote to bring to light that the PPA’s for the project <u>allow</u> up to 280,000 heliostats.</p> <p>All studies and reports addressing these issues, especially off site flow and deposition of sediment in detail have been submitted as of 5/19/09. Applicant has taken care to design the heliostats robustly, and pylon embedment was increased to withstand a 100-year flood. In addition, the site will be fenced which would prevent equipment from leaving the site in the extremely unlikely event that a heliostat was uprooted during a major storm event. Applicant has specifically addressed all of these points in the Hydrology, Sedimentation, DESCP, and supporting report and model documentation. Hydro-mulch soil binders, and dust suppressants have been described and their effects analyzed under all scenarios postulated by Staff.</p>
Updated Revisions to the Site and Stormwater Plans 5/13-18/09		Revisions to these plans were submitted on 5/15/09 and 5/19/09. It is inappropriate to characterize submittal of the plans and response to comments as a “Major Project Change”. In a typical CEC

<b>CEC’s Table of “Major Revisions”</b>	<b>CEC Staff Characterizations</b>	<b>Applicant’s Response</b>
		permitting process, submittal of plans with the level of detail contained in the ISEGS plans is required post-certification and prior to the start of construction, not prior to the FSA.

Staff also opines in its Status Report No. 9 that Applicant has not first obtained agreement with BLM and CEC on the underlying assumptions and design criteria used for the study. Applicant has spent thousands of technical staff-hours on the stormwater management issue and has applied a thorough technical and scientific evaluation of the soils, plants, climate and terrain to determine what it believes to be the most appropriate assumption for the stormwater management design and the design of the solar field equipment. Applicant has also run sensitivity models on the “worst case” scenarios put forth by BLM’s consulting engineers and reported the results in the recently submitted documents, as discussed below.

Staff has created a table of deliverables required for preparation of the FSA/DEIS. Below is our response to each of these items in the order in which they are presented in Staff’s table in Status Report No. 9:

<b>Staff Requested “Deliverables”</b>	<b>Required for FSA/DEIS?</b>	<b>Applicant’s Response</b>
Closure, Revegetation, and Rehabilitation Plan	Not required until post-approval; Under Revision; Submitted January 28, 2009. Staff comments received on March 23, 2009. Applicant is preparing a revision to incorporate staff comments. Applicant expects to submit the final revision of this document to Staff	This document is clearly not required before the FSA/DEIS. The CEC’s practice is to insert standard Conditions of Compliance for the development of closure plans post-certification. Similarly, the BLM regulations then-existing at the time of closure will govern closure procedures. Staff is requiring a detailed plan of methods to restore and revegetate the site. This is typically not required for the preparation of the FSA/DEIS and occurs post-approval. That said, Applicant agreed to provide details of site closure since BLM requested this information

<b>Staff Requested “Deliverables”</b>	<b>Required for FSA/DEIS?</b>	<b>Applicant’s Response</b>
	the week of May 25, 2009.	for their NEPA analysis. Applicant’s commitment to close and revegetate the site is clear. Staff has more than enough information to asses environmental impacts and prepare the FSA/DEIS.
Desert Tortoise Translocation and Relocation Plan	Not required for FSA/DEIS; Submitted on March 19, 2009. Comments received on April 28, 2009. Applicant expects to submit a final revision to the plan the week of May 25, 2009.	Applicant has submitted a Desert Tortoise Translocation and Relocation Plan, following specific guidance provided by the U.S. Fish and Wildlife Service. Details of tortoise translocation can continue to be negotiated with Staff, CDFG and the Service during the continued licensing of this project and Section 7 consultation as is common in other projects licensed by the Commission. This issue should in no way impact the timely issuance of the FSA/DEIS.
Hydrology Studies	Not required for FSA/DEIS; Submitted on 5/18/09	In the opinion of Applicant, prior submissions satisfied the informational needs of CEQA and NEPA. Nevertheless, as requested by Staff, all aspects that Staff describes in its table are included in the Hydrology Report prepared by West Yost Associates, an expert in the field of civil engineering and design.
Supplemental Project Description and Appendices (Civil Engineering Design Drawings)	Not required for FSA/DEIS; Submitted on 5/18/2009	<p>A supplemental project description and a comprehensive package of civil engineering design drawings have been submitted. In addition, many of the issues brought forth by staff with respect to the project description and 90% design, have been addressed in our Response to Comments also submitted on 5/18/09.</p> <p>In the opinion of Applicant, prior submissions satisfied the informational needs of CEQA and NEPA. This is another item that is typically not required until post-approval, prior to the start of construction, but has been requested by the BLM and Staff for this project to be completed prior to the FSA/DEIS.</p> <p>Staff again states that Applicant has changed the number of heliostats to be deployed in the solar field. Applicant has not changed the number of heliostats, but simply provided clarification that the PPA’s allow for up to 280,000 heliostats for</p>

<b>Staff Requested “Deliverables”</b>	<b>Required for FSA/DEIS?</b>	<b>Applicant’s Response</b>
Evaluation of potential vegetation loss due to shading from the heliostats study	Not required until post-approval; In Progress	the project. The need for this report is dubious, given that for purposes of evaluating Biological Resources, the Staffs will assume no residual habitat value within the fence line of the three plants, though there will certainly be some value in fact. Nevertheless, to satisfy Staffs’ requests, this detailed report is currently in preparation. This sort of analysis is not typically required for an informational document such as an FSA/DEIS.
Confirmation that Low Impact Design techniques are achievable	Not required for FSA/DEIS	In the opinion of Applicant, prior submissions satisfied the informational needs of CEQA and NEPA. Applicant has described in detail how it intends to deploy the pylons and heliostats in the solar field, and that it would hold its EPC contractor to high standards of compliance with the concepts put forward in the LID proposal. Compliance with LID procedures will also be the focus of the CBO assigned to the project by the CEC to provide oversight during construction.
Biological Resources Mitigation Proposal	Resolution expected before the end of May 2009. Ongoing discussions with Staff, BLM, CDFG, and USFWS	Applicant expects these issues to be resolved through discussions by May 27, 2009. As discussed below, it is the Commission’s practice to proceed to Evidentiary Hearings without completion of the formal Section 7 or state process, so it is certain that the FSA/DEIS can be produced as this federal process proceeds.
Biological Assessment	Not required for FSA/DEIS; Submitted to BLM on October 31, 2007. Comments received on May 8, 2008. Comments addressed and resubmitted on 9/12/2008. Additional changes made and resubmitted on 4/17/2009.	As a matter of state law and Commission practice, the Commission does not need a Biological Assessment for this federal process to issue the FSA. In fact, the Commission regularly issues Final Decisions without a final Biological Assessment. BLM Staff has stated that the Biological Opinion should be available to the decision makers before the ROD is issued, but again, as a matter of federal law, the DEIS can be issued at this stage of the proceeding. Nevertheless, the Applicant continues to revise and update the BA based on comments received. It will be revised again to incorporate mitigation measures, revised project description and include the revised draft Desert Tortoise Translocation and Relocation Plan. The BA is normally

Staff Requested “Deliverables”	Required for FSA/DEIS?	Applicant’s Response
		prepared by BLM for submission to USFWS.
Incidental Take Permit Application	Not required for FSA/DEIS; In Progress; To be submitted the week of May 25, 2009	CDFG, or in this case the Commission through its preemptive authorities, has two options after the federal ESA processes are completed: (1) a Consistency Determination or (2) an Incidental Take Permit. Given these two options, there is no need for a “draft” Incidental Take Permit <i>application</i> as a prerequisite to the FSA/DEIS. The application itself cannot be acted upon until after satisfaction of CEQA and NEPA. Nevertheless, the Applicant has agreed to Staff’s request to prepare an Incidental Take Permit application.
Streambed Alteration Agreement Application	Not required for FSA/DEIS; In Progress; To be submitted the week of May 25, 2009.	CDFG, or in this case the Commission through its preemptive authorities, will issue a Streambed Alteration Agreement. There is no need for a “draft” <i>application</i> as a prerequisite to the FSA/DEIS. The application itself cannot be acted upon until after satisfaction of CEQA and NEPA.
USACOE Jurisdictional Determination	Not required for FSA/DEIS; Complete; Forms signed and returned to USACOE 5/19/09	Applicant has been informed that the Corps has determined that the ISEGS project is non-jurisdictional and a Corps 404 permit will not be required. USEPA has concurred with this position. Applicant will submit the formal Corps jurisdictional determination to the BLM and CEC upon receipt.
Groundwater Study	Not required for FSA/DEIS; In Progress; Submission expected on May 22, 2009	In the opinion of Applicant, prior submissions satisfied the informational needs of CEQA and NEPA. Study is complete. Applicant is reviewing and will submit by 5/22/09.
Lahontan RWQCB Permits	In Progress	The permit (Report of Waste Discharge, RWD) related to the treatment and discharge of sanitary wastewater for landscape irrigation will be filed week of May 25, 2009.
Health and Safety Plan	Not required until post-approval; Submitted on 5/19/2009	Applicant submitted a draft H&S Plan on 5/19/2009. In the opinion of Applicant, prior submissions satisfied the informational needs of CEQA and NEPA. This is another item that is typically not required until post-approval, prior to the start of construction, but has been requested by the BLM and Staff for this project to be completed prior to the FSA/DEIS.

**CONCLUSION**

By issuing the tabulation of schedules, the Committee has demonstrated that there is a clear path forward for the approval of the Ivanpah Solar Project in sufficient time to allow the project to begin construction in 2010 to help secure a portion of California's fair share of the federal Recovery Act monies.

All that remains is for the Committee to issue an order as soon as possible setting a schedule that allows the Ivanpah Solar Project to begin construction in 2010.

May 22, 2009

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By: \_\_\_\_\_



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STATE OF CALIFORNIA


Energy Resources Conservation  
and Development Commission

In the Matter of: )  
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**PROOF OF SERVICE**

I, Deric J. Wittenborn, declare that on May 22, 2009, I served copies of the attached *Applicant's Status Report No. 9* by email and U.S. Mail to each party on the attached service list.

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

  
Deric J. Wittenborn





**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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