STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

APPLICATION FOR CERTIFICATION FOR THE HIDDEN HILLS SOLAR ELECTRIC GENERATING SYSTEM PROJECT	))))	Docket No. 11-AFC-2

MOTION IN LIMINE FOR A COMMITTEE RULING TO ENSURE THE FINAL STAFF ASSESSMENT CONFORMS TO SUBSTANTIVE REQUIREMENTS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA")

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

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I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED

Pursuant to Section 1716.5 of the Commission's Regulations,[1] Hidden Hills Solar I, LLC and Hidden Hills Solar II, LLC (the "Applicant") hereby bring this Motion in Limine (the "Motion") requesting a Committee ruling directing the Staff to prepare the Final Staff Assessment ("FSA") in conformity with substantive requirements of the California Environmental Quality Act ("CEQA") by correcting legal errors made in the Preliminary Staff Assessment and the Supplemental Staff Assessment (collectively referred to as the "PSA"[2] in this Motion).[3]

The Commission's power plant certification process is a certified regulatory program that must conform to the substantive provisions of CEQA. (*See* Pub. Resources Code §§ 21080(a), 25519(c); 14 C.C.R. §§ 15250, 15251(k).)[4] To implement its certified regulatory program, the Commission is required to prepare one or more written documents that collectively are the "functional equivalent" of an EIR, and these written documents must comply with the substantive provisions of CEQA and the CEQA Guidelines. (Pub. Resources Code §§ 25519, 25522, 25523; 14 C.C.R. §§ 15250, 15252.)

The FSA is one of the documents prepared in the place of an environmental impact report and must provide analysis of the environmental consequences of a project sufficient to allow for an informed and balanced decision by the Commission. (*See*, Pub. Resources Code § 25519(c);

[1] The Commission's regulations are set forth in Title 20 of the California Code of Regulations (hereinafter, "C.C.R.").

[2] However, citations to these two documents will refer to them separately as the "PSA" and the "SSA."

[3] As described in *People v. Morris*, 53 Cal. 3d 152 (1991), "[Motions in limine] permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence. Finally, by resolving potentially critical issues at the outset, they enhance the efficiency of trials and promote settlements." (See *Cotchett & Haight, Cal. Courtroom Evidence* (3d ed. 1988) p. 28-3.)"

[4] To construct a solar thermal power plant of 50 megawatts or more in California, one must first obtain a license (or certification) from the Energy Resources Conservation and Development Commission ("Commission"). The Commission serves as lead agency under CEQA and examines whether: (1) the proposed project will comply with all applicable laws, ordinances, regulations, and standards ("LORS"), and (2) whether the project will cause any significant, immitigable, adverse environmental impacts. The Commission may not approve a project that does not comply with applicable LORS, or that has a significant, immitigable, adverse environmental impact, unless the Commission also determines that the project has overriding benefits. (Pub. Resources Code §§ 21081 and 25525.)

14 C.C.R. §§ 15003, 15252.) The Presiding Member utilizes the FSA, along with other parties' testimony and the materials in the hearing record in preparing the Presiding Member's Proposed Decision. (20 C.C.R. § 1742.5(c).) As such the Commission has a legal duty to ensure that the FSA conforms to the substantive requirements of CEQA.

Certain sections of the PSA for the Hidden Hills Solar Electric Generating System ("HHSEGS" or "Project") do not meet the substantive requirements of CEQA and the CEQA Guidelines.[5] As a result of these errors, these sections of the PSA fail to present an informational document that will "inform public agency decision-makers and the public generally of the significant environmental effect of a project." (14 C.C.R. § 15121(a).)

We have followed the Committee's direction and limited this motion to threshold legal issues in the PSA's application of CEQA. Correcting these legal errors at this juncture will save the Commission and all stakeholders from incurring significant, unnecessary expense and delay in litigating issues that are not relevant to any decision the Commission must make on the Application for Certification ("Application" or "AFC") and ensure that the FSA is compliant with CEQA's substantive requirements.[6] Because there is only limited time for evidentiary hearings, all stakeholders will benefit from focusing the hearings only on those issues that are relevant to the Application, within the Commission's jurisdiction, and consistent with the substantive provisions of CEQA. Moreover, if the legal errors discussed herein are not corrected by the Committee, the Commission will not meet CEQA's substantive requirements and thus face the potentially significant risk of having its decision overturned.

For the reasons set forth in this Motion, Applicant requests an Order directing preparation of a FSA consistent with the substantive requirements of CEQA as follows:

1. That the FSA's statement of project objectives must include the objectives "sought by the proposed project," including development of a 500 MW net solar thermal energy project using Applicant's proprietary technology, as required by CEQA Guidelines Section 15124(b).

[5] Several legal and factual flaws in the PSA are addressed in Applicant's detailed comments on the PSA, submitted on July 23, 2012. If these factual errors are not corrected in the FSA, they will be addressed by Applicant in testimony, briefing and at the evidentiary hearings.

[6] Although Applicant has limited this Motion to address certain threshold legal errors in the PSA, Applicant reserves its right to raise other legal and factual claims in this ongoing proceeding, including, but not limited to, legal and factual claims based on the hearing record developed in this proceeding.

2. That the FSA's analyses of alternatives must exclude from detailed consideration alternatives that are not feasible or reasonable, as required by CEQA Guidelines Section 15126.6(a).

3. That the FSA's evaluation of the No Project Alternative must include a discussion of what would be reasonably expected to occur on the Project site in the foreseeable future – residential use, based on approved land use plans that permit development on 170 parcels – as required by CEQA Guidelines Section 15126.6(e).

4. That the FSA must exclude analysis of all Project components located outside of the Commission's jurisdiction in the sovereign State of Nevada, as mandated by CEQA Guidelines Section 15277.

II. STATEMENT OF FACTS

On August 5, 2011, Applicant filed the HHSEGS AFC. The Commission accepted the AFC as "data adequate" on October 5, 2011. The Project will be located on approximately 3,277 acres of privately owned land in Inyo County, California, adjacent to the Nevada border ("Project Site"). (AFC, p. 1-2.) The Project will comprise two solar plants and associated facilities. Each solar plant will generate 270 megawatts (MW) gross (250 MW net), for a total net output of 500 MW, using Applicant's proprietary concentrated solar thermal technology. (*Id*.) Each solar plant will be surrounded by a field of heliostats (comprised of two mirrors mounted on a pylon, guided by a sun tracking system). (*Id.*) Heliostats will focus sunlight on a solar receiver atop a solar power tower near the center of each heliostat field, which will in turn generate steam that will be piped to a conventional steam turbine located at the foot of the tower. The Project will be served by gas and transmission lines located in Nevada. (*Id.*, at 1-3.) The environmental impacts of the facilities in Nevada will be the subject of an Environmental Impact Statement ("EIS") prepared by Bureau of Land Management ("BLM") in accordance with the National Environmental Policy Act ("NEPA"). (*Id.*) The Project will be reviewed in that EIS as a "connected action" pursuant to NEPA. (40 CF.R. § 1508.25(a)(i)-(iii).)

The Project uses the same solar generating system that the Commission approved in the Ivanpah SEGS Project, which is now under construction. However, the Project incorporates several important technology advancements, including the 750-foot-tall solar power tower. (AFC, p. 1-2.) One principal advantage of the new solar power tower design is that it results in

more efficient land use and greater power generation. (*Id*.) The new tower design permits more compact heliostat placement, substantially reducing mirror shading and accommodating more heliostats per acre, more megawatts generated per acre and a more efficient overall design. (*Id*.) The Project will use air cooled technology, which allows the water usage to be limited to a maximum of 140 acre feet per year of water. (*Id.*, at 1-3, 1-11.) This minimal water use will be entirely offset by the retirement of other water rights within the same water basin. (*See*, HHSEGS Data Response Set 1A-2, Attachment DR 40-1.)

The Project Site is previously disturbed land currently subdivided into approximately 170 parcels.[7] Current general plan and zoning designations permit construction of one single-family home on each lot, in addition to other uses. (Inyo County Code § 18.12.020.) Each lot overlays the Pahrump Valley Groundwater Basin. (AFC, pp. 1-9; 5.15-8) Residences in the vicinity of the Project Site currently obtain water from private groundwater wells that also pump from the Pahrump Valley Groundwater Basin. (*Id.*, at 5.15-8)

Inyo County has consistently identified the Project Site and surrounding area as an "excellent location" for, and "appropriate" for, solar energy development.[8] Significantly, at the time the AFC was filed with the Commission, the Project Site was located in a "solar overlay zone," specifically designated by Inyo County for development of renewable energy projects.[9] The Project Site has also been identified in Renewable Energy Action Team ("REAT") documents as being on disturbed lands and surrounded by disturbed lands, and as not being

[7] The current zoning for these parcels is Open Space, which permits single-family dwellings, farms and ranches, livestock ranches, animal hospitals or kennels, wildlife refuges; hunting and fishing preserves, wilderness areas and wilderness use, public stables, roping arenas, riding academies, parks, campgrounds, private recreational clubs, pack stations, lodges, resorts, feed lot, dairies or commercial ranches, public and quasi-public buildings, airports, landing fields and airstrips, public and commercial refuse disposal sites, mining and processing of natural resources. *See*, Inyo County Code § 18.12.020.

[8] *See* Inyo County draft proposed CREZ areas submitted to the CEC in 2009, *available at* http://www.energy.ca.gov/reti/steering/workgroups/phase2A_update/2009-11-19_meeting/RETI_Paper_Attachment_2009-11-19.pdf; Report by Inyo County to RETI Steering Group in Nov. 2009, *available at* http://www.energy.ca.gov/reti/steering/workgroups/phase2A_update/2009-11-19_meeting/RETI_Paper_2009-11-19.pdf; Comments Regarding RETI Phase 2B Report Update from Mike Conklin, Inyo County Planning Department Director (April 23, 2010) (requesting that the proposed Charleston View Competitive Renewable Energy Zones (CREZ) be incorporated into Renewable Energy Transmission Initiative (RETI) and other renewable energy planning efforts), *available at* http://www.energy.ca.gov/reti/documents/phase2B/comments/2010-04-26_Inyo_County.pdf; and see Inyo County Renewable Energy Overlay Map, August 2010, included for the BOS consideration in the adoption of Title 21, *available at* http://www.inyoplanning.org/documents/RenewEnergyARF8-10_002.pdf.

[9] For example, *see* http://www.inyoplanning.org/documents/REGPA-F.CharlestonV.pdf.

located on or nearby any lands identified as "Category I Lands."[10] No designated critical habitat for any listed species exists on or adjacent to the Project Site. (AFC, p. 1-8.) Only two desert tortoises were found within the Project boundary during the protocol level surveys conducted pursuant to agency guidelines. (*Id.*, at 5.2-2.) No other threatened, endangered or candidate species under either the federal Endangered Species Act ("ESA") or California Endangered Species Act ("CESA") are located on the Project Site. No significant archaeological or historical resources are located on the Project Site. (*Id.*, at 5.3-31; also see SSA, p. 76.)

On May 25, 2012 the Staff released the PSA. Included in the PSA was a set of purported project objectives significantly different than the "objectives sought by the project," in the AFC. (PSA, p. 6.1-3.) Several key objectives constituting the underlying purpose of the Project were eliminated, including the use of BrightSource's proprietary technology in a utility-scale project, compliance with power purchase agreement provisions, and achievement of a targeted first/second quarter 2015 commercial on-line date. (AFC, p. 1-3; also see HHSEGS Data Response Set 2A, Data Responses 137-140.) Instead, for the purposes of the PSA, Staff included a generic set of project objectives relating to the *Commission's* "underlying purpose . . . to fulfill its role in implementing California's Renewables Portfolio Standard (RPS) program." (PSA, p. 6.1-2.)

The PSA's alternatives analyses also include alternative technologies that are not feasible given technological, economic, and timing issues. (*See*, for example, PSA, pp. 6.1-62, 71.) Moreover, the PSA's No Project alternative assumes that no future development will occur on the Project Site if the Project is not approved by the Commission, despite the fact that the Project Site is currently subdivided into 170 lots and current zoning permits residential and other development on the land. Thus, the PSA's No Project alternative assumes that baseline environmental conditions will be forever preserved, rather than assuming future impacts reasonably expected to occur in accordance with the Project Site's current land use entitlements, i.e. residential development, groundwater pumping, and related infrastructure for residential development. (PSA, Section 6, *passim*.)

Finally, the PSA includes analysis of Project components located entirely in the sovereign State of Nevada that will be subject to review under NEPA – i.e., transmission and

[10] Category I lands are those where energy development is "prohibited or restricted by policy". *See* http://www.energy.ca.gov/33by2020/documents/renewable_projects/REAT_Generation_Tracking_Projects_Map.pdf

natural gas lines. The focus on Nevada-based project components is most pervasive in the PSA's discussions of Alternatives, Biological Resources, Cultural Resources, and Water Supply. (PSA, *passim*.)

III. ARGUMENT

The FSA is an environmental document prepared pursuant to the Commission's certified regulatory program and subject to the substantive requirements of CEQA. (Pub. Resources Code §§ 21080.5, 25519(c); 14 C.C.R. § 15250; *see also* the legal opinion prepared by Commission Chief Counsel William M. Chamberlain, *Use of Final Staff Assessment as a CEQA Environmental Document*, Docket No. 01-AFC-19, p. 2 (April 21, 2003), stating that the FSA is substantially similar to an EIR and is prepared by Staff in accordance with Public Resources Code sections 25500 *et. seq*.) Because, the PSA fails to comply with the substantive requirements of CEQA for the reasons described below, the Committee must issue an order directing Staff to ensure that these failures are remedied in the FSA.

A. The PSA Arbitrarily And Improperly Rejects Applicant's Project Objectives.

According to the California Supreme Court, the EIR is the heart of CEQA and the alternative analysis is the "core of an EIR." (*Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 564 (1990) ("*Goleta Valley*").) The basic purpose of the CEQA alternatives analysis is to identify ways in which the objectives sought by the proposed project might be achieved while also avoiding or substantially lessening any of the significant effects of a project. (14 C.C.R. § 15126.6(a).)

To achieve this purpose, CEQA mandates that the FSA include a "statement of the objectives *sought by the proposed project*", and to analyze a "reasonable range" of project alternatives that will "feasibly attain" most of those project objectives (14 C.C.R. § 15124(b), 15126.6(a) (emphasis added).) Per the CEQA Guidelines, the statement of objectives sought by the project "should include the *underlying purpose of the project*." (14 C.C.R. §15124(b) (emphasis added).) The statement of objectives sought by the Project, as described in the AFC, is set forth on the attached Exhibit A (collectively, the "Project Objectives"). For comparative purposes, Exhibit A also sets forth the generic project objectives developed by Staff to replace the Project Objectives identified by Applicant.

1. The PSA Improperly Replaces Applicant's Project Objectives With A Generic Set Of Policy Objectives.

Instead of analyzing a range of alternatives selected on the basis of the "objectives sought by the project," as CEQA requires, the PSA arbitrarily sets them aside. Indeed, the Alternatives analysis in the PSA eliminates the most significant and fundamental objective sought by the Project - constructing and operating a 500 MW solar thermal facility *using Applicant's proprietary technology*. (AFC at 1-3, 4; HHSEGS Data Response Set 2A, p. 26.)[11] The PSA instead replaces the Project Objectives with a set of generic policy objectives tailored to the *Commission's* "underlying purpose . . . to fulfill its role in implementing California's Renewables Portfolio Standard (RPS) program." (PSA, p. 6.1-2, 3.)

The PSA's alternatives analysis thus focuses on achievement of the Commission's "underlying purpose" — increasing the in-state generation of electricity by renewable electrical generation facilities in general – rather than on the Project's underlying purpose, as required by CEQA. The result of this legal error is an *unreasonable* range of analyzed alternatives that would not meet most of the "objectives sought by the project" in at least three out five instances, a clear violation of the "reasonable range" requirement of CEQA Guideline Sections 15124(b) and 15126.6(a).

2. Applicant's Project Objectives Cannot Be Dismissed As A Mere Preference.

According to the PSA, Staff replaced the "objectives sought by the project" with Staff's preferred generic objectives in order to purportedly "facilitate . . . analysis of a reasonable range of potentially feasible alternatives, including alternatives that may not be preferred by the project applicant." (PSA, p. 6.1-3.) The "objectives *sought by the project*" cannot, however, be summarily dismissed simply by characterizing them as the Applicant's mere "preference." Rather, the Project Objectives are the entire reason the Applicant filed an AFC in this proceeding. Absent these objectives, there is no project. To dismiss the project's important, foundational objectives as mere "preference" is to misunderstand the alternatives analyses fundamental purpose – to identify whether there are alternatives to the project that avoid or substantially lessen any of the significant effects of a project but which would feasibly *attain*

[11] In addition, the PSA omits key objectives that make the Project commercially feasible – *i.e.,* achieving a commercial on-line date in first/second quarter of 2015 and compliance with power sales agreement provisions.

most of the basic objectives sought by the project. (*See,* 14 C.C.R. §§ 15124,15126.6 (emphasis added).)

3. Rejection Of Project Objectives Is An Arbitrary Departure From Past Commission Practice.

The PSA's refusal to identify and analyze a range of alternatives based on the "objectives sought by the project" not only misunderstands the statutory purpose of such analysis, it represents a stunningly arbitrary departure from the Commission's past practice. For example, the PSA rejects the Project Objective that the Project be constructed *in California*, yet the Abengoa Staff Assessment included a project objective to "construct and operate a mid-sized (250 MW) solar power generating facility *in California*."[12] Similarly, the PSA rejects the Project Objective to achieve an on-line target for the first and second quarter of 2015, yet the Abengoa Staff Assessment included the project objective "[t]o start commercial operation by winter of 2012."[13] Similarly, the PSA rejects the Project Objective to select "a site with minimal slope, predominately 5 percent slope or less[,]" yet the Rice Staff Assessment included the project objective to select a site "in areas of high solarity with ground slope of less than 6 percent."[14] Finally, the PSA rejects the Project Objective "[t]o use BrightSource's proprietary technology in another utility-scale project, further proving the technical and economic viability of the technology," yet the Victorville 2 Project Staff Assessment included the similar project objective to "integrate" two specific types of technologies, which "maximizes the synergies between the

[12] Abengoa Mojave Solar Desert Project Commission Decision, Docket No. 09-AFC-5, p. 23 (CEC-800-2010-008-CMF, Sept. 2010). The Commission states a similar project objective for several other large solar energy projects including: Blythe Solar Power Project ("Construct a utility-scale solar energy project of up to 1,000 MW and interconnect directly to the CAISO Grid"), Calico Solar Power Project ("To construct and operate an up to 663.5 MW renewable power generating facility in California"), Genesis Solar Energy Project ("To construct a utility-scale solar energy project of up to 250 MW"), Ivanpah Solar Electric Generating Facility ("To safely and economically construct and operate a nominal 370 MW, renewable power generating facility in California"), and Palen Solar Power Project ("Construct a utility-scale solar energy project of up to 500 MW and interconnect directly to the CAISO Grid").

[13] Abengoa Mojave Solar Desert Project Commission Decision, Docket No. 09-AFC-5, p. 23 (CEC-800-2010-008-CMF, Sept. 2010). The Commission states a similar project objective for several other large solar energy projects including: Blythe Solar Power Project, Calico Solar Power Project, Genesis Solar Energy Project and Palen Solar Power Project which all include the following project objective: "Complete the review process in a timeframe that would allow the Applicant to start construction or meet the economic performance guidelines by December 31, 2010 to potentially qualify for the 2009 American Recovery Reinvestment Act (ARRA) cash grant in lieu of tax credits for certain renewable energy projects."

[14] Rice Solar Energy Project Commission Decision, Docket No. 09-AFC-10, Alternatives Section p. 2 (CEC-800-2010-019 CMF, Dec. 2010).

two technologies to increase project efficiency."[15] Simply put, there is no principled basis for the PSA's rejection of statement of the objectives sought by HHSEGS where the very same objectives have been acceptable to the Staff in other similarly situated proceedings.

4. Applicant's Business Purposes Are An Acceptable Project Objective.

Finally, the "objectives sought by the project" cannot be disregarded or altered on the basis that the objectives are tailored in part to achieve Applicant's business purposes. The California Supreme Court has left no doubt that the business purposes of the project proponent are an appropriate project objective:

> Although a lead agency may not give a project's purpose an *artificially* narrow definition, a lead agency may structure its EIR alternatives analysis around a reasonable definition of underlying purpose and need not study alternatives that cannot achieve that basic goal. For example, if the purpose of the project is to build an oceanfront hotel or waterfront aquarium, a lead agency need not consider inland locations. (*In re Bay Delta Programmatic Envt'l Impact Report Coordinated Proceedings*, 43 Cal.4th 1143, 1166 (2008) (emphasis added).)

Indeed, California courts have long recognized that it is perfectly acceptable to base a CEQA alternatives analysis on the applicant's underlying business objectives. (*See, e.g.*, *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal.3d 553, 561 (1990) (holding that inland location alternative need not be analyzed if business objective of project is to build a waterfront hotel); *Save San Francisco Bay Ass'n v. San Francisco Bay Conservation Comm'n*, 10 Cal. App.4th 908, 924 (1992) (holding that inland location alternative need not be analyzed if business objective of project is to build waterfront aquarium); *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal.App.4th 704, 715 (1993) (holding that low density alternative need not be analyzed if business objective is providing multi-family housing); *Ass'n of Irritated Residents et al. v. County of Madera*, 107 Cal.App.4th 1383, 133 (2003) (holding that a reduced herd size alternative need not be analyzed if it would not achieve the business objective of proposed dairy expansion).

The foregoing case law makes clear that CEQA does not permit the Alternatives analysis to ignore the "objectives of sought by the project" merely because they are tailored to achieve

[15] Victorville 2 Project, 07-AFC-1, Preliminary Staff Assessment, p. 6-3.

Applicant's underlying business objectives. Indeed, CEQA compels the Committee to order that the FSA include a reasonable range of alternatives based on the "objectives sought by the proposed project," as required by CEQA Guidelines Section 15124.

B. The PSA Analyzes And Promotes Alternatives That Are Legally Infeasible, In Contravention Of CEQA.

As explained above, CEQA mandates that an EIR evaluate a "reasonable range" of project alternatives. (14 C.C.R. § 15126.6(a).) In determining this range, the California Supreme Court counsels that "local agencies shall be guided by the doctrine of feasibility" and should not consider alternatives "whose implementation is remote and speculative," because unrealistic alternatives do not contribute to useful analysis. (*In re Bay Delta,* 43 Cal.4th at 1163.)

CEQA defines the term "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." (14 C.C.R. § 15364.) In short, CEQA requires that project alternatives analyzed in the FSA be both reasonable and feasible. The PSA's proposed PV and Solar Trough alternatives fail to satisfy these mandatory requirements, resulting in consideration of infeasible alternatives. Therefore, the Committee must issue an order ensuring that the FSA does not suffer from the same failure as the PSA.

The Applicant has provided substantial information demonstrating that neither a PV nor a solar trough alternative is "feasible," as that term is defined by CEQA Guideline Section 15364. The substantial lead time in project development, the required renegotiation of existing PPA's to accommodate a different proprietary technology, and additional permitting requirements alone render the PV and solar trough alternatives incapable of being accomplished in a reasonable period, as is required by CEQA. Moreover, the HHSEGS Application is before this Commission precisely because the Applicant's solar thermal technology can deliver renewable energy with specific attributes, in particular superior Resource Adequacy value, which these infeasible alternatives cannot. (HHSEGS Data Response Set 2A, Data Responses 137-140.)

In addition, the feasible implementation of such alternatives is highly speculative given that Applicant's entire business structure, staffing, research and development and technological expertise centers on the solar thermal power tower design. In addition to the feasibility concerns addressed above, because the PV alternative uses a non-thermal energy source, Applicant may be required to initiate a new CEQA process before another agency. Furthermore, contractual

counterparties are under no obligation to accept generation from an alternative technology; indeed, the California Public Utilities Commission could require such a substantial change to be rebid into a new RPS solicitation. (*See generally*, HHSEGS Data Response Set 2A, Data Responses 137-140.) These factors all pose serious feasibility issues that are not considered in the PSA. Moreover, failure to consider these factors is tantamount to a failure to provide an objective consideration of the Project as required by the Commission's regulations. (*See*, 20 C.C.R. §§ 1712.5, 1742.5(c).)

CEQA requires examination of a range of feasible alternatives sufficient to "permit a reasoned choice." (14 C.C.R. § 15126.6(f).) No "reasoned choice" is possible when the examined alternatives exceed the realm of feasibility for a project proponent. Further, the Commission may exclude from detailed consideration an alternative located outside of its decision making authority as infeasible. (*See, Goleta Valley,* 52 Cal.3d at 575 (upholding agency rejection of alternative outside of agency's permit jurisdiction).) The PV and solar trough technologies studied in the alternatives section clearly exceed the realm of feasibility as an alternative to the Project and do not permit "a reasoned choice" among a range of alternatives that can actually be implemented, in contravention of CEQA. Since the utility-scale PV and solar trough alternatives are legally and practically infeasible, both should be eliminated from detailed consideration in the FSA.

C. The Alternatives Section Violates CEQA Because The No Project Alternative Arbitrarily Fails To Consider The Project Site's Existing Land Use Entitlements And What Would Reasonably Be Expected To Occur In The Foreseeable Future If The Project Were Not Approved.

The FSA's discussion of project alternatives must include a No Project alternative and an analysis of its impacts. (14 C.C.R. § 15126.6(e).) The purpose of the No Project analysis is to allow the public and decision-makers to compare the environmental effects of Project approval against the effects of Project denial over time. (*Planning & Conserv. League v. Dept. of Water Resources*, 83 Cal.App.4th 892, 917 (2000).) Unlike all other alternatives, however, the No Project alternative must be evaluated irrespective of its feasibility. (*Id*.)

In assessing the No Project alternative, CEQA requires the FSA to analyze "what would reasonably be expected to occur on the Project Site in the foreseeable future if the Project were not approved, based on current plans and consistent with available infrastructure and community services." (14 C.C.R. § 15126.6(e).) Thus, CEQA dictates that the No Project alternative's

analyses must not assume that disapproval of the project will maintain the environmental status quo. Indeed, CEQA mandates that the lead agency not "create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment" when analyzing the No Project alternative. (14 C.C.R. §15126.6(e)(3)(B).)

The Project Site is currently subdivided into 170 individual parcels that range in size from 2.5, 20 and 40 acres, and can be developed under current zoning, as single family residences, farms, and livestock ranches. (Inyo County Code § 18.12.020.) Because there is no municipal- or county-operated water or sewer service to the property, applicable law permits private groundwater wells and septic systems to serve these needs, just like other existing residential lots in the Charleston View area. (Inyo County Code §§ 14.28.050, 15.24.020.) No further discretionary permits are required for residential development of these 170 parcels. Instead, all additional approvals – *e.g.*, building permits, well permits, etc. – are "ministerial"[16] and not subject to Inyo County's discretionary authority. (Inyo County Code § 14.28.050.)

Despite an existing approved subdivision map and water entitlements, the PSA unreasonably assumes that the lots within the Project Site's existing subdivision will not be developed. Specifically, despite the existing entitlements and lack of any further discretionary permitting, the PSA takes the position that "it is unknown whether the County would issue a well permit for a new residence," implying that the County has discretion to withhold such permits. (PSA, p. 6.1-14.) California law grants an owner of land overlying a groundwater basin the unqualified right to the reasonable and beneficial use of groundwater on the overlying land, correlative to the use of other overlying right holders. (*City of Barstow v. Mojave Water Agency*,23 Cal.4th 1224, 1240 (2003). In effect, the Staff incorrectly assumes away the Project Site's existing land use entitlements and groundwater rights by assuming the County will not exercise its ministerial duty to issue non-discretionary well permits.

As a matter of law, the PSA's assumption that the County will not issue a well permit or other non-discretionary, ministerial approvals violates CEQA's clear directive that the PSA's No

[16] As defined by the CEQA Guidelines, "ministerial" is defined as a "governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project." (14 C.C.R. § 15369.) No special discretion or judgment is used in reaching a decision; rather, a public official applies "fixed standards or objective measurements" in reaching a decision. (*Id.*) Courts have defined as ministerial actions where an applicant is able to legally compel issuance of a permit without any change in a proposed project, as the lead agency cannot lawfully deny the permit, nor condition it in any way if all fixed standards or objective measures are satisfied. (*See, e.g. Friends of Westwood v. City of L.A.*, 191 Cal. App. 3d 259, 272 (1987).)

Project analysis "identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment." (14 C.C.R. § 15126.6(e)(3)(B).) Given the existing state of the entitlements process, the practical result of project denial is not that the subdivided site would remain undeveloped. To the contrary, the No Project alternative must be reformulated to reflect the facts on the ground – the building of up to 170 residences without further discretionary permitting.

In light of CEQA's requirements, the Committee must order that the FSA include a No Project alternative that reasonably identifies what would reasonably be expected to occur at the Project Site in the foreseeable future if the Project were not approved, based on existing land use approvals, i.e. up to 170 residences and all of the potential environmental impacts associated with such development and use.

D. The PSA Improperly Analyzes Environmental Impacts Of Project Components Located In Nevada That Are Expressly "Exempt" From CEQA.

The protestation in the PSA that "CEQA does not stop at the border" is simply incorrect. (PSA, p. 1.1-4.) In fact, CEQA expressly exempts from further consideration projects or portions thereof located in neighboring under the exact fact pattern in the HHSEGS project case.

Specifically, Public Resources Code section 21080 expressly *exempts* from CEQA review project components located in another state -- if those project components will be the subject of environmental review under the National Environmental Policy Act (NEPA) or a similar state law. Specifically, existing law provides a complete CEQA "exemption" as follows:

> This division [CEQA] does not apply to any of the following activities:
> * * *
> (14) Any project *or portion thereof located in another state which will be subject to environmental impact review pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. Sec. 4321 et seq.) [NEPA]* or similar state laws of that state. Any emissions or discharges that would have a significant effect on the environment in this state are subject to this division. (Pub. Resources Code § 21080(b)(14); also see 14 C.C.R. § 15277.)

The Project includes certain components located in Nevada – *i.e.*, natural gas and electric transmission lines – that are currently subject to NEPA review conducted by the BLM.

Nevertheless, the PSA analyzes environmental impacts associated with such out-of-state Project components, as summarized in the attached Exhibit B.

As set forth in detail in Exhibit B, the PSA ventures into Nevada extensively in the Biological Resources, Cultural Resources, Growth-inducing Impacts, Land Use, Noise and Vibration, Soils & Surface Water, and Visual Resources sections. One answer to the question of why is the PSA nearly 1,400 pages long is plainly that the PSA has ventured far and wide from the project site in California to analyze project components located in Nevada. This excursion into Nevada is inconsistent with CEQA's express exemption.

The statutory exemption for out-of-state projects under CEQA in Public Resources Code section 21080(b)(14) is further implemented through Section 15277 of the CEQA Guidelines, which specifically states that "CEQA does not apply to any project or portion thereof located outside of California," so long as the project is subject to environmental review under NEPA or a comparable state law.

In this case, the BLM will conduct a thorough review under NEPA of potential environmental impacts from the HHSEGS linear facilities that will be located in Nevada. These linear facilities are not expected to result in emissions or discharges that will have a significant effect on California. Therefore, pursuant to Section 21080(b)(14), these portions of the HHSEGS project are wholly exempt from review under CEQA.

Since these out-of-state components are expressly exempt from CEQA, the Committee should order that all analysis of the environmental effects of such components located in Nevada be stricken from the FSA.

IV. PRAYER FOR RELIEF

As described above, certain sections of the PSA fail to comply with the substantive requirements of CEQA, particularly the PSA sections that address the Project Objectives as they relate to Alternatives, the feasibility of alternative technologies, and the evaluation of the No Project alternative. Similarly, as it relates to project components located in Nevada, the PSA oversteps CEQA's bounds with its plenary analyses of project features located in Nevada, including the expansive and lengthy discussions found in the Biological Resources, Cultural Resources, and Water Supply sections. Indeed, one of the principal reasons that the PSA

contains nearly 1,400 pages is that many of its protracted analyses are focused on Nevada, contrary to the express CEQA exemption.

These sections ignore the plain language of CEQA and the CEQA guidelines and must be promptly corrected to avoid causing this proceeding substantial unnecessary expense and delay. For the foregoing reasons, the Applicant submits this Motion in Limine requesting the Committee Order that the FSA be prepared consistent with the substantive requirements of CEQA as follows:

1. That the FSA's statement of project objectives must include the objectives "sought by the proposed project," including development of a 500 MW net solar thermal energy project using Applicant's proprietary technology, as required by CEQA Guidelines Section 15124(b).
2. That the FSA's analyses of alternatives must exclude from detailed consideration alternatives that are not feasible or reasonable, as required by CEQA Guidelines Section 15126.6(a).
3. That the FSA's evaluation of the No Project Alternative must include a discussion of what would be reasonably expected to occur on the Project site in the foreseeable future – residential use, based on approved land use plans that permit development on 170 parcels – as required by CEQA Guidelines Section 15126.6(e).
4. That the FSA must exclude analysis of all Project components located outside of the Commission's jurisdiction in the sovereign State of Nevada, as mandated by CEQA Guidelines Section 15277.

Respectfully submitted,

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Exhibit A
Comparison of Objectives

PROJECT OBJECTIVES HHSEGS AFC, SECTION 1.3	PSA OBJECTIVES PSA, PP. 6.1-3 THROUGH 4.
To safely and economically construct and operate a net 500 MW, solar electric generating facility in California capable of selling competitively priced renewable energy, consistent with the procurement obligations of California's publicly owned and privately owned utilities.	Safely and economically construct and operate a nominal 500-megawatt renewable electrical generating facility resulting in sales of competitively priced renewable energy consistent with the needs of California utility companies.
To use BrightSource's proprietary technology in another utility-scale project, further proving the technical and economic viability of the technology.	
To locate the solar electric generating facility in an area of high solarity.	
To reduce stormwater impacts by selecting a site with minimal slope, predominately 5 percent slope or less.	
To site the project in a timely manner by minimizing potentially significant impacts and complying with applicable LORS.	Ensure construction and operation of a renewable electrical generation facility that will meet permitting requirements and comply with applicable laws, ordinances, regulations, and standards (LORS). Develop a renewable energy facility in a manner that will avoid or minimize significant environmental impacts to the greatest extent feasible.
To secure site control within a reasonable timeframe and a reasonable effort.	Obtain site control and use within a reasonable time frame.
To locate the solar electric generating facility on land that has been identified by local governments as suitable for renewable energy development.	
To assist California in repositioning its generation asset portfolio to use more renewable energy in conformance with state policies, including the policy objectives set forth in Senate Bill (SB) 1078 (California RPS Program), Assembly Bill (AB) 32 (California Global Warming Solutions Act of 2006), and SB X 1-2 (the California Renewable Energy Resources Act) recently signed by Governor Brown codifying the 33 percent RPS by 2020.	Develop a renewable energy facility that will supply electricity for use by retail sellers and publicly owned electric utilities to help satisfy their required California Renewables Portfolio Standard (RPS) goals.

Exhibit A
Comparison of Objectives

PROJECT OBJECTIVES **HHSEGS AFC, SECTION 1.3**	**PSA OBJECTIVES** **PSA, PP. 6.1-3 THROUGH 4.**
To comply with provisions of power sales agreements to develop a net 500 MW solar generating facility that can interconnect to the CAISO Balancing Authority with the potential of achieving a commercial on-line date as soon as possible, targeted for the first/second quarter of 2015.	
To provide renewable power capable of providing grid support by offering power generation that is flexible, and delivered to the grid operator through communications with a scheduling coordinator.	Develop a renewable energy facility capable of providing grid support by offering power generation that is flexible.
To generate renewable electricity that will be qualified as meeting the RPS requirements of the CEC, California Public Utility Commission, and the Western Renewable Energy Generation Information System program for tradable renewable energy credits.	

Exhibit B
PSA Excerpts Analyzing Impacts of Project Components Located in Nevada

SECTION	PAGE(S)	EXCERPT
Biological Resources	4.2-151	Construction of the pipeline along the eastern boundary would require trenching through many of these washes. Significant indirect impacts to adjacent streams during operation are expected from human disturbance, glare, lighting, and potential head-cutting or erosion above the gas pipeline trench that cuts through the washes at the eastern boundary. These indirect effects, although individually minor, are cumulatively considerable.
Biological Resources	4.2-158	The project would also disturb habitat in occupied habitat in Nevada to support linear facilities including a natural gas pipeline and transmission line.
Cultural Resources	5	The available archaeological evidence indicates a great deal of variability in the Native American use of different portions of the project area through time. A relatively sparse veneer of toolstone acquisition debris on the present surface of the proposed facility site indicates a transitory Native American use of that area, while the presence and moderate frequency of fire pit ruins, stone tool production and maintenance debris, and fragmentary stone tools demonstrate a much more extensive use of the discontinuous mesquite woodland along the fault zone to the immediate northeast of the facility site, through which the transmission line and natural gas pipeline for the proposed project would be built.
Cultural Resources	36	Ground disturbance accompanying construction at a proposed plant site, along proposed linear facilities, and at a proposed laydown area has the potential to directly impact unknown archaeological resources.
Growth-inducing Impacts	4.1-1	This analysis will focus on the potential for growth-inducing impacts related to the project's electric transmission line and natural gas pipeline as well as existing limitations to development in the project area. Potential impacts include loss of biological resources, open space, groundwater resources and other significant effects on the environment such as increased industrialization of an existing rural landscape.
Growth-inducing Impacts	4.4-2	Significant growth impacts could occur if a project provides infrastructure or service capacity to accommodate growth levels beyond those permitted by local or regional plans and policies. Included in this are projects such as a new electric transmission line or gas pipeline which could remove obstacles to growth activities.
Growth-inducing Impacts	4.4-2	The BLM has raised concerns about impacting the nearby mesquite thickets during construction of the gas pipeline and transmission line.
Growth-inducing Impacts	4.4-5	The electric transmission lines and gas pipelines that serve HHSEGS would provide new infrastructure that could be utilized by other development projects in Nevada and California.

Exhibit B
PSA Excerpts Analyzing Impacts of Project Components Located in Nevada

SECTION	PAGE(S)	EXCERPT
Land use	4.6-19	The environmental impacts of the transmission and gas pipelines and associated facilities are being analyzed in a separate environmental process in accordance with NEPA for which BLM will be the lead agency.
Noise and Vibration	4.7-8	Construction of linear facilities typically moves along at a rapid pace, thus not subjecting any one receptor to noise impacts for more than two or three days. Further, construction activities would be limited to daytime hours.
Noise and Vibration	4.7-11	All water pipes and gas pipes would be underground and therefore silent during plant operation. Noise effects from electrical interconnection lines typically do not extend beyond the lines' right-of-way easements and would be inaudible to receptors.
Soils & Surface Water	4.10-11-12	A detailed environmental impact analysis will be prepared by BLM.
Soils & Surface Water	4.10-19	Although the amount of excavation required to install the onsite underground transmission lines and natural gas pipelines would be relatively minor, soil disturbance associated with buried linear facilities could total to a considerable amount of soil disturbance. Activities such as clearing vegetation, excavation, and vehicle travel would present the highest potential for erosion. However, for the HHSEGS project the onsite linear facilities would be located along proposed paved internal roads.
Soils & Surface Water	4.10-27	The proposed offsite linear facilities east of the proposed HHSEGS project would not alter existing offsite drainage patterns. The gas pipeline would be constructed underground, and the pole structures for the overhead power transmission lines would not impede or adversely redirect existing flows. Staff believes that offsite flooding impacts of the proposed Hidden Hills Transmission Project would be less than significant.
Soils & Surface Water	4.10-36	Staff has not identified any significant impacts that would occur in Nevada regarding water quality and hydrology caused by the proposed HHSEGS project. The water quality and hydrology impacts from the linear facilities (transmission line and natural gas line portions) within the state of Nevada would be assessed by BLM under the requirements of the National Environmental Policy Act (NEPA) of 1969.
Visual Resources	41	The net effect on views throughout the valley would be a noticeable increase in the number and size of electric transmission facilities.

STATE OF CALIFORNIA

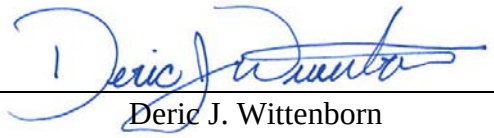
Energy Resources Conservation
and Development Commission

Application for Certification for the HIDDEN HILLS SOLAR ELECTRIC GENERATING SYSTEM PROJECT	))))	Docket No. 11-AFC-2

PROOF OF SERVICE

I, Deric J. Wittenborn, declare that on August 31, 2012, I served the attached *Motion In Limine for a Committee Ruling to Ensure the Final Staff Assessment Conforms to Substantive Requirements of the California Environmental Quality Act ("CEQA")*, 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.



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11-AFC-2

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