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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:

APPLICATION FOR CERTIFICATION FOR THE RIO MESA SOLAR ELECTRIC GENERATING FACILITY

DOCKET NO. 11-AFC-4

INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY'S OPENING BRIEF REGARDING DATA ADEQUACY AND SCHEDULING

March 9, 2012

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Pursuant to the Committee's hearing notice and direction on briefing regarding data adequacy and scheduling dated February 23, 2012, (and the extension of time for briefing to be filed provided via email from Hearing Adviser Kourtney Vaccaro on March 5, 2012), Intervenor Center for Biological Diversity submits the following briefing on the issues identified by the Committee.

1. *Whether the AFC is data adequate in the technical areas of Biological Resources and Cultural Resources. Discuss the data adequacy issues raised by CBD; Staff's representations that a PSA/DEIS cannot issue until further surveys are conducted in the technical areas of Biological Resources and Cultural Resources; and, the data adequacy requirements set forth in Commission Regulations sections 1704 and 1709 and Appendix B to Chapter 5 of the Commission's Regulations. (See footnotes 1, 3, and 4.)*

The data adequacy finding was premature: As the Center previously explained, the finding of data adequacy by the Commission two days before the REAT recommendations that stated additional baseline data were needed on birds and bats were released to the public raises serious concerns about the Commission's internal communication procedures. Clearly someone at the Commission (whether an individual commissioner or staff person) knew or should have known that the REAT was considering specific recommendations which would require more baseline data than was provided in the AFC. In addition, it is unclear whether the Commission (or any individual commissioner or staff person) knew from participation in the REAT meetings, or otherwise, that the U.S. Fish and Wildlife Service would recommend that far more additional data be collected before the proposed project could be considered by that agency. The Center has sought documents that may shed light on these issues from the Commission through a Public Records Act Request but has not yet received any responsive documents.

The timing of these events calls into question the Commission's process. Before the December 14 hearing, the Commission was working with the other REAT agencies on specific recommendations for additional survey and other data gathering requirements for the Rio Mesa project and knew that those requirements had not yet been met by the applicant. Nonetheless,

the Commission Staff recommended a "data adequacy" finding first on December 6, 2011 for some resources except water resources and then revised the data adequacy recommendation on December 12, 2011 to include all categories and the Commission made a data adequacy finding on December 14 – two days before the Interagency Recommendations were provided to the applicant and the public. The timing of these events raises significant questions about the accuracy of the data adequacy recommendation dated December 12, 2011 with regards to biological issues and statements made at the December 14 hearing.

Commission Regulations Sections 1704 and 1709.

Section 1709(a) states:

> Upon the filing of any notice or application for certification, all documentation shall be reviewed by the executive director or a delegatee to determine whether the notice or application for certification contains the information required under section 1704 and is therefore complete. The executive director or a delegatee shall take into consideration the timely comments of the Air Resources Board, local air pollution control districts, other agencies, and members of the public prior to the determination of whether the notice or application for certification contains the information required under section 1704 and is therefore complete.

The timing of the data adequacy finding, the REAT Recommendations, and the U.S. Fish and Wildlife Service letter puts in question what the executive director or delegatee knew regarding these issues before recommending data adequacy and whether the executive director or delagatee properly took into consideration the views of the expert agencies that are part of the REAT (California Department of Fish, Game and the U.S. Fish and Wildlife Service) regarding the adequacy of the documentation for biological resources specifically avian and bat surveys.

It may be possible that "one hand does not know what the other is doing" --- that is, the Commission staff working on the data adequacy recommendation did not know about the work that other Commission staff or Commissioners were participating in, in formulating REAT recommendations. However, the Commission staff or Commissioner(s) participating in the REAT knew or should have known about the inadequate biological information for avian and bats and may also have been aware of the significant concerns of the U.S. Fish and Wildlife

Service that even more data would be needed to move forward with the application. However, those persons failed to raise these significant issues regarding data adequacy at the December 14, 2011 Commission hearing where data adequacy was considered. Instead, the staff mentioned only survey *protocols*—not the adequacy of the provided data – and did not explain that the previously conducted surveys were not adequate. As a result, the Commission was not made aware of or unlawfully ignored significant concerns from expert agencies regarding the *lack* of adequate data based on survey protocols that are considered inadequate by the expert agencies when it made the finding "data adequacy" finding on December 14, 2011. The Center renews its request that the Commission investigate this matter and provide a full public explanation of this inconsistency and flaw in the Commission's internal process. In the interests of fairness, the Center requests that the Committee seek reconsideration of the Commission's untimely and premature "data adequacy" finding until these issues are fully resolved.

In addition, even the project applicant's own response to data adequacy review for biological resources recognizes that the complete project area was not surveyed because right-of-entry had not been acquired. According to the Supplement to the Application for Certification Rio Mesa Solar Energy Generating Facility (11-AFC-4)(at pg.1), 229 acres were inaccessible for biological and cultural resource surveys.

In the January 6, 2012 CEC workshop, U.S. Fish and Wildlife Service indicated that they had discussed survey protocols with the project applicant's consultants in early 2011, prior to field surveys, yet in a subsequent field visit in May 2011, it became clear to U.S. Fish and Wildlife Service that the survey protocols they had recommended earlier had not been implemented. The failure to implement the recommended surveys of trustee wildlife agencies also shows that the project was not data adequate and failed to comply with Appendix B 13.(D)(i) which states:

> Current biological resources surveys conducted using appropriate field survey protocols during the appropriate season(s). State and federal agencies with jurisdiction shall be consulted for field survey protocol guidance prior to surveys if a protocol exists.

Clearly, the federal agency's recommended survey protocols were not conducted, which renders the AFC inadequate. To date the recommended protocol level surveys have not been conducted.

Further, the Center would ask the Commission to consider the following question: What is the purpose of the data adequacy finding? Is it simply a statement by the Commission that the bare minimum of required information (as laid out in the Commission Regulations) has been provided by the Applicant and that the Commission will proceed to consider the application and undertake the needed review? If so, then clearly the finding here was in error, premature, and should be withdrawn. While staff mentioned during the December 14 hearing that REAT agencies were developing "an appropriate protocol for surveying both birds and bats on the project site and within the vicinity, to better understand the potential impacts to them" (12/14/11 Transcript at 28), staff did not explain that the need for new protocols was tied to the need for additional baseline surveys that had not yet been conducted and nonetheless recommended, in direct contradiction, that the application be found data adequate.

Alternatively, the Commission should consider whether the data adequacy finding intended to be an explicit finding that the matter is ready to proceed towards a decision within 12-months? If so, then clearly the finding was also in error here as the Staff noted in its recommendation and during the December 14 hearing that the schedule would need to be extended past the 12-month timeframe. During the hearing on December 14, the Staff explained that the REAT agencies were preparing additional survey protocol language and that the need for this information could "impact our ability to get a final decision within the 12-month regulatory mandated timeframe." 12/14/11 Transcript at 27-28. The new schedule proposed by the Staff in its filing today appears to be reasonable and takes into account the need for significant additional survey information before the environmental review can be prepared.

Indeed, the error in a premature data adequacy finding is clearly shown in recent filings by the Applicant which show that it to hopes to use the date of the data adequacy finding as a hammer to require the Commission to make a decision on the application in the 12-month period regardless of whether or not the information provided is adequate to support a full and fair

CEQA review. In light of the REAT recommendations and the letter from the Fish and Wildlife Service it is clear that a 12-month time frame is too short to provide adequate environmental review. If, as the Applicant insists, the Commission must complete its review on the 12-month schedule, the only decision possible will be to deny the application.

Appendix B to Chapter 5 (Information Requirements for an Application)

Appendix B: (g)(1) requires the applicant to provide environmental information as follows:

> For each technical area listed below, provide a discussion of the existing site conditions, the expected direct, indirect, and cumulative impacts due to the construction, operation, and maintenance of the project, the measures proposed to mitigate adverse environmental impacts of the project, the effectiveness of the proposed measures, and any monitoring plans proposed to verify the effectiveness of the mitigation.

The AFC cites the only published study on avian impacts from "power tower" technology, but mischaracterizes the results of the study. The AFC provides no scientifically designed studies or results that contradict the published study's conclusion that the power tower technology indeed caused significant mortality to avian species from birds running into heliostats as well as being singed by the focused sunlight. The AFC also downplays the threat to avian species based on the proximity of the proposed site to the Cibolo National Wildlife Refuge, established along the Colorado River portion of the Pacific Flyway.

As is evident from the recent filings, the premature data adequacy finding, which ignored the recommendations of the REAT, is now causing significant conflict between the parties regarding scheduling and may prejudice full and fair CEQA review of the proposed project. In order to provide the needed data discussed in the REAT recommendations and the U.S. Fish and Wildlife recommendations it is clear, as Staff noted in the report, that any decision on the application will need to be significantly delayed.

The PSA/DEIS cannot issue until further surveys are conducted in the technical areas of Biological Resources and Cultural Resources. The Center agrees with Staff that a PSA or DEIS cannot issue until further surveys are conducted to establish baseline conditions

and inventory resources that may be affected by the proposed project. As discussed in more detail below, in addition to the REAT Recommendations for additional data, the U.S. Fish and Wildlife Service recommendations must be followed.

In a recent filing the Applicant contends that there is no need to obtain adequate baseline data before undertaking environmental review and urges the Committee to ignore the need for such information and the expert agencies which have asked for this information. The Applicant has also asked the Committee to separate the NEPA and CEQA processes in an attempt to draw the Committee into fast-tracking this approval without the needed information — such a result would result in a waste of the Commission's time and resources. A similar waste of resources by the Commission occurred in the case of the Palen project which was rushed through the Commission process as a solar thermal project (although the applicant had already determined it would change to PV technology) and in fact the project has never been permitted by the BLM.

The 12-month review deadline in Public Resources Code Section 25540.6, should not be at issue because the data adequacy finding was in error. The premature "data adequacy" finding and the 12-month general limit for consideration of applications should not be used to eviscerate the needed identification and analysis of potential impacts of the proposed project under CEQA or NEPA. The Committee should follow recommendations of the REAT regarding avian and bat survey data needed to evaluate the project and the recommendations of the U.S. Fish and Wildlife Service and find that the PSA/DEIS cannot be issued until and unless the needed surveys and inventory data and other information are obtained. If the Commission determines that a decision must be made within 12-months, as the Applicant urges, that decision must be a denial.

As the Center noted in its earlier filing, the Applicant points to two "approved" PPA contracts as well as the CEC's 12 month statutory review schedule as reasons the review should not be delayed and it need not provide the recommended survey data *before* the PSA/DEIS is issued. However, the PPAs were entered into and approved by the CPUC *without any CEQA compliance* and, therefore, the existence of PPAs cannot be allowed to undermine full and fair

CEQA compliance by the Commission in this matter. -- this is unacceptable to the Center. The tactic that the Applicant suggests, where additional survey data is provided only "as available" undermines meaningful CEQA review and the ability of the public and the decisionmakers to fairly review the whole of the project's significant impacts and alternatives that would avoid those impacts.

2. *Whether one additional year of bird and bat surveys will be adequate as indicated by the December 16, 2011 REAT communication or, if several years of additional bird and bat surveys are required as indicated by the January 31, 2012 USFWS communication. (See footnotes 3 and 4.)*

All data requested in the REAT Interagency Recommendations and additional data regarding other species is needed before meaningful environmental analysis can be undertaken by the Commission staff. The environmental review cannot and should not move forward until all of the recommended data requirements by expert agencies have been fulfilled. Without this critical information from the outset, the environmental review would be incomplete and therefore inadequate. Phasing new data and information into the process as it moves forward is not acceptable as it undermines fair consideration of the significant impacts against a clear baseline and creates a moving target which leaves the parties and the public in the position of constantly playing "catch up". In addition, if environmental review based on the incomplete data moves forward there is a substantial risk of creating bureaucratic momentum which undermines the ability to respond to new data in a meaningful way. Such was the case with the ISEGS project proposed by this same applicant—environmental intervenors (including the Center) raised significant questions about the accuracy and adequacy of the desert tortoise surveys and sponsored expert testimony on this point. Although Staff rejected these concerns, ultimately, intervenors' concerns were shown to be well founded and additional surveys were required *after* the project had been approved by the CEC. Additional survey data obtained after the project approval ultimately resulted in a shut down of project construction while reconsultation with U. S. Fish and Wildlife Service was done.

Similarly, recent new information regarding cultural resources on the Genesis project site also shows the risks of moving forward with incomplete data. In the proceedings for the Genesis project, intervenor CURE provided expert testimony that the cultural resource data collected was insufficient but staff argued to the contrary and the Committee and Commission approved the project without additional cultural data being collected. Now, after construction has begun, significant additional cultural resources have been found and the project construction has been delayed on that basis. The Center believes that the lesson to be learned is clear – robust survey data as identified by the trustee wildlife agencies must be provided at the outset of the environmental review process and the Commission should not rush through this critical stage of the environmental review process.

While the REAT agencies have identified that *at least* one full year of additional surveys are required for eagles, migratory birds and other special status species, we note that large projects proposed in such relatively undisturbed and ecologically rich and diverse areas, with the potential to negatively impact so many special-status species typically do due diligence by collecting numerous years of survey data, which allow for statistical evaluation of data and provide more assurances of adequate impact analysis.

3. *Whether, and how, the pending litigation challenging the legality of Riverside County's solar facility development fees will affect Commission evaluation of the project's compliance with the county's land use laws, ordinances, regulations, and standards (LORS).*

The Center takes no position on this question, but notes that generally until litigation is concluded a county's challenged decision generally remains in effect.

4. *Whether, and how, recent adverse health impacts to kit foxes in the project vicinity might affect the scope and timeline of Commission review of the AFC.*

As the Center stated in our response regarding issues identification, to date the applicant and staff have failed to adequately address significant biological impacts to desert kit fox populations on and near the proposed site. The desert kit fox is a fully protected species under California law, 14 C.C.R. § 460. The AFC acknowledges that at least 193 desert kit fox burrow

complexes have been identified on site, and therefore may affect a significant number and population of this fully protected species. In addition, as the Committee should be aware, the first documented outbreak of canine distemper in desert kit foxes was recently identified on the Genesis solar project site which had identified only 65 kit fox burrow complexes. To date over a dozen kit fox mortalities have been identified in the vicinity of the Genesis project. While the cause of the distemper outbreak is not yet known, several experts have noted that disease outbreak can be exacerbated or caused by stress from the so-called "passive relocation" of kit foxes. Under this so-called passive relocation, kit foxes are encouraged to leave their burrow complexes, often times with the use of predator deterrents including coyote urine around the complex, and once kit foxes exit the burrow complex, the burrows are destroyed. Kit fox have relatively high burrow complex fidelity and measures are needed to prevent the kit foxes from returning to re-excavate the burrows by the use of predator deterrents or electric fencing. The risks to kit fox from the proposed project must be fully evaluated particularly in light of the greater number of burrow complexes on this site than the Genesis location and, therefore, the project impacts could be a much greater than the current outbreak. In addition, the cumulative impacts to the species from this proposed project other permitted and pending projects must be fully evaluated.

Because no take of desert kit fox is allowable under California law, except where the take is included in an NCCP, and the proposed project may take desert kit fox, the Committee should consider delaying processing of this project application until after the DRECP is concluded.

5. *Any additional matters relating to data adequacy or scheduling that are not identified in this notice.*

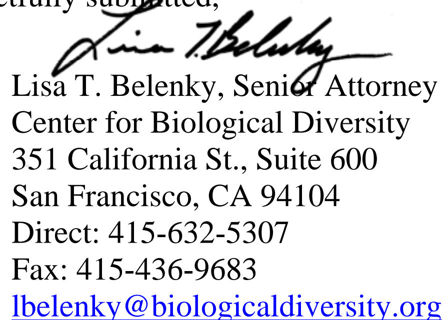
Facility Design is a major issue: As the Center noted in our response to the staff's issues identification report, facility design is also likely to be a major issue in this matter. Specifically, alternatives to the facility design, including alternative technologies, should be considered to avoid or minimize impacts to various resources including, but not limited to, migratory birds, bald and golden eagles, desert kit fox, and cultural resources. The published scientific literature

clearly shows that this type of power-tower facility can have very significant impacts to avian species and because the site is in a major migratory pathway – the Pacific flyway—alternatives to the proposed technology and facility design must be fully considered. For example, the specific facility design of three thermal power towers will both contribute to and cause significant impacts to birds and bats and water resources as compared with other facility designs such as PV which has far less need for water and fewer impacts to birds and bats.

Because facility design is closely tied to many of the other impacts of the project as well it is a "major issue" in and of itself that must be fully explored in the environmental review documents and as to economic feasibility.

In addition, the proposed layout of the project causes impacts to a designated utility corridor and the Bradshaw trail which must be fully considered and alternatives explored. Although those impacts do not depend on type of technology chosen, the access to the site would block the existing Bradshaw trail route and encroach on a designated utility corridor making that corridor less useful for its intended purpose and likely requiring additional corridors to be designated sooner. Therefore, redesigning the project to avoid these conflicts must be fully considered.

Dated: March 9, 2012 Respectfully submitted,



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APPLICATION FOR CERTIFICATION
FOR THE *RIO MESA SOLAR ELECTRIC GENERATING FACILITY*

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Declaration of Service

I, Lisa Belenky, declare that on March 9, 2012, I served and filed copies of the attached Opening Brief, dated March 9, 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].

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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:

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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 Lisa Belenky

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