STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	DOCKET NO. 11-AFC-2
APPLICATION FOR CERTIFICATION FOR THE HIDDEN HILLS SOLAR ELECTRIC GENERATING SYSTEM (SEGS)	

INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY'S OPPOSITION TO APPLICANT'S MOTION "IN LIMINE"

September 24, 2012
Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104
Direct: 415-632-5307
Fax: 415-436-9683
lbelenky@biologicaldiversity.org

Ileene Anderson
Public Lands Desert Director
Center for Biological Diversity
PMB 447, 8033 Sunset Boulevard
Los Angeles, CA 90046
(323) 654-5943
ianderson@biologicaldiversity.org

Table of Contents

Table of Authorities

Cases:

Statutes and Regulations:

Other Authorities:

The Center for Biological Diversity ("Center") opposes the motion filed by applicant as an improper attempt to limit factual development regarding the application, undermine a full and fair environmental review, and untimely pre-determine the scope of the evidentiary hearings and the record. The Center requests that the motion be denied in its entirety.

Although entitled a motion "in limine", which is generally a motion regarding the *admissibility* of evidence, applicant's motion conflates evidentiary issues in a motion more akin to a request for summary adjudication and relies heavily on the erroneous statement that the motion only addresses "threshold legal issues" and that there are no disputed issues of fact related to the issues raised. *See* Code Civil Proc. § 437c (c) & (f) (summary adjudication is only proper where there are no triable issues as to any material fact). Because there are many disputed issues of material facts related to the issues raised by the applicant in its motion, the issues presented cannot properly be decided by the Committee at this stage of the proceedings.

I. Admissibility of Evidence

Pursuant to the Commission's Rules of Practice and Procedure, evidence relevant to proceedings is broadly admissible:

> Rules of Evidence.
> The following rules of evidence shall apply to any adjudicatory proceeding of the commission and in such other proceedings as the commission may determine by order.
> (a) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant noncumulative evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.
> (b) Oral or written testimony offered by any party shall be under oath.
> (c) Subject to the exercise of the lawful discretion of the presiding committee member as set forth in Section 1203(c), each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence against such party. Questions of relevance shall be decided by the presiding committee member.

> (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions. The presiding member may establish such additional rules as necessary for the orderly conduct of the proceeding. 20 C.C.R. § 1212.

The evidence and analysis that the applicant seeks to exclude from the FSA and is clearly admissible in this ongoing proceeding as "relevant noncumulative evidence [which] shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." 20 C.C.R. § 1212(a). Indeed, the evidence and analysis the applicant seeks to exclude regarding alternatives that would avoid significant impacts of the project is just the sort of evidence and analysis relied on in CEQA processes by state and local agencies throughout the state of California every day. Similar information has previously been included in staff assessments before the Commission, for example, regarding a potential PV alternative was included in the Commission's evaluation of the Beacon project which also had potentially significant impacts to water resources.

II. The Committee Cannot Make a Legal Determination Limiting the Extent of Environmental Review of the Application Based on Disputed Facts and an Incomplete Evidentiary Record

The Rules of Practice and Procedure allow a motion to be filed but do not require a determination at this time. The Presiding Member may "act to grant or deny the petition, in whole or in part, or schedule further hearings or written responses on the petition". 20 C.C.R. § 1716.5. Given that the questions raised in the motion by applicant are not properly decided at this stage of the proceedings, the Center urges the Committee to deny the motion in its entirety or, in the alternative, schedule further hearings on the motion after the PMPD is issued.

In some instances it may be possible or prudent for the Committee to rule on purely legal determinations prior to the evidentiary hearings—for example, where the underlying facts are undisputed and the issue calls for the Committee to make a

determination of statutory construction alone. However, where (as here), facts are disputed and/or the evidentiary record is not yet complete, the Committee cannot make a determination that would limit the extent of factual development or the environmental review. The issues raised by the applicant here regarding feasibility of potential alternatives and the reasonableness of the no action alternative as discussed in the PSA, are mixed questions of fact and law and any resolution of these questions by the Committee would require application of law to facts. At this stage of the proceedings these questions cannot be resolved because there is an incomplete evidentiary record and many of the "facts" asserted by the applicant are disputed.

The "statement of facts" provided by the applicant contains many statements that are either disputed and/or opinion that is not properly supported in the motion. These include the following:

- "air cooled technology . . . allows the water usage to be limited to 140 acre feet per year of water." In fact this is only the estimated operational water use, the water usage is estimated to be 696 acre-feet during the 29 month construction period. PSA at 4.15- 9. Moreover, the applicant previously agreed to use air-cooled technology for its ISEGS projects and later sought an amendment to use only "partially dry cooled" technology which requires additional water. (Petition to amend available at http://www.energy.ca.gov/sitingcases/ivanpah/compliance/2012-02-08_Petition_to_Amend-Equipment_Change_to_Reduce_Emissions_TN-64038.pdf) There is currently no evidentiary development regarding the feasibility of the air cooled technology for this proposed project, nor the likelihood that the applicant will ask for a similar amendment to this project later as well.

- "This minimal water use will be entirely offset by the retirement of other water rights within the same water basin." The applicant's statement includes a characterization of the amount of water use as "minimal" – this characterization is unsupported based on the facts currently before the Commission. The applicant's statement also contains an unsubstantiated opinion that the water use "will be entirely offset by retirement of other water rights"—whether the proposed retirement of other water rights will "entirely offset" the proposed water use is a disputed issue of fact that must be determined after evidentiary hearings. This statement also assumes that the water right proposed for retirement are "within the same water basin"—whether the water basin where the

retirement has been proposed is the "same water basin", the degree of connectivity between the ground waters in these areas, and the effect of the proposed mitigation measure of water retirement on local groundwater in the proposed project site area are all disputed issues of fact that must be determined after evidentiary hearings. The Center and many others who provided comments on the PSA noted that the water use may be significant, may cause significant impacts to water resources in a large area, and may cause significant impacts to sensitive and listed species including groundwater dependent vegetation, and is overall highly problematic in this area. (Comments available at http://www.energy.ca.gov/sitingcases/hiddenhills/documents/others/psa_comments/ *see*, *e.g.*, Center comments, Basin and Range Watch comments, Big Pine Paiute Tribe of the Owens Valley comments, Pahrump Paiute Tribe comments, The Nature Conservancy comments, BLM comments, Inyo County comments) The PSA also correctly noted that the proposed pumping may cause significant draw down of the water table at nearby Stump Springs, and the cumulative impacts to water resources may also be significant. PSA at 4.2-140. The Center intends to pursue issues regarding the impacts of the proposed water use and proposed mitigation at the evidentiary hearings.

- The applicant avers: "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." (Citing to a County website). The applicant fails to inform the Committee that a CEQA lawsuit challenging the "solar overlay zones" was brought by the Center and Sierra Club on May 26, 2011, based on the County's failure to provide adequate CEQA review before designating the zones. A settlement agreement was reached by the parties and the zones were rescinded by the County Board of Supervisors on August 22, 2011, in the settlement of the CEQA lawsuit. (Bd. Meeting Minutes available at http://www.inyocounty.us/Board_of_Supervisors/Minutes.php; public notice of the board meeting was provided to the public on August 11, 2011 http://inyoplanning.org/documents/RE-PN-recind-8.22.11.pdf) When the applicant filed the AFC August 5, 2011, the zones were technically still in effect but the lawsuit had been filed and the applicant should have been aware of the lawsuit at that time if it had undertaken even minimal due diligence efforts. To the extent the applicant now claims that it was unaware of the lawsuit when it filed the AFC on August 5, 2011, and asks the Committee to make any factual finding related to that assertion, the Center requests leave to propound additional data requests and discovery on that issue to the applicant and explore the issue at the evidentiary hearings.

- While the applicant correctly states that "two desert tortoises were found within the Project boundary" the PSA also estimates that the project will cause direct mortality to between 46 to 158 eggs and between 3 to 29 juvenile desert tortoises. Staff estimates that the applicant will be required to translocate between 6 to 38 desert tortoises (PSA at 4.2-3). However, the applicant wrongly implies that because no other ESA or CESA *listed* species are found on the site there are no other significant issues regarding impacts to species. In fact, golden eagles, a California Fully Protected species, have been routinely observed over the project site and are known to nest within the adjacent mountain ranges. (PSA at 4.2-4) and several rare plant species will also be affected by the project.

- The applicant also states that: "No significant archaeological or historical resources are located on the Project Site." However the "significance" of the historical resources—including the Old Spanish Trail – are disputed and this factual question cannot be determined before the evidentiary hearing.

- The applicant states that: "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. . . . The PSA's alternatives analyses also include alternative technologies that are not feasible given technological, economic, and timing issues." Motion at 5. However, the question of feasibility is a factual issue that is disputed and cannot be determined by the Committee based solely on the applicant's opinion—it is an issue that should only be determined after full factual development and evidentiary hearings. Indeed, the so-called "facts" regarding feasibility is at the heart of the determinations that must be made by the Commission when it evaluates the project *after* full environmental review and evidentiary development.

Moreover, the applicant's reliance on the target dates in the PPA and citing the data responses provided in February 2012 is puzzling for two reasons. First, the CPUC decision on the PPA (Advice Letter 3459-E, May 13, 2009, and CPUC Resolution E-4269, September 24, 2009, approves PPA for 5 units at two (or more?) locations 1) two units at Coyote Springs in Nevada, and 2) three units at a place "to be determined (TBD)". The 2015 date is clearly associated with the Coyote Springs units not the TBD units. Assuming that the Hidden Hills units might be used by the applicant to fulfill this PPA for the TBD units, the target dates for those are 2016 and 2017. These factual discrepancies must be resolved before the Committee or the staff could rely on any on-line date of 2015 in making any feasibility determination or eliminating alternatives on that basis. In addition, the Center is informed and believes and based thereon

alleges that the applicant is renegotiating the PPA including renegotiating the deadlines.

Second, the referenced data responses (2A, 137-140) discuss a 2015 on-line date as a reason not to consider storage as a component of this project. Recent filing by the applicant at the CPUC and the CPUC's draft decisions show that without storage the CPUC considers this project design to be too costly when compared to PV and other available renewable energy sources. Draft Alternate Resolution E-4522, proposed for CPUC hearing October 11, 2012[1] (draft finding that Rio Mesa project units – which have the same technology at the proposed Hidden Hills project units—"are highly uncompetitive" when compared to 2011 solicitation for renewable energy.). The CPUC proposed decision is also relevant to the applicant's rejection of alternatives except those that would support its choice of technology because the proposed decision that would approve a PPA for *only one unit* of Rio Mesa based in part on the applicant's assertion that the design of the Rio Mesa (which is the same as Hidden Hills) "comprises a necessary step in the evolution of BrightSource's technology development to build and finance the third generation power towers with molten salt storage that provide much greater value for California ratepayers." Assuming for the sake of argument alone that building *one unit* of this design is a "necessary step" in the applicant's technology design evolution, the applicant has provided no evidence that more than one unit of that technology would need to be constructed before moving on to the next step of its technology. The feasibility of the project utilizing the proposed technology or alternative technologies can only be adequately determined after full factual development in the environmental documents and at evidentiary hearings.

o The applicant states that: "the PSA includes analysis of Project components located entirely in the sovereign State of Nevada t*hat will be subject to review under NEPA* – i.e., transmission and 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." (Emphasis added). This statement fails to distinguish the Staff's analysis of project components in Nevada from the PSA's discussion of direct, indirect and cumulative impacts to lands in Nevada from the project components in California and impacts to lands in California from project components in Nevada. Each of these aspects must be evaluated in the environmental review and most would not be evaluated in the NEPA review. Moreover, it is the applicant who has consistently proposed to mitigate impacts to groundwater in California by retiring water rights *in Nevada* which are not part of the NEPA analysis

[1] Available at http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M027/K870/27870918.PDF

for the transmission and gas lines. Under CEQA, the Commission is required to analyze the proposed mitigation measures and their likely efficacy regardless of where those mitigation measures occur. Thus, the PSA was clearly required to and properly did evaluate many aspects of the project's impacts in both California and Nevada that it is highly likely would not be evaluated under the NEPA review for the transmission and natural gas lines—contrary to the assertion made by the applicant.

III. Alternatives and Project Objectives

The purpose of alternatives analysis in an environmental review document under CEQA is to enable the agency or commission to fulfill the statutory requirement that feasible alternatives that avoid significant impacts of a project must be implemented. "[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects." Public Res. Code § 21002. The statutory language also makes it quite clear that the Legislature intended public agencies to utilize CEQA's environmental review process and procedures to make determinations regarding feasible alternatives and mitigation measures, *not* to make snap judgments regarding feasibility before undertaking environmental review as the applicant urges the Committee to do here.

A. Commission's Past Practice for Solar Thermal Projects Shows a Range of Approaches to Objectives and Alternatives.

The applicant cherry-picks from past proceedings and ignores those that do not fit its theories. For example, for the Beacon project, where significant impacts to water resources were at issue, the Commission fully considered a PV alternative to the solar thermal trough design proposed by that applicant even though staff had accepted the applicant's project objectives which included use of wet cooling for its solar trough

technology. Beacon Solar Energy Project (08-AFC-2) Final Staff Assessment at 3-1 to 3-2 (objectives), 6-6 to 6-8 (description of PV alternative and feasibility), 6-18 (concluding that a PV alternative would avoid impacts to water, cultural and wildlife resources).[2]

To support the applicant's desire to have its on-line date included as a project objective, the applicant cites to a string of projects that were part of the "fast-track" and the subject of state and federal policies including the ARRA funding which Staff believed made those on-line dates relevant.[3] Further, the applicant's assertion as to the 2015 date appears to be at odds with the terms of the relevant PPA (as discussed above) and information that it is re-negotiating the PPA and the target dates therein. If the Committee considers the inclusion of the applicant's proffered on-line date in 2015 in making a determination on this motion, then the Center respectfully requests that the Committee first allow additional data requests, discovery, and/or evidentiary hearings on that issue.

B. A Mere Conflict with a Project Objective Does Not Render an Alternative Infeasible.

Nothing in CEQA states that an alternative may be found infeasible solely due to a conflict with one of the applicant's objectives. The statutory definition of "feasible"

---

[2] Available at http://www.energy.ca.gov/2009publications/CEC-700-2009-005/CEC-700-2009-005-FSA.PDF. Notably, that solar trough project was not built (in part due to water issues) and now there is a proposal to construct a PV solar project on that site. *See* Draft EIR available at http://www.co.kern.ca.us/planning/eirs.asp

[3] The Center consistently objected to those dates being considered as a project objective and raised significant concerns about the rushed environmental review process based on poor initial environmental data gathering and assessment. Many of those concerns have been borne out with project construction being suspended and changes required after the Decision was made. *See, e.g.*, Ivanpah SEGS 07-AFC-5C (project was suspended in April 2011, pending completion of additional tortoise surveys, assessments, etc. http://www.energy.ca.gov/sitingcases/ivanpah/compliance/2011-04-25_Department_of_Interior.pdf); Genesis Solar Energy Project 09-AFC-8C (desert kit fox deaths concurrent with construction activities and a flooding event – the likelihood of each of these impacts were not adequately analyzed in the certification process). The Center would raise similar objections here if Staff included the on-line date as a project objective.

does not even mention the applicant's objectives. Pub. Res. Code § 21061.1. In fact, the CEQA Guidelines expressly provide that a feasible alternative may *impede* achievement of those objectives to some degree. *See* 14 C.C.R (CEQA Guidelines) § 15126.6(a), (b) Even if a photovoltaic solar (PV) project on this site does not completely satisfy all of the applicant's stated objectives, that does not render it an infeasible alternative. Indeed, if applicants could thwart consideration of all potentially feasible alternatives simply by adopting overly narrow objectives, CEQA would be rendered meaningless. (*See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736-37 (holding that applicant's prior commitments could not foreclose analysis of alternatives). As the Commission has stated:

> A reasonable, feasible alternative must be one that meets most basic project objectives while avoiding or substantially lessening any of the significant effects of the project. [CEQA Guidelines, § 15126.6(a).] Stating project objectives too narrowly or too specifically could artificially limit the range of reasonable, feasible alternatives to be considered.
> . . .
> The evidence leads us to conclude that the Applicant defined its objectives so narrowly as to preclude a reasonable range of alternatives. While it is true that a project's objectives should guide the selection of alternative sites for analysis, when objectives are defined too narrowly, the analysis of alternative sites may be inadequate. (*City of Santee v. County of San Diego* (1989) 214 Cal. App. 3d 1438, 1455.)

Final Commission Decision, Chula Vista Energy Upgrade Project, June 2009 (07-AFC-4) CEC-800-2009-001-CMF ("Chula Vista Decision") at 26 (finding that applicant had not met its duty to analyze a reasonable range of alternatives). Here, in the PSA, staff properly looked at the applicant's stated objectives and also took into account the Commission's policies and goals for renewable energy production in formulating a set of project objectives to form the basis for CEQA review in this matter that allows for some meaningful range of alternatives to the project that may avoid and/or minimize

significant impacts to resources.[4] Indeed, the staff assessments for many other solar projects in the last few years used similar project objectives.

C. A Range of Potentially Feasible Alternatives Must be Considered in the Commission's Environmental Review

Courts have distinguished the feasibility determination in choosing which alternatives to consider, from the determination of feasibility in the final decision.

> The issue of feasibility arises at two different junctures: (1) in the assessment of alternatives in the EIR and (2) during the agency's later consideration of whether to approve the project. (*See Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 489 (*Mira Mar*).) But "differing factors come into play at each stage." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2009) § 15.9, p. 740.) For the first phase—inclusion in the EIR—the standard is whether the alternative is *potentially* feasible. (*Mira Mar*, at p. 489; Guidelines, § 15126.6, subd. (a).) By contrast, at the second phase—the final decision on project approval—the decisionmaking body evaluates whether the alternatives are *actually* feasible. (*See* Guidelines, § 15091, subd. (a)(3).) At that juncture, the decision makers may reject as infeasible alternatives that were identified in the EIR as potentially feasible. (*Mira Mar*, at p. 489.)

California Native Plant Society v. City of Santa Cruz (2009) 177 Cal. App. 4th 957, 981 (emphasis in original) (finding that although CEQA does not require a specific outcome it does did required the agency "to consider environmentally superior alternatives, explain the considerations that led it to conclude that those alternatives were infeasible, weigh those considerations against the environmental harm that the [project] would cause, and make findings that the benefits of those considerations outweighed the harm.") Further, the selection of the range of potential alternatives by the lead agency is subject to a rule of reason and the agency's discretion. "The selection will be upheld, unless the challenger demonstrates 'that the alternatives are *manifestly unreasonable* and that they

[4] The Center has consistently advocated for an even broader formulation of project objectives for this and similar solar projects that would also include distributed solar power, efficiency measures, and conservation, which would avoid even more of the significant impacts of these large-scale projects.

do not contribute to a reasonable range of alternatives." (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265.)" *Id*. at 988 (emphasis added). As relevant here, where the applicant has raised the question at the first stage as to what alternatives should be considered in the environmental review, a PV alternative on this site, which was included in the PSA alternatives discussion, is clearly a potentially feasible and reasonable alternative that should be included in the detailed environmental analysis in the FSA and PMPD.

If the Commission later considers finding one of the alternatives that is analyzed in the FSA and/or PMPD to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting that conclusion. An infeasibility finding must be supported by substantial evidence in the record. Pub. Res. Code § 21081.5; CEQA Guidelines, § 15091 (b).

The Commission's Chula Vista Decision is also instructive because the applicant there raised a similar argument objecting to a PV alternative. "The Applicant effectively eliminated photovoltaic (PV) generation from its alternatives analysis when it stated that it did 'not meet the project objective of utilizing natural gas available from the existing transmission system.' [] This is another example of a too-narrow project objective artificially limiting the range of potential alternatives. Requiring the use of natural gas as a project objective eliminates consideration of alternative fuel sources." Chula Vista Decision at 29. In that case, the Commission had a chance to hear evidence at hearing and found that PV could be a feasible alternative technologically as well as financially where testimony showed that "there was little or no difference between the cost of energy provided" from the gas proposal or PV. Chula Vista Decision at 30. In its decision denying the application, the Commission found that: "the analysis of the PV alternative is insufficient to comply with the requirements of the California Environmental Quality Act, the Warren-Alquist Act, and their respective regulations. In the event the Applicant

chooses to pursue this matter further, we will require a more in-depth analysis of the PV alternative by both Staff and Applicant." Chula Vista Decision at 30.

The CEQA cases cited by the applicant do not suggest otherwise. *See* Applicant's Motion at 9. In *Save San Francisco Bay Ass'n v. San Francisco Bay Conservation Comm'n* (1992) 10 Cal. App.4th 908, the court found that the project purposes could appropriately be used to reject alternatives as infeasible *after* analysis. In that case the issue was siting a waterfront aquarium focused on the San Francisco bay ecosystem on the bay; but that case is inapposite[5] to the question raised here. The issue raised by the applicant here is whether it is appropriate or allowable for Staff to *consider and analyze* alternative solar technologies which would avoid significant impacts of the proposed solar energy project on this same site in the environmental documents. Even if it were appropriate to try to limit the range of alternatives before the environmental review is prepared (which it is not), the analogy the applicant has put forward would only hold if, for instance, the alternative staff proposed to analyze to avoid impacts to water resources were to site the project in an area with abundant water resources but far less solar radiation—no such alternative has been suggested here.

The remaining cases cited by the applicant are similarly inapposite. The decision in *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, did not turn on an alternative's mere inconsistency with project objectives. Rather, the court found that a detailed economic analysis, showing that a proposed alternative would eliminate all profit from the project and result in a loss of construction financing, provided substantial evidence of economic infeasibility. *Id.* at p. 1401. The applicant

[5] Similarly, although the court in, *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 561, upheld the agency's decision not to fully analyze inland alternative for a proposed waterfront hotel that was suggested in comments on the draft EIR based on the agency's explanation that "it is felt that oceanfront property is required to meet the basic objectives of this project," nothing in that case can be read to *prohibit* the agency from analyzing a non-waterfront alternative if it had chosen to.

here has provided no such analysis. The decision in *Sequoyah Hills Homeowners Ass'n v. City of Oakland* (2003) 23 Cal.App.4th 715 mentions that the city council accepted the applicant's assertion that a reduced-density development alternative was economically infeasible. *See* 23 Cal.App.4th at p. 715. What the case actually holds, however, is that the city council's *alternative* conclusion—that a reduced-density alternative was barred by statute, and thus *legally* infeasible—was correct. *Id.* at pp. 715-16. The applicant has raised no issue of legal infeasibility here.

None of these cases stands for the proposition that an applicant's mere assertion of a conflict with project objectives renders an alternative economically infeasible. On the contrary, recent decisions have clarified that a finding of economic infeasibility must be based upon quantitative, comparative evidence showing that the alternative would render the project economically impractical.

> The agency may not simply accept at face value the project proponent's assertions regarding feasibility. (*Sierra Club v. County of Napa, supra,* 121 Cal.App.4th at p. 1504; *see also Laurel Heights, supra*, at p. 404 [courts will not "countenance a result that would require blind trust by the public"].) The applicant's feeling about an alternative cannot substitute for the required facts and independent reasoning. (*Preservation Action Council v. City of San Jose, supra,* 141 Cal.App.4th at p. 1356.)

Save Round Valley Alliance v. County of Inyo (2007) 157 Cal.App.4th 1437, 1458-59, 1461-62 (holding that applicant's inability to achieve "the same economic objectives" under a proposed alternative does not render the alternative economically infeasible; the agency); *see also Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600 (requiring evidence that comparative marginal costs would be so great that a reasonably prudent property owner would not proceed with the project); *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356-57 (holding that evidence of economic infeasibility must consist of facts, independent analysis, and meaningful detail, not just the assertions of an interested party). The courts have set a

high bar for a finding of economic infeasibility. The applicant's conclusory protestations regarding the Project objectives—objectives already defined so narrowly as to undermine consideration of *any* alternative technology or siting —fail to clear that bar.

D. The Actual Feasibility of Any Alternative is A Factual Question that Cannot be Determined at this Stage of the Proceeding

Ultimately, the actual feasibility of any particular alternative that would avoid significant impacts of the proposed project is a factual determination that is not properly addressed at this stage of the proceedings. CEQA requires that a reasonable alternatives analysis must contain a meaningful level of detail showing why an alternative that would avoid significant impacts of the proposed project is rejected by the agency (or Commission) as infeasible. *Laurel Heights Improvement Association v. Regents of the University of California*, (1988) 47 Cal. 3d 376, 399-407. The applicant's conclusory assertions as to feasibility do not provide the needed detail to support a finding rejecting an alternative that would avoid significant impacts of the proposed project on the environment—as a PV solar project clearly would at this site. Furthermore, at this stage of the environmental review, any factual determination regarding actual feasibility used to cabin the range of alternatives that are potentially feasible would be improper. The ultimate determination that an alternative which would avoid significant impacts of a project is actually infeasible must be made by the Commission based on substantial evidence and must wait until after full environmental review and evidentiary development including evidentiary hearings.

The applicant's reliance on the target dates and other aspects of the PPA cannot be relied on to assume feasibility—that is a factual determination that the Committee and Commission must make independently. And as noted above, the Center is informed and believes and based thereon alleges that the applicant is renegotiating the PPA including renegotiating the deadlines.

E. No Project Alternative: The Extent of Reasonably Foreseeable Development is a Question of Fact.

The extent of reasonably foreseeable development is a question of fact that, if disputed as it is here by the applicant and staff, can only be determined after full evidentiary development. While the existing general plan may allow for individual parcels to be developed as housing, that does not automatically make full build-out of these parcels as homes "reasonably foreseeable". In fact this designation has been in place for decades and very few parcels have been developed—even in years when the economy was booming elsewhere. Moreover, there are factual questions regarding whether there is sufficient water to allow all of the parcels to be developed even under the County's existing rules. Simply because an approval is ministerial does not mean that the action will always be approved—it means the action can be approved or denied based on a fixed set of criteria, standards or measurements. *See, e.g.,* CEQA Guidelines § 15369 ("A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out."). Thus, even where the approvals are each ministerial, there remains a factual question regarding whether or not an approval will be given. For example, in this instance, the reasonably foreseeable development may depend on number of potential development proposals on these parcels that could be approved that would meet the existing criteria for water availability-- that is a factual question that must be evaluated and the answer cannot simply be assumed.

IV. Impacts Of the Project and NEPA Analysis for Project Components in Nevada

Under CEQA, the environmental review *must* include 1) analysis of direct, indirect and cumulative impacts from the project components in California even if those impacts are to lands in Nevada and 2) analysis of impacts to lands in California from

project components in Nevada. The environmental review must also include analysis of "any emissions or discharges that would have a significant effect on the environment" in California even if those emissions are in Nevada. Pub. Res. Code § 21080(b)(14). In this instance the proposed gas line that is necessary for the proposed project is sized to accommodate multiple other projects in Nevada (including both other solar projects and gas fired power plants) that may have significant impacts on California air quality and greenhouse gas reduction goals, therefore those growth inducing impacts that will have cumulative emissions effecting California should also be considered. The environmental review must also analyze any proposed mitigation measures and their likely efficacy, regardless of where those mitigation measures occur. CEQA Guidelines § 15126.4(a)(1)(D) ("If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measures *shall* be discussed . . ." emphasis added); *Save Our Peninsula Comm. v. Monterey Board of Supervisors* (2001) 87 Cal.App.4th 99, 131. The environmental review *may* also include a broader evaluation of the impacts of the project as a whole even if those impacts occur in a neighboring state. Nothing in the statute or regulations cited by the applicant holds otherwise.

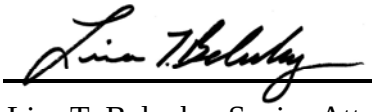
Thus, the PSA was clearly required to and properly did evaluate many aspects of the project's impacts in both California and Nevada that the Committee is required to take into consideration including, for example, the efficacy and impacts of the proposed mitigation measure of retiring water rights in Nevada to off-set for groundwater impacts in California. Notably, it is the applicant who has consistently proposed to mitigation impacts to groundwater in California by retiring water rights in Nevada. The FSA should address issues that affect California even if they may also be evaluated under the NEPA review for the transmission and natural gas lines such as growth inducing impacts leading to emissions that may effect the environment in California.

V. Request for Relief

The Center requests that the Committee deny the motion which erroneously seeks a decision from the Committee regarding disputed factual allegations without the proper procedures being followed and long before the parties have had an opportunity to explore disputed issues at the evidentiary hearings. The applicant's requested relief would unfairly and unlawfully limit the CEQA analysis and shut out full public participation to review and comment on alternatives that could avoid significant impacts of the project.

Dated: September 24, 2012

Respectfully submitted,



Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104
Direct: 415-632-5307
Fax: 415-436-9683
lbelenky@biologicaldiversity.org

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

APPLICATION FOR CERTIFICATION FOR THE HIDDEN HILLS SOLAR ELECTRIC GENERATING SYSTEM

Docket No. 11-AFC-02

PROOF OF SERVICE
(Revised 9/20/12)

APPLICANT
BrightSource Energy
Stephen Wiley
1999 Harrison Street, Suite 2150
Oakland, CA 94612-3500
swiley@brightsourceenergy.com

BrightSource Energy
Bradley Brownlow
Michelle L. Farley
1999 Harrison Street, Suite 2150
Oakland, CA 94612-3500
bbrownlow@brightsourceenergy.com
mfarley@brightsourceenergy.com

BrightSource Energy
Clay Jensen
Gary Kazio
410 South Rampart Blvd., Suite 390
Las Vegas, NV 89145
cjensen@brightsourceenergy.com
gkazio@brightsourceenergy.com

APPLICANTS' CONSULTANTS
Strachan Consulting, LLC
Susan Strachan
P.O. Box 1049
Davis, CA 95617
susan@strachanconsult.com

CH2MHill
John Carrier
2485 Natomas Park Drive, Suite 600
Sacramento, CA 95833-2987
jcarrier@ch2m.com

COUNSEL FOR APPLICANT
Ellison, Schneider and Harris, LLP
Chris Ellison
Jeff Harris
Samantha Pottenger
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816-5905
cte@eslawfirm.com
jdh@eslawfirm.com
sgp@eslawfirm.com

INTERVENORS
Jon William Zellhoefer
P.O. Box 34
Tecopa, CA 92389
jon@zellhoefer.info

Center for Biological Diversity
Lisa T. Belenky, Sr. Attorney
351 California Street, Suite 600
San Francisco, CA 94104
lbelenky@biologicaldiversity.org

Center for Biological Diversity
Ileene Anderson, Public Lands
Desert Director
PMB 447
8033 Sunset Boulevard
Los Angeles, CA 90046
ianderson@biologicaldiversity.org

Old Spanish Trail Association
Jack Prichett
857 Nowita Place
Venice, CA 90291
jackprichett@ca.rr.com

INTERVENORS (con't.)
Cindy R. MacDonald
3605 Silver Sand Court
N. Las Vegas, NV 89032
sacredintent@centurylink.net

Richard Arnold
P.O. Box 3411
Pahrump, NV 89041
rwarnold@hotmail.com

INTERESTED AGENCIES
California ISO
e-recipient@caiso.com

Great Basin Unified APCD
Duane Ono
Deputy Air Pollution Control Officer
157 Short Street
Bishop, CA 93514
dono@gbuapcd.org

County of Inyo
Dana Crom
Deputy County Counsel
P.O. Box M
Independence, CA 93526
dcrom@inyocounty.us

Nye County
Lorinda A. Wichman, Chairman
Board of County Supervisors
P.O. Box 153
Tonopah, NV 89049
lawichman@gmail.com

*indicates change

INTERESTED AGENCIES (con't.)
Nye County Water District
L. Darrel Lacy
Interim General Manager
2101 E. Calvada Boulevard
Suite 100
Pahrump, NV 89048
llacy@co.nye.nv.us

National Park Service
Michael L. Elliott
Cultural Resources Specialist
National Trails Intermountain Region
P.O. Box 728
Santa Fe, NM 87504-0728
Michael_Elliott@nps.gov

*Southern Inyo
Fire Protection District
Larry Levy, Fire Chief
P.O. Box 51
Tecopa, CA 92389
sifpd@yahoo.com

ENERGY COMMISSION – DECISIONMAKERS
KAREN DOUGLAS
Commissioner and Presiding Member
karen.douglas@energy.ca.gov

CARLA PETERMAN
Commissioner and Associate Member
carla.peterman@energy.ca.gov

Ken Celli
Hearing Adviser
ken.celli@energy.ca.gov

Eileen Allen
Commissioners' Technical Advisor for Facility Siting
eileen.allen@energy.ca.gov

Galen Lemei
Advisor to Presiding Member
galen.lemei@energy.ca.gov

Jennifer Nelson
Advisor to Presiding Member
jennifer.nelson@energy.ca.gov

Jim Bartridge
Advisor to Associate Member
jim.bartridge@energy.ca.gov

ENERGY COMMISSION – STAFF
Mike Monasmith
Senior Project Manager
mike.monasmith@energy.ca.gov

Richard Ratliff
Staff Counsel IV
dick.ratliff@energy.ca.gov

Kerry Willis
Staff Counsel
kerry.willis@energy.ca.gov

ENERGY COMMISSION – PUBLIC ADVISER
Jennifer Jennings
Public Adviser's Office
publicadviser@energy.ca.gov

DECLARATION OF SERVICE

I, Lisa T. Belenky, declare that on September 24, 2012, I served and filed copies of the attached Opposition to Applicant's Motion in Limine, dated September 24, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: www.energy.ca.gov/sitingcases/hiddenhills/index.html.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(*Check all that Apply*)

For service to all other parties:

__x__ Served electronically to all e-mail addresses on the Proof of Service list;

____ Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses marked *"hard copy required" or where no e-mail address is provided.

AND

For filing with the Docket Unit at the Energy Commission:

__x__ by sending an electronic copy to the e-mail address below (preferred method); *OR*

____ by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

CALIFORNIA ENERGY COMMISSION – DOCKET UNIT
Attn: Docket No. 11-AFC-02
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.ca.gov

OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

____ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission
Michael J. Levy, Chief Counsel
1516 Ninth Street MS-14
Sacramento, CA 95814
michael.levy@energy.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.