



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

DOCKET	
11-AFC-4	
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**APPLICATION FOR CERTIFICATION
 FOR THE RIO MESA SOLAR
 ELECTRIC GENERATING FACILITY**

Docket No. 11-AFC-04

COMMITTEE SCHEDULING ORDER

Background

On October 14, 2011, Rio Mesa Solar I, LLC, Rio Mesa Solar II, LLC, and Rio Mesa Solar III, LLC (collectively, "Applicant") jointly filed an application for certification (AFC) with the California Energy Commission for the Rio Mesa Solar Electric Generating Facility (Rio Mesa SEGF). On December 14, 2011, the Commission deemed the AFC data adequate.

On February 1, 2012, the assigned Committee conducted an informational hearing and environmental scoping meeting to discuss the Energy Commission's licensing process and the proposed Rio Mesa SEGF project. The Applicant, Energy Commission staff (Staff), and Intervenor Center for Biological Diversity (CBD) presented their perspectives on the project, the project's potential environmental impacts, and the appropriate timeline to evaluate the AFC. The parties' pre-hearing submissions and oral statements during the hearing prompted the Committee to postpone publishing a project review schedule until after it conducts a status conference focused on scheduling.

On March 19, 2012, the Committee conducted a mandatory status conference and heard from the parties, interested agencies, and public on matters that might affect the timing of the Committee's publication of a presiding member's proposed decision (PMPD) and full Commission consideration of the PMPD. Several public agencies participated in the conference, including the Bureau of Land Management (BLM), U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Game (CDFG), and San Bernardino County Museum.

Staff, the Applicant, and CBD submitted pre-conference briefs regarding the scope and timing of the AFC review process. The briefs, other documents in the public record of this proceeding, and status conference arguments reflect continuing consultations among the Applicant, Staff, BLM, USFWS, and CDFG, with particular focus on the project's potential to impact bird species protected under the California Endangered Species Act, Federal Endangered Species Act, and related laws.

Preliminary evaluations and recommendations from Energy Commission, BLM, USFWS, and CDFG biologists (collectively, “the renewable energy action team” or “REAT”) share the view that additional studies are necessary for the REAT biologists’ evaluation of the project’s potential impacts. Staff also contends that additional information is necessary for a comprehensive state and federal evaluation of impacts on cultural resources.

The Applicant disagrees. Regarding bird surveys, the Applicant contends that REAT biologists demand more than NEPA, CEQA, and an analysis of the project’s compliance with applicable laws, ordinances, regulations, and standards (LORS) require. Regarding cultural resources, the Applicant asserts that Staff currently possesses much of the information considered necessary by Staff for completing its analysis. The Applicant further stated that it can produce any additional cultural resources information in a timeframe consistent with its demand for a June 2013 decision.¹

Staff proposes to jointly prepare preliminary and final environmental assessment documents with BLM.² According to Staff’s proposed schedule, a preliminary staff assessment/draft environmental impact statement would issue between 2013 and 2014 and a Commission decision would issue between 2014 and 2015.

Discussion

Relying on Warren-Alquist Act section 25540.6, the Applicant demands an 18-month certification process that ends with a June 2013 Commission decision. Section 25540.6³ provides in pertinent part that “the commission shall issue its final decision on the application [for certification], as specified in Section 25523, within 12 months after the filing of the application for certification of the powerplant and related facility or facilities, or at any later time as is mutually agreed by the commission and the applicant, for ... a solar thermal powerplant.” (Emphasis added.)

The parties’ status conference arguments reveal a tension between the requirements of Section 25540.6 (as framed by the Applicant’s demand) and Staff’s concern that Applicant has yet to produce essential data important to Staff’s preparation of preliminary and final project impact assessments. Staff raises a legitimate concern.

¹ During the March 19 status conference, Applicant’s attorney stated in pertinent part: “But the concern is this: We need a final decision from the Commission in the second quarter of 2013. And I won’t go into all the details. But basically, we need that to meet the online date in our power sales agreements that we’ve already been awarded and negotiated. And those are not easily subject to amendments. A few years ago, they might have been. But not now. So that is a life and death issue for the project, is holding to that schedule.” (3/19/12 RT 17:3-11.)

² Rio Mesa SEGF will require a right-of-way grant from the federal Bureau of Land Management (BLM) and an amendment to the California Desert Conservation Area Plan. Accordingly, BLM will evaluate the project under the National Environmental Policy Act (NEPA) and the Energy Commission will evaluate the project under the California Environmental Quality Act (CEQA) pursuant to the Commission’s certified regulatory program.

³ All subsequent statutory references are to the Public Resources Code, unless otherwise specified.

However, the critical issue before the Committee is whether the Commission can do all of the following:

- comply with Section 25540.6;
- satisfy additional procedural and substantive obligations of the Warren-Alquist Act; and
- fulfill its CEQA lead agency obligations if the Applicant refuses to provide the full scope of biological and cultural resources data deemed necessary by Staff and other state and federal agencies.

Requirements for a Commission Decision

A Commission decision on an AFC must contain specific provisions, based on evidence produced at hearings. The provisions must address matters including (1) the manner in which the proposed facility is to be designed, sited, and operated in order to protect environmental quality and assure public health and safety and (2) conformity of the proposed site and related facilities with all applicable local, regional, state, and federal standards, ordinances, or laws. (§ 25523, subs. (a), (d)(1).)

Evidentiary hearings are an essential feature of certification proceedings, conducted to satisfy three objectives:

1. Ensure that the applicant incorporates into the project all measures that can be shown to be feasible, reasonably necessary, and available to substantially lessen the project's significant adverse environmental effects, and to ensure that any facility which may cause significant adverse environmental effects is certified only if the benefits of such facility outweigh its unavoidable adverse effects.
2. Ensure that the applicant takes all measures that can be shown to be feasible, reasonably necessary, and available to comply with applicable governmental laws and standard; to ensure that any facility certified complies with applicable federal law; and to ensure that any facility which fails to comply with an applicable local or state law or standard is certified only if such facility is required for public convenience and necessity and there are not more prudent and feasible means of achieving such convenience and necessity.
3. Ensure safe and reliable operation of the facility. (Cal. Code Regs., tit. 20 § 1741, subd. (b).)⁴

The Commission's regulations task Staff and concerned environmental agencies to contribute to the hearings. Specifically regarding environmental effects, Staff and concerned agencies must review the AFC and assess whether its list of environmental impacts is complete and accurate; whether the mitigation plan is complete and effective;

⁴ All subsequent regulatory references are to the Commission's regulations, unless otherwise specified.

and whether additional or more effective mitigation measures are reasonably necessary, feasible, and available. (Regs., §§ 1742, subd. (b); 1742.5, subd. (a).) Moreover, they must submit the results of these environmental assessments as evidence during the hearings. (Regs., §§ 1742, subd. (c); 1742.5, subd. (c).)

In particular, Staff's environmental assessment must be a written report or exhibit that informs interested persons and the Commission of the environmental consequences of the project and assists the presiding member in preparing the PMPD. The report must indicate Staff's positions on the environmental issues that would affect a decision on the AFC. (Regs., § 1742.5, subd. (c).) Staff has similar reporting duties regarding a project's safety and reliability factors and compliance with applicable LORS. (Regs., §§ 1743; 1744.) Notably, Staff must publish the required reports as the "final staff assessment" at least 14 days before the start of the evidentiary hearings or at such other time as required by the presiding member. (Regs., § 1747.)

An applicant must also present information during the hearings on environmental effects and mitigation, information on LORS compliance, and project safety and reliability. (Regs., §§ 1742, subd. (c); 1743, subd. (c); 1744, subds. (c), (d).) In fact, the Applicant bears the primary burden of presenting sufficient substantial evidence during the hearings to support the findings and conclusions required for certification. (Regs., § 1748, subd. (d).)⁵

The hearing record, including the evidentiary record, of the AFC proceedings, is the exclusive basis for the PMPD. (Regs., § 1751, subd. (a).) The PMPD encompasses several technical areas, including those that the Commission must evaluate in fulfilling its CEQA lead agency duties.⁶ (§ 25519, subd. (c), Regs., §§ 1742; 1742.5.) Accordingly, the assigned Committee and presiding member prepare the PMPD consistent with CEQA's substantive mandates.

The PMPD contains the presiding member's recommendation on whether the Commission should approve the AFC as well as proposed findings and conclusions on specified topics including LORS compliance and environmental protection. (Regs., §§ 1752; 1752.3; 1752.5; 1752.7.) After conducting one or more hearings on the PMPD, the full Commission adopts a final decision on the AFC. (Regs., §1754, subd. (a).)

The Commission decision must include the provisions required by Public Resources Code section 25523 (discussed above) and make findings set forth in the Commission's

⁵ If, however, Staff (or any other party or interested agency) proposes an additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety, Staff has the burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision. (Regs., §1748, subd. (e).)

⁶ The Commission meets its CEQA obligations through a certified regulatory program in which it produces environmental documentation functionally equivalent to an environmental impact report (EIR). (§ 21080.5, subd. (a), Cal. Code Regs., tit. 14, §15251, subd. (j).) The Commission's environmental analysis is routinely incorporated into and made a part of the written certification decision.

regulations. For instance, if significant adverse environmental effects are identified, the Commission must make both of the following findings:

- With respect to matters within the authority of the commission, that changes or alteration have been required in, or incorporated into, the project which mitigate or avoid the significant environmental effects identified in the proceeding.
- With respect to matters not within the commission's authority but within the authority of another agency, the changes or alterations required to mitigate such effects have been adopted by such other agency, or can and should be adopted by such other agency. (Regs., § 1755, subd. (c).)

If the Commission cannot make both findings, then it may not certify the project unless it specifically finds that:

- specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the application proceeding; and
- the benefits of the project outweigh the unavoidable significant adverse environmental effects that may be caused by construction and operation of the facility. (Regs., § 1755, subd. (d).)

Application of the Decision Requirements to the Rio Mesa SEGF

As discussed above, the Commission's regulations contemplate that Staff's final staff assessment has a unique and important role in helping the Committee and Commission evaluate the Applicant's evidence. Notwithstanding the value of Staff's assessments, the Committee and Commission have the sole, nondelegable duty to determine the sufficiency of evidence to support the findings and conclusions required for AFC certification. The Applicant bears the primary evidentiary burden of influencing these determinations in its favor and assumes the risk that Staff and others will present persuasive evidence and analyses that prevent the Applicant from satisfying its burden.

Through the status conference proceedings, the parties have alerted the Committee to possible evidentiary disputes over the sufficiency of biological resources and cultural resources data and related impacts analyses. The necessity of additional studies and data and the significance of their absence from this proceeding are matters for Committee and Commission determination in the course of evidentiary hearings.

However, the parties can and must be prepared to explain to the Committee and Commission – by way of admissible evidence during hearings – whether they can make the required Warren-Alquist Act and CEQA findings. Staff, in particular, has a duty to articulate its position in a written assessment (report) and submit the assessment as hearing evidence. If the Applicant fails to produce environmental information Staff deems necessary for its, the Committee's, and the Commission's analyses, then Staff's assessment must explain how the absence of this data affects an assessment of the project's impacts and proposed mitigation measures. The assessment must also

provide Staff's position on the environmental issues *even if Staff's position is a recommendation against certification.* (Regs., § 1742.5.)

Thus, despite Staff's reasonable intention to publish its assessments only after receiving all of the information requested of the Applicant, Staff's ability to comply with its regulatory duties is not contingent on the Applicant's production of additional data.⁷ Likewise, the possible absence of this data will not prevent the Committee or Commission from meeting their legal obligations to evaluate the evidence presented, determine whether the Applicant satisfied its burden of proof, and determine whether the required certification findings can be made.

Conclusion

For the foregoing reasons, if the Applicant remains resolute in demanding a June 2013 deadline, Staff, the Committee, and the full Commission can nonetheless satisfy the procedural and substantive requirements for publishing legally compliant documents (impacts assessments, PMPD and decision, respectively), even if the Applicant refuses to produce data deemed necessary by Staff and other concerned agencies.

Thus, the Committee hereby **ORDERS** the parties to comply with the attached schedule, which sets forth deadlines to facilitate May 2013 PMPD publication. It is the full Commission's sole discretion whether to issue a decision by June 2013.

The Committee recognizes that adherence to the attached schedule will likely have the unfortunate consequence of Staff and BLM preparing separate environmental documents.

IT IS SO ORDERED.

Dated: April 13, 2012, at Sacramento, California.

Original Signed By:

CARLA PETERMAN
Commissioner and Presiding Member
Rio Mesa SEGF AFC Committee

Original Signed By:

KAREN DOUGLAS
Commissioner and Associate Member
Rio Mesa SEGF AFC Committee

⁷ In fact, Staff conceded this point during the March 19 status conference in which staff legal counsel and a staff biologist admitted that it can issue the assessments in the absence of information it requested from the Applicant. (3/19/12 RT 46:18 - 49:8.)

**COMMITTEE SCHEDULE
FOR THE
RIO MESA SOLAR ELECTRIC GENERATING FACILITY**

ACTIVITY	DATE
AFC filed	10-14-11
AFC Data Adequacy Determination	12-14-11
Workshop on Biological Resources – Bird/Bat Survey Protocol	1-6-11
Staff Publishes Issues ID Report	1-25-11
Data Requests and Responses and Related Workshops	January 2012 – statutory deadline
Informational Hearing, Environmental Scoping Meeting, and Site Visit	2-1-12
Data Response (round 2) and Issue Resolution Workshop	3-13-12
Mandatory Status Conference re Scheduling	3-19-12
Staff Publishes Preliminary Staff Assessment	August 2012
Preliminary Staff Assessment Workshop	TBD
MDAQMD Preliminary Determination of Compliance (PDOC)	TBD
Public Comments on PSA	TBD
Staff Publishes Final Staff Assessment	January 2013
Final Staff Assessment Workshop (if necessary)	TBD
MDAQMD Final Determination of Compliance (FDOC)	TBD*
Prehearing Conference	Early February 2013
Evidentiary Hearings	Late February 2013/Early March 2013
Committee Publishes Presiding Member's Proposed Decision (PMPD)	Late April 2013/Early May 2013
PMPD Comment Period	TBD
Conference/Hearing on PMPD	Mid-May
Committee files errata to PMPD (if necessary)	TBD
Committee Presents PMPD to Commission	June 2013
Commission issues final Decision	TBD

*TBD = To Be Determined



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DOCKET NO. 11-AFC-04
PROOF OF SERVICE
(Revised 2/27/12)

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DECLARATION OF SERVICE

I, RoseMary Avalos, declare that on April 13, 2012, I served and filed a copy of the attached document COMMITTEE SCHEDULING ORDER, dated April 13, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: <http://www.energy.ca.gov/sitingcases/riomesa/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;

X 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 **NOT** marked "e-mail preferred."

AND

For filing with the Docket Unit at the Energy Commission:

X by sending electronic copies 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:

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1516 Ninth Street, MS-4
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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
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mlevy@energy.state.ca.us

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.

Original Signed By:

RoseMary Avalos
Hearing Adviser's Office