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STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of:

The Application for Certification for the  
Ivanpah Solar Energy Generating System

Docket No. 07-AFC-5

**INTERVENOR DEFENDERS OF WILDLIFE**

**Opening Brief**

April 1, 2010

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**Opening Brief**

On February 11-14, the Committee assigned to this proceeding held an evidentiary hearing to receive evidence into the record regarding the Ivanpah Solar Energy Generating System (“ISEGS”) Application for Certification (“AFC”). The Committee directed parties to file opening briefs by March 25, 2010, discussing all matters in contention. Below, Defenders of Wildlife (“Defenders”) addresses the pertinent issues raised at the evidentiary hearing. Per Hearing Adviser Kramer’s instruction, this brief is limited to those issues addressed at the January 11-14, 2010 evidentiary hearing.

**I. The ISEGS Project Will Result in Unmitigated Significant Adverse Environmental Impacts.**

The Final Staff Assessment (“FSA”), staff’s primary exhibit in the hearing, does not identify adequate mitigation measures for significant impacts to biological resources. The California Environmental Quality Act requires that public agencies refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. *Mountain Lion Foundation v. Fish & Game Commission* (1977) 16 Cal. 4<sup>th</sup> 105, 134. Cal. Pub. Res. Code § 21002. The California Energy Commission’s (“CEC”) site certification program is a certified regulatory program, approved by the Secretary of the

Natural Resources Agency, and implemented pursuant to CEQA. Cal. Pub. Res. Code § 21080.5. Agencies implementing certified regulatory programs must comply with the basic *substantive* policies established by CEQA, including the requirements to identify significant adverse environmental impacts and mitigation measures. *Sierra Club v. State Board of Forestry* (1994) 7 Cal. 4<sup>th</sup> 1215, 1236-1237. CEC staff has failed to adequately identify impacts and necessary mitigation measures to reduce those impacts to less than significant levels.

**a. The FSA failed to identify all of the ISEGS Project’s Significant Direct and Cumulative Impacts to Desert Tortoise.**

The FSA concludes that the ISEGS project would result in “major” significant impacts to the Mojave population of the desert tortoise (FSA, page 1-17). These impacts include permanent loss of approximately 4,073 acres of occupied desert tortoise habitat, translocation of a minimum of 25 desert tortoises, fragmentation and degradation of adjacent habitat, and an increase in the spread of invasive non-native plants and desert tortoise predators such as ravens. These impacts would directly and adversely affect habitat for the threatened desert tortoise (FSA, page 1-17). A number of existing impacts have resulted in significant declines in the Ivanpah tortoise populations over the last 30 years (1/11/10 hearing transcript, page 410). Many of these past impacts were missing from the CEC staff’s analysis (*Id.*) As Dr. Marlow stated in his testimony, “if we eliminate the possibility that the areas where tortoises have declined or died out can be recolonized, then we’re eventually going to lose all of the tortoises in the valley. So linear impacts are more pervasive than very localized impact. Placing two linear impacts up against each other would make more sense. It reduces the edge over which that impact is expressed in the population (1/11/10 hearing transcript, page 420).” Although the Applicant stated in testimony that “the site is not lost in perpetuity since the applicant must restore the project site at the end of the right-of-way grant, the AFC states that “it will not be practicable to recreate the lost habitat elements exactly after 50 years of site disturbance (AFC, page 5.2-29).” In addition to contradicting its own statements, the Applicant’s testimony concerning potential restoration of the site was refuted by Dr. Connor’s testimony:

The Applicant seems to be confusing the expected life span of the project and its obligations to clean up the project site with the requirement for compensation lands acquired as mitigation for impacts to listed species to be protected in

perpetuity to meet the fully mitigated standard of CESA (Western Watersheds Project Rebuttal Testimony, page 5).

CEQA requires CEC Staff, as the lead agency, to identify facts and analysis supporting its conclusion that the project's contribution will be rendered less than cumulatively considerable. 14 CCR § 15130(a)(2). Unfortunately, CEC staff have not fulfilled that obligation. Staff simply make the unfounded statement that they have concluded that “without mitigation the ISEGS project would be a substantial contributor to the cumulatively significant loss of Ivanpah Valley's biological resources, including the threatened desert tortoise and other special-status species (FSA, page 1-18). Staff have not actually *determined* the nature of the cumulative impacts by aggregating all the projects and determining the total load of development against the baseline status of the species in the Valley.

As Dr. Connor testified, this population is located at one of the highest elevations for desert tortoise in the Mojave desert, and therefore the Northern Ivanpah Valley habitat may be very important if climate change results in aridification of the desert (Western Watersheds Project Opening Testimony, page 3). Additionally, the population of desert tortoise in the Northern Ivanpah Valley is genetically distinct (*Id.* and Defenders Rebuttal Testimony, page 4).

In conclusion, the genetic distinction of the desert tortoises in question, the importance of the habitat for climate change adaptation, and the overall decline of the species throughout its range due to predation, disease and the cumulative load of human development, are factors that make achieving adequate mitigation very difficult. The in-lieu mitigation fee program does not contain adequate detail to determine that impacts to the species will be fully mitigated and minimized.

**b. The Mitigation Measures Identified for Desert Tortoise are Inadequate.**

The Mojave population of desert tortoise is State and federally listed as threatened. The California Endangered Species Act (“CESA”) requires project proponents to fully mitigate and minimize impacts to threatened species. Cal. Pub. Res. Code § 2081(b)(2). CEC staff must conduct a reasonable analysis of the cumulative impacts of the relevant past, present and future foreseeable projects. The Staff Assessment must examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects. 14 CCR § 15130(b)(5). Because the

FSA does not consider the impact on the desert tortoise throughout the Northeastern Mojave Recovery Unit, it is inadequate.

This “in-lieu fee” mitigation plan fails to satisfy the requirements of CEQA. Formulation of mitigation measures may not be deferred until some future time. 14 CCR§ 15126.4(a)(1)(B). In California, the payment of fees must be tied to a functioning mitigation program to be adequate. *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359. In order to serve as an adequate substitute for traditional mitigation measures, an in-lieu fee program must be evaluated under the CEQA, including the requirements to circulate the plan for public comment. *California Native Plant Society v. County of El Dorado* (2009), 170 Cal. App. 4th 1026. CEC staff have not adequately ensured that the in-lieu mitigation fee program will (1) be evaluated under CEQA when specific mitigation measures are identified and (2) will manifest into actual on-the-ground improvement to desert tortoise habitat. The FSA/DEIS does not currently contain adequate information to satisfy the public’s interest in ensuring that the required fees translate into recovery benefits to the desert tortoise.

To be legally defensible, the “in-lieu fee” mitigation program must connect the funds paid by the Applicant to the actual mitigation measures being implemented on the ground. Merely throwing money at a significant impact will not necessarily mitigate that effect. In *Kings County Farm Bureau v. City of Hanford* (5<sup>th</sup> Dist. 1990) 221 Cal. App. 3d 692, an applicant agreed to pay funds to a water district’s ground water recharge program. The petitioners pointed to evidence tending to show uncertainty as to the availability of water for purchase. The court found that the failure to evaluate whether the agreement was feasible and the availability of water for purchase was a fatal flaw in the mitigation plan, and it violated CEQA’s mitigation requirement. *Id.* at 728. Here, as in *Kings County*, CEC staff failed to show that the funding from the “in-lieu fee program” will eventually make its way into implementation. There is no certainty that land of equal or greater value as the desert tortoise habitat being impacted will eventually be available for purchase and that it indeed will be acquired. Therefore, the in-lieu fee mitigation program is inadequate and violates CEQA’s requirements that specific impacts be mitigated with specific mitigation measures. 14 CCR § 15126.4(a)(1)(B).

**a. The Mitigation Measures Identified for Special Status Species are Inadequate.**

CEC staff concedes that the project will have significant impacts on several special status species, including banded gila monster, burrowing owl, golden eagle, loggerhead shrike, brewer’s  
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sparrow, Leconte's thrasher, bighorn sheep, and American badger. Inexplicably, however, CEC staff determined that the mitigation plan for desert tortoises – BIO-17 – is appropriate mitigation for all of these additional species. CEC staff does not back up this statement. This is a blanket assumption that special status species will benefit from desert tortoise mitigation, in the form of land acquisition, and it violates CEQA's requirement that mitigation be tied to specific impacts rather than generalized impacts. 14 CCR § 15126.4(a)(1)(B).

Indeed, the testimony of Scott Flint and the Department of Fish and Game's ("DFG") comment letter on the Preliminary Staff Assessment ("PSA") illuminate the point that the mitigation measures for special status species are wholly inadequate. The letter (Defenders exhibit 709) states, for migratory bird species:

"... the compensatory mitigation plan could offset the significant loss of habitat for these species." This section should be updated to either show that the compensatory mitigation does offset the loss, or other measures may need to be developed that will reduce impacts to less-than-significant levels (Defenders exhibit 709, page 4).

CEC staff neither updated the compensatory mitigation plan in the FSA to show that mitigation would offset the loss to migratory bird habitat, nor developed other measures. CEC staff did not indicate why DFG's concerns were not addressed. Again, CEQA requires feasible mitigation measures to be implemented for specific impacts. CEC staff failed to accomplish that. In another example, DFG advise that "there must be a plan in place to address impacts to Gila monster should desert tortoise mitigation be insufficient to reduce Gila monster impacts to less than significant levels (Defenders exhibit 709, page 4)." Staff again failed to heed this advice, putting the mitigation plan for desert tortoise and special status wildlife from the PSA in its entirety into the FSA.

CEC staff's total lack of observance of DFG's concerns is a troubling sign. Indeed, Scott Flint testified that the two agencies "have been working on an MOU. It is not finalized (1/11/10 hearing transcript, page 299)." This is very troubling. DFG is the only agency with the expertise to advise the CEC on avoidance and mitigation of wildlife impacts. Yet, this advice and corresponding recommendations have not been penetrating the CEC. CEC staff is disaffected. And the result is a final environmental document that does not include adequate mitigation – or even a discreet mitigation plan – for special status wildlife.

## **II. The Energy Commission's Alternatives Analysis Does Not Comply With CEQA.**

CEC Staff did not fulfill its obligation to analyze a reasonable range of alternatives. CEQA requires a lead agency to describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. 14 CCR § 15126.6(a). CEC staff failed to fully evaluate the private land alternative submitted by the Applicant in the AFC. Additionally, CEC staff failed to fully evaluate the Sierra Club's I-15 alternative. Most importantly, CEC staff failed to evaluate the comparative merits of every alternative analyzed.

### **a. CEC Staff Failed to Analyze More than One Multiple Private Land Alternatives, and Thereby Failed to Analyze a Reasonable Range of Alternatives.**

Considering the overriding policy impetus toward siting renewable facilities on private degraded land, CEC staff should have fully considered a reasonable range of private land alternatives. The Renewable Energy Transmission Initiative ("RETI") recently issued the following statement:

RETI stakeholders agree that utilizing disturbed private lands close to existing infrastructure for renewable energy development should be a priority for the state. County governments and state agencies are in the best position to develop mechanisms to consolidate the ownership of extensively-parcelized lands that have excellent renewable resource potential. For this reason, the RETI Phase 2A Final Report includes a formal recommendation that the California Energy Commission, in conjunction with other state and federal agencies, counties and the renewable energy industry, develop and implement a strategy for consolidating ownership of disturbed or degraded private lands for renewable energy development on an expedited basis (RETI Phase 2A Final Report, page 2-33).

RETI's prioritization of private lands for renewables siting creates a mandate for the CEC to analyze a reasonable number of private lands alternatives. CEC staff should not have precluded a

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private land alternative or any other alternative from analysis because it is not within the agency's jurisdiction or not currently within the Applicant's control. CEQA regulations only require an analysis of whether the proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site is already owned by the proponent). 14 CCR § 15126.6(f)(1).

CEC staff dismissed the Applicant's proposed alternative to locate the project on private land because it would have required the project proponent to complete "option-to-purchase agreements with multiple private owners (FSA, 4-19)." In the case of the Harpers Lake private land option, which "had sufficient land for a 400 MW facility with the configuration of the proposed project," it was rejected by the proponent because "one of the major land owners at the site requested too much money (FSA, page 4-20)." CEC staff did not conduct a cost feasibility analysis for private land alternatives (1/14/10 hearing transcript, page 238):

MS. LEE: We didn't put up a cost parameter on it. But we didn't eliminate anything because it would have been more costly. And that is straight out of CEQA.

MR. BASOFIN: And cost was a factor in determining feasibility?

MS. LEE: It was not.

However, despite the fact that cost was not part of the feasibility analysis, CEC staff inexplicably did not independently analyze the above statements of the Applicant concerning the number of landowners and the landowner asking for "too much money." This dismissal is unacceptable. The CEC should have at least independently analyzed the project proponent's statements concerning cost. CEC staff failed in this instance to evaluate the comparative merits of the alternatives, as required by CEQA Guidelines, section 15126.6(a). Further, CEC staff did not determine whether the Harper Lake site would have feasibly attained most of the basic objectives of the project. In fact, CEC staff did not consider the Harper Lake alternative at all (1/14/10 hearing transcript, page 240 – "we did not pursue that site in any more detail than what was in the AFC"), though it certainly was within a reasonable range considering RETI's mandate to look at disturbed private lands and the project's major significant impacts on biological resources.

Even the *one* private land alternative that CEC staff did analyze, known as Private Land Alternative, seemed to be an exercise in elimination, something of an afterthought, rather than a diligent search to determine if the site might alleviate the proposed project's impacts. As CEC staff



stated, this site was “designed to basically mimic the configuration of the proposed project because we wanted one that had the appropriate acreage.” This statement ignores the CEQA’s mandate to consider alternatives that feasibly attain *most* project objectives. Indeed, CEC staff only analyzed one private land alternative, and it was one that would have attained *all* project objectives identified in the FSA – to operate a 400 MW renewable power plant, locate it in an area with high solararity and less than 5% slope, and finish the process in 2010. CEC staff did not allow even the slightest deviation from these objectives in their entirety, and therefore the alternatives analysis is sorely deficient.

Indeed, DFG, in its comment letter on the PSA, implored CEC staff to analyze site alternatives that would not have significant impacts on desert tortoise:

The PSA is lacking in specific information to support many of the statements regarding the limited alternatives evaluated for the Project. The conclusions in the FSA/FEIS should be supported with the best available data for impacts to desert tortoise and plant species of concern that clearly indicate a comparable or at least higher level of impact to those resources than they are being impacted by the Project. For example, Ivanpah and Broadwell Dry Lakes should be studied and fully analyzed in the FSA/FEIS regardless of existing recreational use vs. "take" of an endangered species...(Defenders exhibit 709).

CEC staff failed to heed DFG’s advice, did not consider comparable desert tortoise impacts in a comprehensive analysis for alternatives such as Ivanpah and Broadwell Dry Lakes, and did not support its conclusions with the best available data. Instead, staff opted for a curtailed alternatives analysis with only one private land alternative. This alternatives analysis is wholly inadequate.

**b. The FSA Did Not Adequately Address the Sierra Club’s “I-15 Alternative”**

The Sierra Club submitted an alternative, commonly known as the “I-15 Alternative” in good faith. However, CEC staff did not adequately analyze this alternative, did not perform a full survey of its biological resources, including the desert tortoises and rare plants located within the direct area. The Sierra Club submitted testimony from Scott Cashen to the effect that this area did not support desert tortoises in the abundance that the proposed project site did. Indeed,

Mr. Cashen encountered desert tortoise burrows at a frequency of 0.67 burrows/mile on the Project site, and 0.30 burrows/mile on the I-15 site (Sierra Club Opening Testimony, page 11). CEC staff should have fully considered this alternative.

### **III. Conclusion**

In conclusion, the proposed project will have major significant impacts on desert tortoise and special status wildlife species. CEC staff have not prepared a legally defensible mitigation plan to address those impacts. The alternatives analysis is inadequate insofar as it does not contain a reasonable range of alternatives, including multiple private land alternatives, and a full analysis of the Sierra Club's "I-15 Alternative".

**DECLARATION OF SERVICE**

I, Joshua Basofin, declare that on April 1, 2010, I served and filed copies of the Attached Intervenor Defenders of Wildlife's Opening Brief. 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:**

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

X by personal delivery or by depositing in the United States mail at Sacramento, CA 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**

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

**OR**

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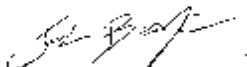
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I declare under penalty of perjury that the foregoing is true and correct.



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

DOCKET No. 07-AFC-5  
PROOF OF SERVICE  
(Revised 11/23/09)

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