

CONTINUATION OF COMMITTEE CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)

Application for Certification)
for the Calico Solar Project)
(formerly SES Solar 1))
-----)

Docket No. 08-AFC-13

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1 APPEARANCES

2 HEARING OFFICER

3 Paul Kramer

4 COMMITTEE MEMBERS

5 Anthony Eggert, Presiding Member

6 Jeffrey Byron, Associate Member

7 STAFF

8 Caryn Holmes, Staff Counsel

9 Christopher Meyer, CEC Project Manager

10 Jennifer Jennings, Public Advisor

11 APPLICANT

12 Ella Foley Gannon, Esq., Bingham, McCutchen, LLP

13 Allan Thompson, Esq., Bingham, McCutchen, LLP

14 Felicia Bellows, Tessera Solar

15 INTERVENORS

16 Bart Brizzee, Deputy County Counsel, San Bernardino County
17 (via Webex)

18 Loulena Miles, Esq., Adams Broadwell Joseph & Cardozo

19 Laura Cunningham, Basin and Range Watch (via WebEx)

20 Steven Lamb, Burlington Northern Santa Fe (BNSF)

21 Cynthia Burch, Burlington Northern Santa Fe (BNSF)

22 Travis Ritchie, Sierra Club (via WebEx)

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P R O C E E D I N G S

1
2 PRESIDING MEMBER EGGERT: On the record.

3 All right. Good morning, everybody. This is
4 Anthony Eggert. I am the presiding commissioner for the
5 Calico Solar Project.

6 To my immediate left is our hearing officer,
7 Paul Kramer, and to his left is my partner on this case,
8 Commissioner Jeff Byron. And this is a continuation of
9 the Calico PMPD conference to specifically address soil
10 and water and one other. Civil 1, yes.

11 So I think we'll go ahead and take introductions.
12 Applicant?

13 MS. FOLEY GANNON: Good morning. Ella Foley
14 Gannon, counsel to the applicant. And to my left is
15 Felicia Bellows with the applicant.

16 PRESIDING MEMBER EGGERT: Okay. Staff?

17 MS. HOLMES: Caryn Holmes, staff counsel. And
18 with me is Christopher Meyer, the project manager. We
19 also did have -- still have a soil and water expert, Casey
20 Weaver in the audience. Thank you.

21 PRESIDING MEMBER EGGERT: Thank you.

22 CURE?

23 MS. MILES: Loulena Miles here on behalf of CURE.

24 And prior to launching into the soil and water
25 resources issues, could I just make a -- reserve a moment

1 to make a statement, perhaps not right now, but --

2 PRESIDING MEMBER EGGERT: Sure.

3 MS. MILES: Thank you.

4 PRESIDING MEMBER EGGERT: And we'll go to BNSF.

5 MR. LAMB: Steve Lamb for BNSF. And Cynthia
6 Burch should be here momentarily. She's trying to pull
7 together some things that we've been making changes on.
8 She's here locally, but it will be a little while before
9 she gets here. So maybe it would be an opportune time for
10 Ms. Miles to make her comments, if that's okay with the
11 Commission.

12 ASSOCIATE MEMBER BYRON: You're being very quiet.

13 PRESIDING MEMBER EGGERT: Mr. Lamb, we need you
14 to speak up.

15 MR. LAMB: I thought you would have liked that,
16 Commissioner Byron.

17 But what I was saying was that Ms. Burch is
18 trying to make some changes. We had a rather long
19 workshop yesterday, and we were trying to make some
20 changes, are trying to make some changes. She doesn't
21 have those yet. She's in Sacramento, I've seen her
22 recently, so I know that's going to happen, but it could
23 be anywhere from 15 minutes to half an hour before she
24 gets here, just so you're aware of the timing of that.

25 PRESIDING MEMBER EGGERT: Sure.

1 MR. LAMB: Thanks.

2 Okay. Rather, I think, than go down the list,
3 are there any other intervenors that either are here with
4 us in the room or on the phone?

5 MS. CUNNINGHAM: Laura Cunningham, Basin & Range
6 Watch.

7 PRESIDING MEMBER EGGERT: Hello.

8 MR. RITCHIE: And Travis Ritchie with
9 Sierra Club.

10 PRESIDING MEMBER EGGERT: Okay.

11 MR. BRIZZEE: Bart Brizzee with the County of
12 San Bernardino.

13 PRESIDING MEMBER EGGERT: Hello.

14 Any others? Anybody here from the federal
15 agencies or other state agencies?

16 Okay. And then we have -- we do have our public
17 advisor; Ms. Jennifer Jennings is here in the room.

18 Okay. I think we'll go ahead and get started.

19 Actually, do you want to -- Ms. Miles, did you
20 want to make your statement?

21 MS. MILES: Thank you, Commissioner.

22 Since the last workshop that we had, a number of
23 documents were filed, including the Desert Tortoise
24 Translocation Plan was filed by the applicant as well as
25 the appendices to the Record of Decision.

1 Although I must admit I've not had an opportunity
2 to review these documents in great detail nor have I had
3 an opportunity to have an expert review these documents in
4 great detail, there are clearly new significant impacts
5 associated with these plans that have not been analyzed by
6 the Commission staff.

7 And we filed something to this effect yesterday.
8 The Committee needs to have a hearing on this; the staff
9 needs to analyze this new information. There's a proposal
10 to construct directly around occupied tortoise burrows if
11 burrows are not able to be translocated. And there's not
12 an adequate buffer, from discussing this matter with our
13 expert. And this is something that has not been a part of
14 prior proposals that have been approved by the Commission.
15 And we did put that into our comment letter yesterday.

16 So we believe this is unprecedented and
17 unanalyzed, and we believe that the Committee does not
18 need to go forward with the project at this point because
19 the project can still get ARRA funding as per the
20 guidelines that we filed and docketed yesterday.

21 Thank you.

22 PRESIDING MEMBER EGGERT: Okay. Thank you.

23 Actually, just a question on that.

24 In terms of -- you mentioned this, the fencing of
25 tortoise, that's in the plan what was filed?

1 MS. MILES: That's correct. In the Desert
2 Tortoise Translocation Plan that was filed by the
3 applicant, it gives a specific description of what the
4 plan is for Phase 1A, and that would include fencing
5 directly around the occupied tortoise burrow and going
6 forward with allowing construction right around that area.

7 PRESIDING MEMBER EGGERT: Okay. Thank you.

8 MR. RITCHIE: And if I may, this is Travis
9 Ritchie with Sierra Club on the phone.

10 PRESIDING MEMBER EGGERT: Go ahead.

11 MR. RITCHIE: Can I have a couple minutes?

12 PRESIDING MEMBER EGGERT: Sure.

13 MR. RITCHIE: We're concerned also just with the
14 nature of what the translocation plan is at this point.
15 My understanding is that the record is closed as to
16 biological resources and that this continuation of the
17 hearing is strictly with respect to soil and water. But
18 there was some discussion when -- regarding, last week,
19 the translocation plan.

20 I'm still unclear on who is signed off on the
21 plan, whether staff supports it, whether the resource
22 agencies support it. We haven't had any expert testimony
23 on it, we haven't had any support from it, and all we've
24 seen is a circulated draft, which Mr. Otahal from BLM
25 stated was one of the many iterations of the draft, that,

1 you know, I believe he said that calling it final was just
2 a matter of semantics.

3 So from our perspective, Sierra Club still hasn't
4 seen any official draft in the record, and I don't believe
5 the draft that was circulated is in the record. And we
6 just wanted to be clear that the project that we analyzed
7 and the proposals that we analyzed did not include the
8 translocation plan that was circulated by the applicant
9 last week. And our understanding is that that's not in
10 the record, and we just wanted to clarify that.

11 MS. FOLEY GANNON: To be clear, we --

12 PRESIDING MEMBER EGGERT: Does the applicant want
13 to respond?

14 MS. FOLEY GANNON: Yes, thank you.

15 We provided the -- as we discussed at the
16 workshop on Friday, we were providing it as a courtesy to
17 the parties; we did not ask that the Commission admit it
18 into evidence.

19 The conditions of certification and the PMPD,
20 which we think are appropriate and adequate, call for the
21 development of the final plan as approved that meets the
22 performance standards, including the PMPD, and that has to
23 be approved by the other agencies that have jurisdiction
24 over these resources. We think that's appropriate.

25 Again, there's been a lot of interest in this

1 plan, so we simply docketed it so that the parties would
2 have it to review and did -- if they were interested in
3 seeing what has been worked on by the agencies. It is the
4 plan that is described in the biological opinion, which
5 was an appendices to the ROD as the -- and it was a
6 described as a final plan. So that is the current status,
7 and that was why we provided it.

8 PRESIDING MEMBER EGGERT: Mr. Meyer, did you have
9 something to say to this?

10 MR. MEYER: Just to reiterate. This, as the
11 applicant stated, this would be part of the compliance
12 portion if the project is approved. Yeah, staff, under
13 the compliance program, would ensure that all the
14 conditions of certification are met, and this is -- you
15 know, the plan would be part of meeting those conditions
16 of certification rather than something that staff was
17 looking at as part of the analysis for the, you know, a
18 pre-decisional state.

19 Also, just to clarify, staff has looked at the
20 plan, preliminarily approved it; but I have talked to the
21 staff, and they're holding off our official approval of
22 the plan until we can get concurrence from Fish & Game,
23 Fish & Wildlife. That was, I think, something that got
24 missed for the biologists, didn't understand that there
25 was not concurrence from those agencies. So we're going

1 to be working with Fish & Game, Fish & Wildlife, make sure
2 that everyone is in agreement on the plan before, you
3 know, it gets signed off by the Energy Commission and the
4 compliance program.

5 Another outstanding issue that staff wants to and
6 is working right now to run down with both the BLM and the
7 resource agencies is our initial understanding is that the
8 area that the project had vacated, the approximately
9 4,000 acres to minimize the impacts to Desert Tortoise may
10 not be held as a linkage area by the BLM. So if that is
11 not in that -- did not make it from the FEIS into the ROD,
12 which is my understanding, we're not sure if that would
13 just open the -- we believe that that could open up that
14 area to development of another project. So -- and that
15 would change the cumulative impacts. So that's an open
16 issue that we're -- we want to resolve as quickly as
17 possible. And we're working on it; unfortunately, some of
18 the principles that need to get back to us are not
19 available till next week.

20 PRESIDING MEMBER EGGERT: But just to clarify, so
21 that's a component of the condition of certification in
22 terms of -- the staff's approval of that as a component of
23 the condition of certification is not yet complete; is
24 that --

25 MR. MEYER: Well, there's two -- I'm sorry, I was

1 mixing a little bit of two issues.

2 The first one, the Desert Tortoise relocation
3 plan is definitely a part of the compliance, doesn't
4 affect the staff's position at this point. The staff's
5 position on the impacts to Desert Tortoise, mainly the
6 linkage, and also following the Committee's guidance on
7 looking at a reduced acreage alternative of the project,
8 which led us to 5.5, that is directly related to avoiding
9 impacts in that linkage area, if that is just switched
10 from this project to another PV or another renewable
11 project, it doesn't really address the cumulative impacts
12 to that area. And that's something what just came up this
13 morning, so we're frantically trying to address it.

14 MS. FOLEY GANNON: In other words, what we're
15 concerned about is that one of the assumptions that staff
16 used in its cumulative impacts analysis, in fact, that
17 there wouldn't be development in this area may not be
18 true; and we're working with BLM and U.S. Fish & Wildlife
19 Service to try to run this down.

20 It's my understanding that that supposition or
21 condition, that there wouldn't be development in that area
22 to the north of the project, may also have been a basis
23 for the biological opinion, so we're trying to determine
24 whether or not there could be development in that area,
25 and if so, does that affect the biological opinion and

1 does it affect the staff analysis. So we've raised this
2 issue with our sister agencies.

3 As Christopher said, unfortunately, a number of
4 people are not available today, so we're doing what we can
5 to try to resolve this.

6 HEARING OFFICER KRAMER: And you also said they
7 would not be available this week; is that right?

8 MR. MEYER: The principle, the biologist that
9 staff has been working with from the Fish & Game and
10 Fish & Wildlife Service are not available this week, but
11 it is going to be brought up in the Renewable Energy
12 Action Team meeting, so hopefully we'll get some
13 information from that.

14 HEARING OFFICER KRAMER: When's that meeting;
15 this week?

16 MR. MEYER: Yes, this week. I believe it's
17 tomorrow, but I'd have to double check. I'm not part of
18 that meeting.

19 MR. RITCHIE: This is Travis on the phone,
20 Travis Ritchie with Sierra Club.

21 From Sierra Club's perspective, I mean, I'm glad
22 that staff is revisiting that issue, and that is something
23 that's important that we didn't consider either. But it
24 would have substantial impact I believe on the proposal
25 and the ability of the Commission to approve the PMPD, and

1 so we would be very interested in seeing staff's
2 conclusions and comments on that and having an opportunity
3 ourselves to comment on that.

4 MS. FOLEY GANNON: May I ask a question?

5 I'm a little confused as to how that can be
6 impacting the cumulative effects analysis when there is no
7 proposed project in that area. And in looking at
8 cumulative impact, you're looking at proposed or
9 reasonably-foreseeable projects; and I don't understand
10 how we assume that there's something reasonably
11 foreseeable in the area, the avoidance area.

12 It's not proposed to be impacted by the project;
13 there's no one else who's proposing to impact it by the
14 project. So the fact that there is some maybe not
15 absolutely precluded possibility that something could
16 happen in an area in the future doesn't necessarily equate
17 it with a cumulative impact, so I'm confused with the
18 change in this analysis.

19 MS. HOLMES: Well, there hasn't been a change
20 yet. Staff is just trying to look at it to determine if
21 there did -- if one of the assumptions that we based
22 conclusions on, both with respect to cumulative impacts as
23 well as my understanding -- and I've been out of the loop
24 for six weeks, but my understanding also is that there's a
25 proposal in some instances to move tortoises from the

1 project site to that area. We need to make sure that our
2 conclusions about the viability of that option are not
3 affected by this.

4 We're not even sure at this point -- we're not
5 even sure at this point exactly what the status is of the
6 issue involving the exclusionary or the exclusion zone.
7 And again, we're trying to track it down, we're doing the
8 best we can, but I just believe in the interest of full
9 disclosure, I think it's prudent to raise it now rather
10 than have somebody show up at the adoption hearing and say
11 this is a new issue.

12 So hopefully we'll be able to resolve it, but we
13 did think it was appropriate to provide our understanding,
14 which is incomplete at this time of what the issue is. As
15 I said, it's both potentially an issue that could affect
16 staff's conclusions as well as the potential impact for
17 some sort of a discrepancy between the biological opinion
18 and the Record of Decision.

19 And we'll get you information as soon as we get
20 it, and I presume you'll be using your own resources to
21 try to find out what's going on as well.

22 PRESIDING MEMBER EGGERT: So just let me maybe
23 ask a question related.

24 Is there some evidence that suggests that there
25 will be a proposed project in that area?

1 MS. HOLMES: I don't know. I have not talked to
2 BLM about this, so I don't know what the current status
3 is. I mean, we obviously talked with them when we were
4 developing our cumulative impacts analysis. I have not
5 talked to them about this issue since then.

6 HEARING OFFICER KRAMER: Couple questions. One
7 for the applicant.

8 Is your right-of-way grant just now for the
9 roughly 4600 acres, or are you receiving permission to --

10 MS. BELLOWS: That's correct.

11 HEARING OFFICER KRAMER: Okay. So you won't have
12 any site control over this area then.

13 MS. BELLOWS: We do not.

14 HEARING OFFICER KRAMER: Okay. And for the
15 staff, was this assumption that that area would remain
16 undeveloped stated in the testimony somewhere and --

17 MS. HOLMES: I have not had a chance to go back
18 and look at it. We haven't even been able to get in touch
19 with our own biologist. We found out about this this
20 morning; and, you know, on one hand I sort of hesitated to
21 raise it because we don't have enough information to know
22 whether this is a significant issue or not. On the other
23 hand, I did not want to remain silent and have it come up
24 as a major problem for the Commission for the first time
25 at the adoption hearing.

1 So I've, I hope, not erred on the side of
2 creating panic, but I do think it's appropriate to let
3 people know that this isn't an issue out there that's
4 unresolved that has a potential, I do know how great a
5 potential, but has a potential to create some problems.

6 HEARING OFFICER KRAMER: Okay. And then my other
7 question, which I don't expect you to answer now, but
8 would be, did -- I don't recall anything in the conditions
9 requiring that this land be preserved in any sort of way,
10 so that leads me to question on one level whether staff
11 really was making that assumption as a part of their
12 analysis, because logically then it would be backed up
13 with an easement or something to make it stick.

14 MR. MEYER: We'll talk about it. I think what
15 our understanding was is the BLM as part of their land use
16 amendment process was going to put a status on that as a
17 linkage area that wouldn't be open for solar development,
18 in recognizing the Energy Commission's position on moving
19 the project out of that area and using it for the intent
20 of relocating tortoises and is a linkage area.

21 So, as we're saying, this is information that's
22 coming out of the BLM biology, staff and the people that
23 developed the biological opinion had that belief, so we
24 want to make sure that it doesn't have any ripple effects
25 onto our decision.

1 HEARING OFFICER KRAMER: Okay. And are we ready
2 Mr. Lamb and Ms. Burch to talk about the soil and water
3 conditions?

4 MS. BURCH: I'm sorry, we ended our workshop at
5 7:00 last night, and I have the job of trying to
6 synthesize that, and I just -- my office served it on the
7 Commission and everyone. So we need someone to print it.

8 MS. HOLMES: Somebody is going upstairs right now
9 to make copies for everybody.

10 ASSOCIATE MEMBER BYRON: Microphone, please.

11 MS. HOLMES: Somebody is going upstairs right now
12 trying to get copies.

13 So thank you so much for taking on the
14 responsibility of putting together the comments. I'm not
15 troubled by the fact that you weren't here exactly at
16 10:00 in the morning.

17 PRESIDING MEMBER EGGERT: Yeah, I guess I should
18 have said this: We greatly -- the Committee appreciates,
19 you know, all of the effort by all parties in getting
20 the -- working on these issues trying to find common
21 ground specifically as it relates to the conditions, so
22 appreciate all the hard work on all sides.

23 HEARING OFFICER KRAMER: I don't see it yet in my
24 e-mail, but it's coming?

25 MS. BURCH: It is coming.

1 HEARING OFFICER KRAMER: Well, then I guess we
2 really need that as our stalking horse for our discussion.
3 So we may have to wait for that.

4 But we did have the one -- Ms. Holmes, did you
5 have something if --

6 MS. HOLMES: Well, since -- I mean, it depends on
7 how the Committee would like to proceed. If you would
8 like to proceed, if you're willing to proceed without the
9 express language in front of you, I can summarize in
10 general a couple of significant concerns or issues that
11 the staff would like to raise with the Committee. But if
12 you'd rather wait until you see the -- have the precise
13 language in front of you, I can wait until then.

14 HEARING OFFICER KRAMER: Okay. Let me see if I
15 can spot that noisy person.

16 Somebody on the phone who can't hear me is
17 probably talking in the background. Okay. We'll just
18 mute her, bring her back a little later.

19 Okay. And then we also have to discuss the
20 applicant's proposal for, in essence, a tiered set of soil
21 and water requirements that would allow Phase 1A to go
22 forward without some of the more detailed work being done.

23 Is that a fair paraphrase?

24 MS. FOLEY GANNON: Yes. And I think it's because
25 what we have proposed is directly based on what's included

1 in the PMPD right now, I think it would probably make
2 sense to first discuss the proposed changes and see how
3 those would be implemented because, again, if the proposed
4 changes are not implemented, we don't have any problem
5 with the PMPD other than the comments or the suggested
6 revisions, the minor suggested revisions we included in
7 our comments.

8 This is to respond to -- if the revised structure
9 that we discussed at the workshop yesterday is going to be
10 implemented, we would ask that the Committee consider
11 basing the requirements for 1A based on what is included
12 in the PMPD today so that the project could still proceed
13 in a timely fashion.

14 HEARING OFFICER KRAMER: Okay. Let me -- I'm
15 going to mute people. Let's go off the record.

16 (Recess.)

17 HEARING OFFICER KRAMER: Okay. Then we can go
18 back on the record.

19 So, go ahead, Ms. Holmes, then with your general
20 comments.

21 MS. HOLMES: Okay. Thank you.

22 My comments are directed at the proposed changes
23 that were made by Burlington Northern Santa Fe. And in
24 general, a number of their comments I think were very
25 helpful.

1 We were also able yesterday to, I think,
2 reorganize and clarify some of the language in the
3 conditions. As a result of the discussions that we had
4 yesterday, some of staff's concerns have been alleviated.
5 However, we have two significant remaining issues that I
6 want to walk through one by one.

7 The first results from a couple of phrases that
8 were added repeatedly throughout the conditions of
9 certification. And the second refers specifically to
10 language that's proposed for Soil and Water 12.

11 And I'll walk through the first issue first.

12 There's a number of areas where BNSF has proposed
13 to add language requiring an assessment or determination
14 of the feasibility of meeting performance standards
15 contained in the conditions of certification. We believe
16 that this language would introduce a significant new legal
17 vulnerability into the proposed decision and one that's
18 not supported by the record.

19 You've probably heard all of the lawyers in this
20 case repeatedly state that a selection of specific
21 mitigation measures can only be deferred to the future if
22 there's a feasible performance standard that's been
23 included. Staff testified as did, I believe, the
24 applicant, that the performance standards that are
25 contained in the conditions of certification are feasible.

1 And I'm actually unaware of any testimony to the contrary.
2 So including language that requires feasibility to be
3 reopened and reassessed post certification isn't supported
4 by the evidence. It also provides support for those who
5 want to claim that the Energy Commission has blatantly
6 violated a fundamental requirement for mitigation that's
7 proposed under CEQA.

8 The second proposed change appears in Soil and
9 Water 1 and 13, and it includes -- the BNSF language would
10 include a requirement that BNSF concur with plans that are
11 submitted to the applicant, to the Energy Commission. The
12 applicant is certainly free to choose not to submit
13 anything to the Energy Commission that BNSF hasn't
14 blessed, but we're not certain what there's a legal basis
15 for the Energy Commission to require and to enforce such
16 an agreement.

17 Including such a requirement in the decision, I
18 think, could result in the Energy Commission ending up in
19 compliance proceedings trying not to determine whether or
20 not the plan is a good plan but whether or not BNSF has
21 agreed with the plan. So we think that that's not a very
22 good use of public resources.

23 And now I want to turn specifically to Soil and
24 Water 12. I think you heard Steve Adams talk a little bit
25 about it last Friday. This is the condition that requires

1 the applicant to fund a hydrology report that's directed,
2 in essence, by BNSF.

3 I want to make it clear that there's already a
4 hydrology report required. It's required in Soil and
5 Water 8. Staff is going to review it and approve it or
6 not, as the case may be. So Soil and Water 12 imposes a
7 requirement that a second report be included in the
8 Commission's decision; and this report is the result of a
9 private agreement between the applicant and BNSF. And as
10 I mentioned earlier, the purpose, at least as I understand
11 it, of this requirement, is to result in the Energy
12 Commission being required to enforce a condition that BNSF
13 bless the applicant's submittal to us. And again, they're
14 free to enter into private agreements to do that.

15 Energy Commission staff thinks that it's unwise
16 for the Commission to get involved in brokering private
17 agreements between applicant and private parties. We have
18 a long tradition at the Energy Commission of staying out
19 of such agreements. We think that that's a wise policy
20 for the Commission to follow.

21 Nonetheless, in an effort to try to move the
22 project along, as you're aware staff did propose some
23 language that would reference this agreement that BNSF
24 direct a study that's funded by the applicant, the same
25 study as I said that's required in Bio 8, but we think

1 that there's important differences between the language
2 that's been proposed by BNSF and the language that's been
3 proposed by the Energy Commission staff.

4 First of all, the language that's proposed by
5 BNSF, again, refers to determining what the impacts are.
6 We had specific language that referenced impacts, if any,
7 in our proposed rendition of that condition; and the
8 reason that we did that is that we believe that the
9 evidence in the record indicates that there are not likely
10 to be impacts.

11 A condition that implies that there has been no
12 determination of whether or not there are likely to be
13 impacts is, again, another invitation to litigation since
14 CEQA requires that the Commission assess the potential
15 impacts for impacts prior to its decision.

16 Similarly, the leading -- we recommend that you
17 delete language referencing the feasibility of meeting
18 performance standards. As I said before, feasibility of
19 performance standards is required under CEQA to be
20 determined by the lead agency prior to adoption of its
21 decision, not post certification. And we also recommend
22 deleting references to the determination of mitigation
23 measures. Once again, CEQA is clear that you cannot as a
24 lead agency say we're going to do a study to determine
25 what the mitigation measures should be in the future.

1 So we think that with the language that staff has
2 proposed, you have a condition that's much more legally
3 defensible than the language that has been proposed by
4 BNSF.

5 PRESIDING MEMBER EGGERT: It's actually -- just
6 to clarify that, the comments that you were just making
7 were specifically in relation to the proposed changes by
8 BNSF; is that correct?

9 MS. HOLMES: Correct.

10 PRESIDING MEMBER EGGERT: Okay.

11 HEARING OFFICER KRAMER: And the language that
12 staff proposed, is that the language that's currently in
13 the PMPD?

14 MS. HOLMES: I would have to pull the PMPD out to
15 look. We have so many versions flying around.

16 I believe that you -- if the PMPD still includes
17 the language about imposing the mitigation as a result of
18 the report, that's language that we recommend be deleted.
19 We believe that that's a clear flag for litigation.

20 HEARING OFFICER KRAMER: Okay. Which condition?

21 MR. MEYER: Bio 12.

22 MS. HOLMES: Soil and Water 12.

23 Let me ask, BNSF, are your -- the changes that we
24 have that we're looking at, are those based on what's in
25 the current -- in the PMPD?

1 MS. BURCH: The red line has the word "impacts"
2 in the PMPD; that is what's in the PMPD. The PMPD does
3 not have the words with the rest of the stipulation, "and
4 determine appropriate mitigation measures, if necessary,
5 to be paid for by the project owner."

6 MS. HOLMES: Right. So I believe that the PMPD
7 does include the language recommended by staff. I was
8 listening in on Friday, and I recollect a discussion about
9 was that language that Ms. Burch just referenced, why was
10 it omitted; and I believe that Mr. Adams explained that we
11 were concerned about creating unnecessary liability for
12 the Commission with that language.

13 HEARING OFFICER KRAMER: All right. Well, the
14 current Soil and Water 12 just requires that the study be
15 funded, but it doesn't require that any specific action be
16 taken with the results.

17 MS. HOLMES: Right. And that's, as I said, the
18 comments that I'm making now are with respect to BNSF's
19 comments last Friday as well as the proposed language that
20 they gave us. Staff would recommend that either be
21 deleted or remain as written in the PMPD.

22 MS. BURCH: May I speak now?

23 HEARING OFFICER KRAMER: Okay. Let me get you a
24 second microphone. I think we've got plenty here.

25 (Discussion regarding microphones.)

1 HEARING OFFICER KRAMER: So go ahead.

2 MS. BURCH: Okay. As I began to explain last
3 Friday, I think it was, at the hearing, we were approached
4 by Calico with respect to several requests they had of the
5 railroad. And in that context we then learned of the
6 magnitude of this project. They began to give us
7 presentations on it. And during that time, one of the
8 questions that was raised by the engineers for BNSF was
9 whether the hydrology mitigation measures would, in fact,
10 protect the right-of-way.

11 We were under the impression at that time that
12 the work was already done, that they had a proposal, they
13 had done the plans; and they proposed that they would fund
14 a study because we would hire an outside consultant, and
15 we wouldn't otherwise hire an outside consultant, to
16 perform a study to look at what they had already done and
17 determine if anything more needed to be done. In layman's
18 terms, that was the framework for this understanding.

19 We put it into words, and they are the words that
20 are in the stipulation that was put on the record in
21 August, at the hearings in early August. And it states,
22 "The project owner shall fund a hydrologic study
23 commissioned by BNSF to determine the erosion and
24 sedimentation impacts, if any, on BNSF infrastructure
25 resulting from the project owner's planned emplacement of

1 SunCatchers, flood-control structures, and run-off control
2 measures, and determine appropriate mitigation measures,
3 if necessary, to be paid for by the project owner."

4 And with that understanding, BNSF would be happy
5 to, you know, write off any concerns about that issue.

6 In September -- and with that in mind, we
7 actually hired a firm, and we were paid some initial
8 start-up money, and we began to review the plans -- well,
9 we tried to begin to review the plans. All we had was
10 actually the FEIS and documents the staff has put out.
11 Because when we asked for the DESCOP or other reports, we
12 were told they were close but were not quite there.

13 So the next thing that happens is on
14 September 3rd, I believe it was, the Commission rejected
15 that particular alternative and offered another
16 opportunity to Calico. And they submitted a new plan,
17 which this time eliminates by and large all of the
18 hydrologic controls that were anticipated by the railroad
19 in which they were just going to be peer reviewing after
20 the fact, if you will.

21 So after the Committee decided, and I believe
22 it's the September 20th hearing, to adopt 5.5, we went
23 back to look at conditions and see if -- how to work with
24 the new situation to reach the same end, okay? And we
25 spoke with experts, and they advised us that based upon

1 what they had reviewed in preparing for comments on 5.5,
2 that there were significant holes in what had been done.

3 For instance, the geology report has three soil
4 borings in it for ten square miles. And they said that's
5 just not enough to characterize a site.

6 So we said go through and tell us what you think
7 it takes, given what you understand to be the current
8 situation, to do what you would need to do to get to the
9 same place where we can just determine that we're taken
10 care of, the right-of-way's protected.

11 And with that in mind, we produced the document
12 that we presented last Friday. We had attempted to
13 negotiate the details of that; that did not happen.

14 I did hear and appreciated hearing at least
15 preliminary concerns by staff last Friday. And I heard
16 more from Ms. Holmes last night. And so I would -- I
17 would characterize the issues generically the same; but we
18 do listen, we do try and respond, and I have hope -- I
19 hope that we have something that works and it's in what we
20 present today. If not, we're willing to continue to work
21 with you. Okay?

22 But first of all, I think that -- it looks like
23 there are significant changes, if you looked at just the
24 number of red lines; there aren't. I believe we added one
25 report, an infiltration report. What we did was specify

1 what needs to be in those reports for completeness so that
2 we do understand that what the Commission will consider
3 will be complete from our perspective and so that we have
4 what we need to evaluate if it's correct. And I think
5 that there's by and large, I think, complete consensus on
6 all of that.

7 The two issues I would agree with Ms. Holmes,
8 those are the two issues. And I'd like to go back to the
9 original agreement, and you'll understand where we're
10 coming from.

11 First of all, you'll see that we do not dispute
12 that there are feasible solutions to meet the minimum
13 performance standards, okay? And I do believe the
14 language we had drafted was ambiguous at best. We're not
15 trying to create a litigation strategy. Here's what we
16 were trying to do: We were trying to clarify that it is
17 our understanding, it is our experts' opinions that the
18 Huitt Zollars report and the Stantec report, thousands of
19 pages of documents, established that debris and retention
20 basins were needed to mitigate an 11-square-mile site with
21 this amount of activity happening, and that if those are
22 in place, those performance standards can be met.

23 So applicant had argued on the 20th of September
24 for the deletion of those. And, in fact, that is the
25 current standing of what is described as 5.5. However,

1 staff, in the PMPD, leaves open the question of whether
2 they're appropriate or not; and we very much appreciate
3 that. And so where we would disagree is that there is a
4 feasibility showing that as of yet there's any other kind
5 of structural or drainage control that will meet those
6 standards. And we would like to not be in the position
7 where we are reopening and ignoring all the work that's
8 been done to date. So we'd like to build on that.

9 And you'll see in our proposal, we say the work
10 going forward should be based on the work of the past. If
11 good science, good engineering supports something else,
12 then so be it. Okay? But we don't think that it's
13 correct to say that other structural controls are feasible
14 at this time.

15 So we have drafted language -- let me just read
16 you in places. One in Soil and Water 1, one in Soil and
17 Water 8.

18 At least you will know what we're trying to
19 accomplish. We said, "In the event that debris and
20 detention basins are not included in the proposed project,
21 the design report shall determine the feasibility of the
22 project meeting the above performance standards," those
23 being the minimum performance standards. So there's no
24 litigation issue in the sense that there's not something
25 available to meet the minimum performance standards, which

1 I believe is the litigation issue.

2 HEARING OFFICER KRAMER: Can I ask you a question
3 about that?

4 MS. BURCH: Uh-huh.

5 HEARING OFFICER KRAMER: So if I heard right,
6 your approach seems to be if they put in detention basins,
7 you're pretty much assuming that they'll meet the
8 standards, the performance standards; and only if they try
9 to design something that doesn't have those, do you think
10 a further degree of analysis is necessary to compare them
11 to the standards. And I think what your condition was
12 intending to do was, you know, no matter what kind of
13 design they come in, the engineers have to look at it and
14 measure it against the standards.

15 So wouldn't that meet your needs just as well to
16 have a report that is saying that it will meet the
17 standards for -- because otherwise it won't get approved?
18 I mean, that's what the condition says.

19 MS. BURCH: That's a -- I would say that from a
20 litigation standpoint that's a different question, whether
21 a study's been done to support the other approaches, to
22 support 5.5 as it's now designed I think is very
23 questionable. And I want to emphasize that to say that we
24 believe that having debris and detention basins included,
25 it still needs to be determined are they the right size

1 and the right locations, those kinds of -- those are the
2 things that we would have been looking at before.

3 And so there is work to be done even on that end.
4 You can't just put in one detention basin and one debris
5 basin and say, we've got it; you know, it will depend on
6 how they design it.

7 HEARING OFFICER KRAMER: But what I was hearing
8 was that there's sort of a heightened scrutiny if somebody
9 proposes something without detention basin.

10 MS. BURCH: I think there is based upon the
11 existing work. Every single -- every single alternative
12 required -- whether it was a 2,000 acre one, had detention
13 and debris basins in it. If you look at the Huitt Zollars
14 report, our expert testified as to that at the hearing.

15 So why they believe that nothing is required, I
16 don't understand -- we just do not understand that. So we
17 think that's questionable. And that is what's being
18 approved.

19 It would be one thing if they left them in, and
20 the assumption was that they were going to be included,
21 but a study was going to consider taking them out, but
22 what we have is just the opposite. 5.5 assumes they're
23 out, and it has to be shown at this point that something
24 should be put back in. And that really is shifting from
25 the applicant to any intervenor the responsibility for

1 proving what all the reports to date have shown, and we
2 think that's inappropriate.

3 HEARING OFFICER KRAMER: Staff, is it your
4 understanding of the conditions, the conditions in the
5 PMPD that there's a burden shifting issue that she
6 describes or -- I mean, what -- I think what we intend to
7 say -- if we got it wrong, you know, please help us -- is
8 that good science has to be applied to their design to see
9 if it meets the performance standards, which, you know, at
10 a very high level are, they take the water that comes in
11 as it is now, and what they feed to their neighbors is as
12 it is now, and they don't increase the burden on their
13 neighbors. I mean, there's more details to it than that,
14 but that's the basic concept.

15 MS. HOLMES: My reaction to that is what I'm
16 hearing BNSF say is if the only evidence in the record
17 indicates that debris basins are likely, you should adopt
18 a condition of certification that specifically identifies
19 debris basins as a control measure and not just adopt a
20 performance standard. Now, I think that the law allows
21 you to adopt performance standards.

22 We share BNSF's concerns about some of the work
23 that was provided by the applicant, as you heard staff
24 testify at the hearing in September. So I can -- as I
25 said, I think the performance standards are legally

1 sufficient; on the other hand, I do understand -- I do
2 understand their concern. I think their concern is simply
3 that if the evidence supports debris basins that the
4 Commission should use that as an assumption in their
5 decision. I don't think that's legally required, but I
6 certainly understand why they're saying that.

7 HEARING OFFICER KRAMER: But even if you did
8 express a preference, a rebuttable preference for
9 detention basins, you'd still have to have the performance
10 standards to measure the whole package.

11 MS. HOLMES: Well, you could do -- I mean, you
12 could -- you could have -- you could have detention basins
13 be the project to design and have a lot more information
14 about them and not need a performance standard, but we
15 didn't go that route; presumably because of lack of time
16 they're not as -- that's not -- that would not have been
17 well-enough developed to include without the performance
18 standard.

19 So I don't think that you had to have a
20 performance standard, there was another alternative that
21 would require a lot more pre-certification effort, but
22 given that we didn't have that level of effort, I think
23 the performance standard is an appropriate way to proceed.

24 HEARING OFFICER KRAMER: Right, because now at
25 this point detention basins are, in essence, a concept,

1 just like the performance standard, because the details
2 aren't worked out.

3 MS. HOLMES: Well, I think with staff -- and I'm
4 paraphrasing the testimony that I'm remembering from last
5 September of Mr. Weaver, but I think that staff testified
6 that they have a fairly high level of confidence that
7 debris basins can be an effective way of protecting the
8 BNSF site. We don't necessarily have the same level of
9 confidence in other types of control measures, but we
10 understand that CEQA allows lead agencies to establish
11 performance standards; and in this case, that would allow
12 the applicant to come in with a proposal, they could prove
13 it to us that some other mechanism is going to be as
14 effective.

15 But I think you did hear testimony saying that we
16 have a greater level of confidence with the information
17 that we have now in the detention basin approach.

18 MS. BURCH: And may I add the other -- and why I
19 feel there is a shifting of the burden?

20 It is because -- and it is an issue, again, I
21 brought up on Friday with the Commission, if you have a
22 design that was presented to us, I believe on the -- gee,
23 the 13th or so, or 13th of September, 5.5 was presented,
24 and if those at the workshop recall, I said if you're
25 going to proceed with this, the one thing we have to see

1 for the first time is what the design of the SunCatchers
2 on this footprint.

3 And if you recall at the hearing we then put
4 on -- we took that drawing to our experts, Exhibit 1214,
5 and blew it up 200, 400, 800 degrees, and there is hardly
6 a square foot of that 11-mile square area that doesn't
7 have a SunCatcher, a maintenance road, or something on it.
8 And with that in mind, our -- I believe that if you -- if
9 you approve the megawatts for this facility, that is the
10 amount that assumes that the number of SunCatchers will
11 cover that entire area, then it will be shifting the
12 burden to anyone who disagrees with that to prove that the
13 SunCatchers and the energy they produce are not more
14 important than the hydraulic, you know, the controls. And
15 I'm very -- I think it's a huge issue.

16 HEARING OFFICER KRAMER: Well, we intend to solve
17 that. It's not our understanding that the megawatts drive
18 everything else. But we intend to clarify the decision --

19 MS. BURCH: Thank you.

20 HEARING OFFICER KRAMER: -- to the effect that
21 if -- you know, if some land has to disappear for some
22 service like detention basins, then the power output may
23 be reduced. And we're also going to be clear if we
24 continue with the proposed approval route, that it is --
25 we would override something less than the 663 or whatever

1 it is, you know. So we're going to -- it's -- there will
2 be -- there should be no doubt after we make these
3 clarifications that the megawatts are going to rule, if
4 you will.

5 MS. HOLMES: Megawatts are not going to rule,
6 Hearing Officer Kramer?

7 HEARING OFFICER KRAMER: Are not going to; thank
8 you.

9 MS. HOLMES: When will we see these changes?

10 HEARING OFFICER KRAMER: At some point before the
11 hearing; how much before, I'm not sure at this point.

12 PRESIDING MEMBER EGGERT: Right, but I think -- I
13 mean, the important point, which is -- hopefully addresses
14 the concern that, I think you stated it quite well, which
15 is the fact that that will be the opportunity for the
16 performance standards to drive a change in the output. So
17 the performance standards in this case for the purposes of
18 the design of the system are as they are in the PMPD, and
19 it's not that they -- the output of the project, the
20 megawatts would somehow overrule those.

21 MS. BURCH: Okay. So that was feasibility? Was
22 that my feasibility discussion?

23 Yeah, that is the approach, and explains the
24 language; I hope it explains that what our concern
25 actually is, is that it's genuine and it gives you more

1 ideas as to how you might address them.

2 HEARING OFFICER KRAMER: Okay. And so what sort
3 of role were you giving BNSF --

4 MS. BURCH: Let's go to that -- now let's go to
5 that.

6 HEARING OFFICER KRAMER: -- was that a consultive
7 role?

8 MS. BURCH: That is a very different issue. And
9 it is between -- our perspective is they came to us -- we
10 had concerns, they came to us with a proposal as to how to
11 resolve it. They said, we'll pay for you to do a study,
12 and whatever it says, if something's necessary, we'll pay
13 for it, we'll do it.

14 Well, having been an administrative law lawyer
15 for 30 years, I said, well, that's good, but how do we
16 know given that what is required might not reduce the
17 amount of megawatts or project that it will be acceptable
18 to the Commission? And I really believe that we can't
19 enter into private agreements that affect the agency's
20 jurisdiction without working somehow within the agency
21 format.

22 HEARING OFFICER KRAMER: Yeah, I don't think I
23 agree that you can't have a private agreement. You know,
24 you would be, in effect, a third government here. You
25 know, we've got the state telling them what to do about

1 various things; we've got the landlord, the BLM, telling
2 them what to do; and one of, you know, the efforts we
3 make -- and the other day people asked why we were so
4 intent on seeing the ROD, and that's to try to make sure
5 that we're not giving them instructions so they're being
6 pulled in two different directions and they can't meet
7 both of the requirements; but basically what ends up
8 happening is the most restrictive requirement is what
9 limits their behavior. So if you had a private contract
10 with them, you may have enforceability concerns --

11 MS. BURCH: Well, that seems like --

12 HEARING OFFICER KRAMER: -- and you'd probably
13 prefer that, you know, that the might of the California
14 state government perform that service for you, in essence,
15 at no charge to your client, but --

16 MS. BURCH: That is not what we're requesting.

17 So let's talk about how you really do things in
18 the real world post certification.

19 What an applicant project owner will do is hire
20 a -- like an engineering firm, and they will produce
21 reports, and those reports will be reviewed by the
22 applicant, and they won't be released to the CPM until the
23 applicant is happy with them. That's how it really works.
24 Okay?

25 And then the CPM has before them the report, and

1 then they do independently analyze it, and if they need to
2 hire a consultant, they do at the expense of the
3 applicant, the project owner, and they make a
4 determination.

5 What we are trying to have acknowledged here is
6 that we have an agreement with the applicant that they
7 will include the mitigation measures that this report
8 requires in what they submit. We are in no way, in no way
9 at all trying to impact what the Commission decides or
10 what the Commission would otherwise do with the
11 deliverable from the applicant. This was their proposal;
12 and what we would like to know is if it will be able to be
13 enforced. And we are very concerned by the lack of
14 support for how to implement that at this time.

15 So as I said on the phone last night, what -- I
16 very much respect Ms. Holmes's concerns, I understood the
17 misunderstanding, and I have tried to make it clear, I
18 think the language she will have a, at least an initial,
19 adverse reaction to, but if you would read it with what
20 that intent is, which is simply to -- you know, that it's
21 not enough to give us the same -- to give us the document
22 at the same time as the CPM, that's not our agreement with
23 the applicant. Our agreement with the applicant is they
24 will include these mitigation measures. And I'm trying to
25 find -- given the change -- and this is why I brought this

1 up again last Friday, but you might not have understood
2 the context now that things are being changed and they're
3 being submitted for the first time, and we're not coming
4 in after the fact to peer review a current proposal, what
5 is the best way to do that.

6 And in my experience, the quickest way, the best
7 way is through a peer review. We called it a -- we call
8 it "over-the-shoulder EPA," where you -- you work on a
9 document, and you decide together how to do it, the group
10 gets together, and they reach concurrence, and then you
11 give it to the agency; the agency gives the feedback, the
12 determinations, they tell you how to go forward, then you
13 go and you produce the next document.

14 And again, the consultant, the private consultant
15 would be preparing a document, they would give it to
16 Calico, Calico would give it to us, we would comment on
17 that, they would incorporate their comments, then it goes
18 to the CPM as any document from the applicant would have
19 gone, and again, the CPM makes the decision and moves
20 forward.

21 So this is not a shift in any way of
22 jurisdiction, this is just trying to find the most
23 effective way given -- given how this project has evolved
24 to integrate that agreement. And the other thing I have
25 done is I have tried to narrow what it is that we -- we

1 would like to review the entire document, but we only are
2 looking for concurrence on the things that we agreed to in
3 Soil and Water 12, that's all we're looking for; we're
4 only trying to enforce our agreement. So I have changed
5 it to say concurrence only as to the report and the
6 requirements of Soil and Water 12.

7 And again, I'm open to wordsmithing that, but I'm
8 trying to move us towards conceptually what we were after.
9 Okay. So other than looking at the specifics, I do think
10 that is generically what we're proposing and why.

11 HEARING OFFICER KRAMER: So it sounds to me as if
12 you want to participate in the process of designing the
13 drainage so that it meets the performance standards.

14 MS. BURCH: That affect us.

15 HEARING OFFICER KRAMER: And so maybe it's -- the
16 language that uses terms like "impact" and "mitigation" is
17 perhaps a little, if you will, maybe red flaggy or
18 inflammatory, because what we're -- at least a decision is
19 presuming that if you meet those, the various
20 requirements, the county level, and that the general
21 engineering principles and a few others that I'm, you
22 know, not mentioning, because they're not at the front of
23 my brain, that impacts are mitigated because those
24 performance standards that are embodied in all those
25 standards mitigate the impacts.

1 So the act of meeting that test is it's really
2 not about, you know, identifying impacts and then pounding
3 them back into the board so to speak, nails that pop up,
4 it's simply just designing the board that doesn't have the
5 problem in the first place.

6 MS. BURCH: That's why we spent so much time
7 trying to get the right standards, the right FEMA
8 documents -- you know, this should -- this actually should
9 be, I would hope be very fluid if it stopped it, but --

10 PRESIDING MEMBER EGGERT: So actually, if I
11 understand Ms. Burch's comments, is that it's the level of
12 involvement of BNSF to ensure the standards are not --
13 that's sort of where I am -- how do you ensure that you
14 have a level of involvement that provides comfort or
15 assurances --

16 MS. BURCH: And at the right point in the
17 process.

18 PRESIDING MEMBER EGGERT: -- and at a time that's
19 not after the fact.

20 MS. BURCH: Exactly.

21 PRESIDING MEMBER EGGERT: I see.

22 MS. BURCH: That's it. That's very well put.

23 And I would just say that, you know, it's
24 concerns, now when our consultant brought up the fact
25 there were only three borings, Ms. Bellows stated that BLM

1 didn't allow them to do more at that time. And we
2 understand -- if that's the case, we're not saying there's
3 a fault there, we're just saying it's work to be done.
4 And it wasn't called -- it certainly wasn't pointed out to
5 us that we were going to have -- you know, that that was
6 going to be done, but it does need to be done. And it's
7 that level of concern that the railroad has about the
8 magnitude of this project right next to its main line that
9 they're spending this level of effort to try and have
10 these addressed.

11 HEARING OFFICER KRAMER: Ms. Gannon?

12 MS. FOLEY GANNON: Thank you.

13 Couple of points. First off, we agree completely
14 with Ms. Holmes's assessment of these three issues, and we
15 think that they are critical issues, and we do agree with
16 staff's proposal of how to address them.

17 A couple of issues that were just raised, first
18 off, I think to say that there is no evidence in the
19 record that suggests that there may be alternative methods
20 that can be used rather than just the detention basins as
21 addressing it is not accurate. We presented evidence, and
22 additionally Mr. Weaver from the staff testified, and this
23 is at the September 20th hearing at page 246, Mr. Lamb
24 asked him, "So would you agree that you have seen nothing
25 from the applicant that would warrant an elimination of

1 the debris basins?" And Mr. Weaver said, "Debris basins
2 are one method of flood mitigation. It was one that
3 happened to be presented by the applicant and was
4 continued in their design. It's not a cure-all, it may
5 not be the design that they end up with, they may do some
6 other method of flood control besides debris basins,
7 detention basins, retention basins, whatever you call
8 them, holes in the ground, dams, channels, there are other
9 methods besides these debris basins."

10 So there was testimony by staff, and as I said,
11 by our witnesses as well, that supported the fact that
12 there are other methods that may work. What we think is
13 important and what is reflected in the PMPD is that the
14 performance standards be met. And this has been described
15 repeatedly as this huge change of saying if there's a
16 presumption that detention basins are the way to meet
17 these performance standards, but the performance standards
18 are still the thing that rules, we don't see why that's a
19 huge change if you still have the same performance
20 standards and you just say you have to implement measures
21 that meet these standards.

22 And you're doing the same studies. It's not a
23 huge change. You're going to get the same water quality
24 protection. You're meeting the same end goal. And in
25 terms of looking at environmental impacts, that's what we

1 think is important, and that's what we think should be
2 reflected in the conditions, and we think you have done
3 that in the PMPD.

4 Again, we don't have objections to some of the
5 further refinements that were discussed yesterday at the
6 workshop, presuming that, again, we can discuss later the
7 timing or the phasing of this, but we think that what is
8 in the PMPD with the performance standards is also
9 adequate.

10 And we also agree with what I think you were --
11 what you were addressing, Hearing Officer Kramer, in the
12 questions about what can be addressed in a private
13 agreement and what can be addressed in front of the
14 Commission. That has been one of the issues that we have
15 repeatedly discussed as well.

16 We think there's many things that we need to do
17 in a private agreement with BNSF. We need to get a
18 right-of-way grant from them. And in exchange for that,
19 we're willing to do things, some of which would be beyond
20 what you can require by this Commission or that you would
21 be interested in.

22 We are also -- we had agreed to do a hydrologic
23 study that would be reviewed by them and that we would
24 implement what came out of that study. We have agreed to
25 that with them.

1 But we think what's appropriate is for this
2 condition, these conditions to reflect things that your
3 staff and your compliance people are going to have
4 oversight of and that they will be enough to ensure for
5 you that the mitigation -- that potential significant
6 impacts will be mitigated to a less than significant
7 level.

8 HEARING OFFICER KRAMER: Okay. I see the e-mail
9 with the draft in my e-mail. So do we have somebody
10 working on printing out copies?

11 MS. HOLMES: We thought we did.

12 (Comment beyond microphone range.)

13 HEARING OFFICER KRAMER: What he gave you didn't
14 look thick enough.

15 (Comment beyond microphone range.)

16 MS. HOLMES: This is just a point of
17 clarification --

18 MS. BURCH: Excuse me, you know what? That is
19 not -- that was what I had that I talked from and made the
20 final revisions to.

21 MR. MEYER: This is the one you e-mailed --

22 MS. BURCH: The one e-mailed is the only one that
23 is --

24 MS. HOLMES: If you could forward it to some
25 support staff somewhere and have copies made, that would

1 be helpful.

2 HEARING OFFICER KRAMER: Yeah. Let's go off the
3 record.

4 (Recess.)

5 MS. HOLMES: I just had one clarification to
6 make, it's not an argument, but -- and I think this issue
7 came up last Friday.

8 There were actually two types of basins that were
9 proposed. There was the on-site -- the small debris
10 basins, and then there were also the flood control basins,
11 which were much larger. And I just want to make sure that
12 when we are talking about basins, we keep in mind that, in
13 fact, there were two different types that were proposed;
14 lots of little small ones throughout the site, and then
15 the large ones at the north end -- the north side of the
16 property.

17 MR. LAMB: Actually, I think there were three
18 types; really very large debris basins at the top of the
19 site, detention basins scattered throughout the site; and
20 to be really kind of comprehensive, I think there's
21 retention basins -- you're referring to them now as ponds
22 adjacent to the structures that have platforms.

23 Am I right?

24 MS. HOLMES: Yeah, I think that's correct. I
25 just want to make sure that we keep that in mind as we

1 talk about what has and what hasn't changed.

2 HEARING OFFICER KRAMER: Now, is that distinction
3 drawn anywhere in the text of the conditions?

4 MS. HOLMES: The condition doesn't refer -- the
5 conditions at this point don't refer to that. We had
6 suggested that -- I can't remember the phrase now that we
7 used, "control structures," something along those lines,
8 in an effort to try to accommodate the applicant's desire
9 for the use of a performance standard.

10 HEARING OFFICER KRAMER: I think it is good that
11 my office is printing it, because we can probably get it
12 printed in color, which will help.

13 Now, is there anything else we can talk about
14 while we're waiting for the copies?

15 MS. HOLMES: Well, I think that the issue has
16 been -- staff's response is that the issue has been
17 narrowed, and I think that Ms. Burch's comments have been
18 very helpful. Staff does not take issue with the fact
19 that the applicant is free to enter into an agreement with
20 BNSF to have BNSF bless plans that they submit to the
21 Energy Commission. The question before the Committee
22 really is whether or not the Commission has a role in
23 enforcing that agreement or that portion of that
24 agreement. And as I stated before, staff urges caution.
25 In the past, the Commission has not done so; we did

1 propose language that referenced that.

2 If the Commission chooses to go forward and adopt
3 that as a condition of certification, at a minimum, we
4 recommend that the language that we referred to earlier
5 regarding determination of feasibility and determining
6 mitigation measures be deleted and the language that staff
7 originally proposed be adopted.

8 MS. BURCH: And I just want to reinforce that --
9 as Commissioner Eggert stated, we have, you know, just two
10 goals, early comment, and that there is some way to have
11 the agreement be manifested in what the Commission orders.
12 So, you know, with that in mind --

13 HEARING OFFICER KRAMER: So is there now an
14 agreement that's been signed between the two parties?

15 MS. FOLEY GANNON: Not addressing this issue, no.

16 MS. BURCH: There is a stipulation that --

17 MS. FOLEY GANNON: I said we agreed to the
18 stipulation, and it wasn't put into the -- we stipulated
19 that if you chose to put that condition into the PMPD, we
20 had no objection to it. And it was not included. But
21 there is no independent private contractual agreement
22 addressing this issue.

23 MS. BURCH: But we -- I would value this being
24 part of the process more than I would value it individual
25 contracting.

1 HEARING OFFICER KRAMER: Did we make that
2 stipulation an exhibit?

3 MS. BURCH: I believe it was in the revision that
4 Calico did at the end of August.

5 What was that document number?

6 MS. FOLEY GANNON: I think it was in one of your
7 exhibits, but -- we can find it, but it was -- it was
8 submitted.

9 MR. LAMB: 1209 --

10 MS. FOLEY GANNON: I think that's right.

11 MR. LAMB: -- is what it was.

12 MS. BURCH: I thought you had included it when
13 you did that revised list of conditions.

14 MR. LAMB: Well, 1209 was the exhibit where we --
15 I think it was at like 1:00 in the morning, and we
16 submitted it, and it was agreed to on the record; but it
17 was 1209, but there was some other ones in there too, but
18 that's the exhibit number, 1209.

19 MS. BURCH: Commissioner -- Mr. Kramer, would you
20 like this to go to the entire group or just to yourself
21 or -- do you want it served on the entire group?

22 HEARING OFFICER KRAMER: Your choice. I'm only
23 interested in myself.

24 MS. BURCH: Does anyone else want --

25 MS. FOLEY GANNON: We all are interested in you

1 as well.

2 MR. LAMB: All right. There we have it.

3 MS. BURCH: Thank you.

4 MR. LAMB: Points for --

5 HEARING OFFICER KRAMER: So now that we have dead
6 air, that person with the radio on their phone would be
7 useful.

8 MS. HOLMES: If you like classical music.

9 HEARING OFFICER KRAMER: I couldn't hear it at
10 all.

11 Okay. So --

12 PRESIDING MEMBER EGGERT: Actually, just to
13 clarify, the Word document that we'll be getting, that is
14 reflective of the pdf that was sent, that's a marked-up
15 version of the comments that were previously provided? So
16 in other words, this isn't a mark-up of the original
17 conditions, this is a mark-up of subsequently submitted
18 changes to the conditions.

19 MS. BURCH: It is a mark-up of the PMPD
20 conditions.

21 PRESIDING MEMBER EGGERT: So it is actually --
22 okay, that's very helpful.

23 MS. BURCH: We're back to the original.

24 MR. LAMB: But having said that, there may be
25 some formatting quirks.

1 PRESIDING MEMBER EGGERT: Carry-overs; I see.

2 MR. LAMB: Particularly, Commissioner Eggert,
3 when we tried to move bullet points or change it from like
4 a "1" to an "A," that may look a little goofy.

5 PRESIDING MEMBER EGGERT: Yeah, we have many of
6 our own formatting challenges, as you'll probably notice
7 by the pagination of the PMPD.

8 MS. FOLEY GANNON: Would it be possible to take a
9 break while we're waiting for this document?

10 HEARING OFFICER KRAMER: That's a good idea. So
11 we'll go off the record.

12 (Recess.)

13 HEARING OFFICER KRAMER: Okay. What's the most
14 efficient way to go through this? Ms. Burch? Because I
15 need to note that we need to be out of here by, say, 20
16 minutes -- 12:30?

17 PRESIDING MEMBER EGGERT: Well, I guess actually
18 we could probably go till 1:00 if we had to.

19 HEARING OFFICER KRAMER: Okay. By 1:00, because
20 there's a -- there's a 2:00 business meeting for the
21 Ivanpah case, and we need some time to carbo-load for that
22 or something.

23 So these are your proposals, Ms. -- well, I guess
24 to a degree these are -- if I understand correctly, there
25 is agreement about some of these.

1 MS. BURCH: I was going to say -- I would say
2 90 percent of this there's agreement on.

3 HEARING OFFICER KRAMER: Okay. So if we could
4 maybe just point the areas of agreement out to us first,
5 and then we can talk about the areas of disagreement.

6 MS. BURCH: Okay. We fleshed out what this DESCOP
7 plan would actually have -- excuse me, did I interrupt
8 you?

9 HEARING OFFICER KRAMER: It was pointed out to me
10 that it might be even more efficient to talk about the
11 areas of disagreement, and then just let the others come
12 in.

13 MS. BURCH: Okay. Well, that's -- I think I can
14 do that pretty simply. Unfortunately, just bad luck.
15 It's like the second line.

16 The Soil and Water 1 begins with pre-construction
17 site mobilization. There we were just using the term of
18 art in the PMPD, just so you understand why there's no
19 disagreement on that.

20 And this is where -- this is my attempt to
21 provide us with the draft before it's submitted to the
22 CPM.

23 "So the project owner shall submit for BNSF's
24 review and concurrence as to those portions of
25 deliverables relating to the study and requirements of

1 Soil and Water 12," then a site specific DESCPC, and then
2 it just lists the things that should go in there.

3 And then what I tried to devise was a timeline
4 that didn't require us to comment. So it begins 30 days
5 after delivery of the DESCPC to BNSF, the project owner
6 shall deliver it to the CPM for its review and approval.
7 And just to tell you, our thinking on that is we had
8 arrived at this format last night as to everything, all
9 these deliverables. It really allows us about two weeks
10 to turn it around. And the experts say they believe even
11 though some of these documents are very lengthy, that they
12 can do it in two weeks; and then it leaves for Calico
13 to -- and its experts to synthesize and do whatever
14 they're going to do with it.

15 MR. MEYER: I'm sorry to interrupt. I just
16 wanted to get a copy for the soil and water expert.

17 ASSOCIATE MEMBER BYRON: Yeah, you definitely
18 need it.

19 MR. MEYER: Thank you.

20 MS. BURCH: So that is how I would propose with
21 no pride of authorship to try and embody this concept.
22 And then you'll find that mirrored then in the
23 verification, which states on page -- on page 5, it just
24 says, "no less --" and then here I was trying to develop
25 the correct timing in relation to other reports, "but no

1 later than 60 days prior to the start of pre-construction,
2 the owner shall submit a copy of the plan --" I'm
3 thinking that's about right because of other things that
4 have to happen "-- to BNSF for review and concurrence,"
5 using the same language, "as to those portions of
6 deliverables relating to the study and requirements of
7 Soil and Water 12. 30 days after delivery of the DESC to
8 BNSF the project owner shall deliver to the county --"
9 again, these were all entities, or some that we proposed
10 that everyone agreed on should receive this for review.
11 And then it says, "-- BNSF and the CPM for review and
12 comment. The CPM shall consider the comments received
13 within 15 days." That puts a deadline on all comments,
14 when they have to be received by and approving the plan.

15 So again, it is only the CPM who makes the
16 determination as to what's appropriate in the plan.

17 And I don't --

18 PRESIDING MEMBER EGGERT: Can I ask a question?

19 What is the term "concurrence," what is the
20 definition of that?

21 MS. BURCH: Agreement.

22 PRESIDING MEMBER EGGERT: Agreement?

23 MS. BURCH: Agreement.

24 PRESIDING MEMBER EGGERT: Is that the one -- is
25 that the word that you were concerned about, Ms. Holmes,

1 or is there something else that --

2 MS. HOLMES: Yes, it's the concept that the
3 Energy Commission staff somehow becomes sort of
4 responsible for ensuring that the applicant and the BNSF
5 agree. We don't have any problem if they do that outside
6 the CEC process, we have no difficulty with that at all,
7 but would prefer to simply -- when the plan comes in, what
8 we want to be responsible for is assessing its
9 sufficiency, not assessing its sufficiency and whether or
10 not there's complete agreement between BNSF and the
11 applicant.

12 Now, obviously BNSF would have an opportunity to
13 comment on the plan and staff would consider those
14 comments, but to us, that's quite a different burden or
15 responsibility than ensuring that there's been agreement
16 between the two parties.

17 PRESIDING MEMBER EGGERT: So is this a different
18 word that we would be more comfortable with? Or is
19 review?

20 HEARING OFFICER KRAMER: "Comment" is, of course,
21 that's a lower level of -- or potentially a lower level of
22 participation.

23 MS. HOLMES: But this is, I think -- as I said,
24 this is the heart of the disagreement between staff and
25 BNSF, is whether or not the Commission wants to take a

1 role in ensuring that BNSF has been completely satisfied
2 with what the applicant submits. Staff is suggesting that
3 that's an unwise responsibility to take on. BNSF, I
4 think, believes that it's very important to them to feel
5 comfortable with the -- relying on the CEC process to
6 ensure that their concerns are addressed. I think that's
7 the heart of the dispute here.

8 PRESIDING MEMBER EGGERT: So let me ask the
9 question --

10 MS. BURCH: No, that is not the heart of the
11 dispute, just to keep us problem solving. We aren't
12 looking for your enforcement. We're looking for the
13 opportunity to have Calico live up to its agreement. So
14 I'm willing to, again, work with you on language.

15 HEARING OFFICER KRAMER: So does "comment" get
16 you where you need to go?

17 PRESIDING MEMBER EGGERT: If it includes the --

18 MS. BURCH: At the right -- perhaps here, as long
19 as -- if you can understand why we're asking to see the
20 document first and be able to give our input, then the
21 dispute will be between us as to whether they did what
22 they agreed to do.

23 PRESIDING MEMBER EGGERT: Is there a reason why
24 you wouldn't want to have the document go concurrently to
25 both you and the staff, providing sufficient opportunity

1 for review and comment?

2 MS. BURCH: Because the agreement we have with
3 Calico is that they will include our mitigation measures.
4 And so if it goes to staff concurrently and they don't
5 know whether we agreed or not and they didn't include our
6 measures, then there's no effective way to make this
7 happen.

8 MS. FOLEY GANNON: Go ahead.

9 MS. BELLOWS: The agreement we have is that we
10 would do a study, and whatever the study results were in
11 terms of looking at protection for the railroad,
12 additional protection caused by things that are project
13 impacts, that we would implement any mitigation necessary
14 to do so. But what we don't have is an agreement that we
15 will implement mitigation proposed by BNSF. So I just
16 wanted to clarify that, because it sounded like that's
17 sort of what you were saying.

18 MS. HOLMES: And to muddy the water further, I
19 think we have less concern with the condition that
20 requires the applicant to submit a proposal to BNSF prior
21 to submitting it to us, because that way we're not
22 involved in any kind of -- again, our concern is about --
23 about having a staff responsibility to ensure agreement or
24 concurrence between BNSF and the applicant. So if there's
25 a condition of certification that says the applicant

1 provides the plan to BNSF "X" number of days before it
2 provides it to the Energy Commission staff, that's of much
3 less concern to us than what's currently proposed by BNSF.

4 PRESIDING MEMBER EGGERT: Because -- (beyond
5 range of microphone).

6 MS. HOLMES: Right, because when it becomes a
7 condition of certification, that's something staff becomes
8 responsible for ensuring compliance with, and that's what
9 we don't want to get involved in, is we would like that
10 process to occur outside of the CEC process and what comes
11 to us be the result of that process; and then we can
12 assess its sufficiency.

13 HEARING OFFICER KRAMER: Do you also have any
14 sort of concern about that the apparent veto power this
15 would give to a private party?

16 MS. HOLMES: Well, I don't think that there's
17 much that we can do about that. I mean, I think as a
18 matter of fact and as a matter of law the applicant will
19 agree privately with BNSF not to submit anything to us
20 that BNSF hasn't blessed. So I don't think that we have
21 the ability to say to the applicant, you cannot -- you
22 cannot make an agreement with BNSF to include all of their
23 proposed mitigation measures.

24 Now, obviously we have the ability to
25 independently review the plan, and we will, to determine

1 its sufficiency. I suspect, based on the level of concern
2 that BNSF has been expressing, that we're not going to
3 have a problem with there being insufficient protection to
4 the BNSF right-of-way as a result of their participation;
5 I suspect that they're fully capable of protecting their
6 own interests, and what the applicant submits to us that
7 incorporates BNSF's concerns will be sufficient to meet
8 the performance standard we've identified.

9 MR. MEYER: And just to elaborate on that just
10 very slightly, it would also be my expectation if this
11 goes through, you know, and I would be the CPM on it, that
12 if the applicant, you know, in advance has submitted it to
13 the Energy Commission, works with BNSF, they can't work
14 everything out, I would expect in the comments that BNSF
15 inform us, inform the Energy Commission and, you know,
16 staff looking at this in the compliance phase, that there
17 are disagreements so that the Energy Commission's review
18 of the plan, that we understand that just because we
19 received it from the applicant, that doesn't presuppose
20 that there is a complete agreement between the BNSF and
21 the applicant. So if BNSF has outstanding issues, that we
22 are informed in that, you know, 15-day period prior to any
23 decision we would make.

24 MS. BURCH: That is why you see a second delivery
25 to us, exactly, so that we will have a chance to have you

1 hear our concerns. If they don't -- we can't make them --
2 you know, anyone can breach an agreement, that's never a
3 problem.

4 HEARING OFFICER KRAMER: Okay. So is the word --
5 substituting the word "comment" for "concurrence," is that
6 acceptable to everyone?

7 MS. HOLMES: Simply deleting "in concurrence."

8 I mean, I think what I'm hearing BNSF say is that
9 they want to be sure that the applicant considers their
10 comments before they submit anything to the Energy
11 Commission, and I'm seeing Ms. Foley Gannon --

12 MS. FOLEY GANNON: We would like to discuss
13 that --

14 MS. HOLMES: Okay.

15 MS. FOLEY GANNON: -- because we haven't agreed
16 to that, and that was not what we discussed yesterday in
17 the workshop; we discussed having it be submitted to the
18 staff, to the CPM, and to BNSF and other parties at the
19 same time, and that any comments that were received within
20 15 days of that submittal would be considered by the CPM
21 prior to making a decision. That's what we discussed at
22 the workshop yesterday, and that was what was agreeable to
23 us.

24 This addition of another 30-day review period
25 prior to us submitting to the CPM, we don't think it's

1 necessary, and we don't think it's necessary to ensure
2 compliance with the performance standards, and we would
3 ask that it not be included.

4 MS. HOLMES: I think that I would agree that it's
5 not necessary to ensure compliance with the performance
6 standards that staff has identified and the Committee has
7 now adopted in the condition. Staff would agree to the
8 language as a compromise, as an effort to try to move this
9 project forward. So we agree, as I said, it's not
10 necessary to meet the performance standard.

11 Staff is very interested in hearing what BNSF has
12 to say about these plans as they come in, because we
13 suspect that the knowledge that they have about their
14 facilities is greater than what we have and that it will
15 be very useful in determining the effectiveness of the
16 proposed plans.

17 MS. BURCH: And I would support -- that this has
18 helped a lot. I would support changing "concurrence" to
19 "comments," that we don't put you in a position
20 Christopher can't --

21 HEARING OFFICER KRAMER: Okay. But as for the
22 timing?

23 MS. BURCH: And the timing needs to be though
24 that we have that first.

25 And just to clarify, based upon the misperception

1 I think of what we were trying to accomplish, Ms. Holmes
2 threw out the idea of simultaneously delivering to the two
3 parties, and I said that's not accomplishing what we're
4 trying to accomplish.

5 We will think about this tonight and submit our
6 best effort to get this straightened out tomorrow, and
7 that's what this is.

8 ASSOCIATE MEMBER BYRON: Didn't I understand you,
9 Ms. Gannon, earlier to say you also need a right-of-way
10 agreement with BNSF?

11 MS. FOLEY GANNON: That's correct.

12 PRESIDING MEMBER EGGERT: And so in terms of
13 your -- the applicant's concern about this sequencing, is
14 that a timing issue --

15 MS. FOLEY GANNON: Timing.

16 PRESIDING MEMBER EGGERT: -- how long it would
17 take to reach final approval?

18 MS. FOLEY GANNON: Correct.

19 PRESIDING MEMBER EGGERT: So I guess, is there --

20 MS. FOLEY GANNON: And I guess we think that,
21 again, there can be things that may need to be worked out
22 privately between the parties; we think the conditions of
23 certification should be directed as making sure that the
24 things are identified as being necessary to mitigate those
25 impacts are implemented, and that, you know, because these

1 conditions -- this is in the condition. So, you know,
2 let's say it turns up they only needed 10 days to do that,
3 and something's changed, then we have to come back to you
4 to have it changed. If it's something that we have in a
5 private agreement that's related to timing between us, two
6 private parties, we think we should be doing that outside
7 of the Commission, and that these should be, again,
8 focused on what's necessary to mitigate those impacts, and
9 we think the way that -- without having that additional
10 review period is sufficient.

11 And this is just one other clarification when we
12 get done talking about this timing issue, and that's -- I
13 think it may just be a mistake or we don't understand what
14 one of these phrases is, so we'd like to discuss that as
15 well, too.

16 HEARING OFFICER KRAMER: Well, go ahead because I
17 think --

18 MS. FOLEY GANNON: If we're looking at the
19 standards, and this is about halfway down the paragraph in
20 the underlined portion where --

21 MS. HOLMES: Excuse me.

22 MS. FOLEY GANNON: -- Soils and Water 1 on
23 page 1, it's the sentence that starts with, "The plan
24 shall protect the BNSF right-of-way from storm water
25 runoff and sediment transport." And I guess we're just

1 confused with transport to existing conditions in a
2 hundred-year -- so "The plan shall protect the
3 right-of-way from storm water runoff and sediment
4 transport to existing conditions." I mean, I think what
5 we're trying to reflect here is it's not going to result
6 in an increase in existing conditions, but I think that's
7 just not clear the way it's written.

8 MS. HOLMES: Right, we had -- in the draft that
9 we have not completed yet because everything changed
10 yesterday afternoon we had proposed adding language to
11 refer to above baseline.

12 MS. FOLEY GANNON: Okay.

13 MS. HOLMES: So I don't know, I'm hoping that we
14 get the opportunity to provide comments on BNSF's comments
15 tomorrow. We'll certainly try.

16 HEARING OFFICER KRAMER: Okay. What if we just
17 changed "to" to "beyond"?

18 MS. BURCH: Well, I guess I --

19 HEARING OFFICER KRAMER: Or "above."

20 MS. FOLEY GANNON: Or "above the baseline," or
21 "above existing conditions"; that's fine with us.

22 MS. BURCH: Is this in the middle of -- it says
23 "The plan shall demonstrate no increase --" we just said
24 "no increase" so many times in this document --

25 MS. FOLEY GANNON: It's the next sentence; that's

1 sentence is fine, the next sentence.

2 MS. BURCH: Okay.

3 MS. FOLEY GANNON: I think we're all in agreement
4 in what we're trying to do to it.

5 MS. BURCH: "To existing conditions"; isn't
6 that -- I mean, that was --

7 MS. FOLEY GANNON: "The plan shall protect the
8 right-of-way from transport to existing conditions"?

9 MS. BURCH: Yeah.

10 MS. FOLEY GANNON: I mean, I think what you're
11 trying to say is it's not above, it's not going to
12 increase it, right, so it's not going to go above the
13 baseline.

14 MS. HOLMES: We are in excess of existing --

15 MS. FOLEY GANNON: Or in excess of, yes,
16 whatever, that's the concept that needs -- I mean, that's
17 a standard that I think we can understand.

18 MS. BURCH: That is our standard. So if you need
19 to clarify it, please do.

20 MS. FOLEY GANNON: Above or in excess.

21 HEARING OFFICER KRAMER: Isn't the one repeating
22 the other or --

23 MS. BURCH: It gets very redundant.

24 HEARING OFFICER KRAMER: Literally, couldn't the
25 second sentence be read to say that if a -- that this is

1 guaranteeing that no event, regardless of whether it's a
2 500-year event or whatever, will result in anything more
3 than a hundred-year effect on the railroad?

4 MS. BURCH: No, it's -- this was drafted by --
5 the experts all agreed on this, "to existing conditions"
6 takes care of -- it's "to existing conditions." So
7 whatever 100-year flood, given existing conditions, which
8 is an undeveloped site, that's what the baseline is.

9 HEARING OFFICER KRAMER: Yeah, but what I'm
10 saying is though, let's say that a 500-year flood was
11 coming at their property, the applicant's. Is this saying
12 that the result that you're guaranteed is hundred-year
13 flood level of impacts?

14 MS. BURCH: The 100-year flood is the requirement
15 that's in the San Bernardino County guidelines that we
16 are -- everyone agrees should be the right guidelines to
17 apply.

18 MS. FOLEY GANNON: It's the design basis. This
19 is not going to be designed to address a 500-year flood.

20 HEARING OFFICER KRAMER: Okay. So all kind of
21 weird things can happen if it's greater than a
22 hundred-year event. And that's just life.

23 MS. BURCH: Well, then it just gets messy, and
24 that's life.

25 MS. HOLMES: We had also had -- expressed

1 concerns yesterday in the workshop about the sentence that
2 refers to transport of damaged materials. We thought that
3 belongs in another condition. But I don't want to --
4 those kind of details, we don't have a problem with the
5 concept; if it's just a question of placement, we'll
6 simply defer the discussion of that to the written
7 comments that we provide.

8 So but I just wanted to make it clear that there
9 may be minor changes or moving things from one condition
10 to another that staff may provide, that we won't -- I
11 don't believe we want to walk through line by line at this
12 time. I don't think we'll finish if we do.

13 HEARING OFFICER KRAMER: The only thing is --

14 MS. BURCH: And I'm sure I --

15 HEARING OFFICER KRAMER: We're going to have to
16 do this on Thursday, then.

17 MS. FOLEY GANNON: Well, can we off the record
18 for a moment?

19 HEARING OFFICER KRAMER: Sure.

20 (Discussion off the record.)

21 HEARING OFFICER KRAMER: So we'll see how it goes
22 and then discuss timing of further filings after that.

23 MS. HOLMES: And perhaps at the end of this
24 session we'll ask the permission of the Committee or
25 indicate that staff will continue this into a workshop to

1 go through the line-by-line changes.

2 HEARING OFFICER KRAMER: Okay. You won't be able
3 to use this room, though.

4 MS. BURCH: Cafeteria?

5 MS. HOLMES: How about the park? Is it sunny
6 outside today? I haven't even seen yet.

7 HEARING OFFICER KRAMER: Okay. So are we done
8 with Soil and Water 1?

9 PRESIDING MEMBER EGGERT: I guess -- do we need
10 to address the sequencing issue? Should we -- or is that
11 something that's going to be determined by the parties?

12 HEARING OFFICER KRAMER: Sounds like they -- they
13 at this point agree to disagree. The applicant wants
14 concurrent review with 15-day window, BNSF would like
15 30 days ahead of the 15 day or whatever window it is
16 for -- basically for their folks and the applicant's folks
17 to review. So we will have to decide, I think.

18 PRESIDING MEMBER EGGERT: Okay.

19 HEARING OFFICER KRAMER: And that probably
20 relates to a degree to the applicant's suggested revisions
21 that would eliminate some of the pressure to have the plan
22 reviewed as quickly for their activities for the rest of
23 the year. But it's only for --

24 MS. FOLEY GANNON: Well, we had --

25 HEARING OFFICER KRAMER: If you clear Phase 1A,

1 then you can take a little more time to do the work on the
2 other phase, right?

3 HEARING OFFICER KRAMER: If Phase 1A was carved
4 out as we proposed, that's correct, yes.

5 MS. BURCH: We do not believe, however, that our
6 suggestions here to correct what's in the reports and the
7 addition of the time that was anticipated anyway between
8 the parties actually is the reason why they can't make any
9 deadlines.

10 HEARING OFFICER KRAMER: Well --

11 MS. BURCH: So we do object, and we will need to
12 explain our concerns with the suggestion, but we do not
13 concur --

14 HEARING OFFICER KRAMER: Well, let's get to that
15 in a little bit.

16 So okay, done with Soil and Water 1.

17 Where else is there a potential disagreement?

18 MS. BURCH: The other language that I actually
19 mentioned early on, I think it's in Soil and Water 1 as
20 well, but I know where it is in 8.

21 Okay. Well, did you want to repeat the same
22 discussion on -- I assumed that -- Soil and Water 8 has
23 the same language as Soil and Water 1 on how to resolve
24 the issue on BNSF prior review, but I don't think we need
25 to discuss it again.

1 But the other issue is on page 16.

2 HEARING OFFICER KRAMER: Soil and Water 8.

3 MS. BURCH: It's on page 16, it's paragraph two.

4 HEARING OFFICER KRAMER: Because my concern about
5 that is that it implies that there's a lower level of
6 scrutiny of a project that has the debris and detention
7 basins, and just seems to me that no matter what's
8 proposed, it gets the engineering review to see if it
9 meets the standards.

10 MS. BURCH: I -- I do not read it that way. What
11 I believe based upon this particular site's history is
12 that the -- there is evidence to support a finding that
13 you can achieve the performance standard if you use debris
14 basins. And the question is, you know, how much and where
15 and when, which is the concern that Ms. Holmes had that we
16 not be undermining that.

17 On the other hand, all that evidence says that
18 you have to have them, and that there isn't an
19 alternative, and there hasn't been a study. And I would
20 go back to the testimony of the experts, and the experts
21 did not say that there wasn't a possibility that other
22 alternatives exist. We agree completely. And that is
23 what Mr. Weaver stated that day. That's a different --
24 that's different than saying that it's been determined
25 that that would solve the problem.

1 And so we think there is a different standard
2 based upon the engineering work that's been done to date,
3 and that supports this agency's decision.

4 PRESIDING MEMBER EGGERT: But I guess I'm -- I
5 think I'm -- maybe I am missing something. Because I --
6 as I read this, it just basically says that if they're not
7 included, then the project has to meet the same standards.
8 In other words, if they are included, they have to meet
9 the performance standards; if they're not included, they
10 have to meet the performance standards. Isn't it just
11 saying that the project has to meet the performance
12 standards? Unless I'm -- I might be missing a piece of
13 the sentence, but --

14 HEARING OFFICER KRAMER: And here's another
15 aspect. Paragraph O, right above it says, "If it is
16 determined that detention basins are needed," which
17 suggests, I don't know, either a blank slate sort of
18 approach to the analysis or -- it certainly doesn't
19 suggest that you have to prove something else if you're
20 going to take them out, so to that degree I see those two
21 as conflicting. One is saying if you need them, then
22 these are the details that you have to address; but the
23 other is -- seems to me is implying that you're probably
24 going to need them and you're going to have to work extra
25 hard to convince us that you don't.

1 MS. BURCH: On O?

2 HEARING OFFICER KRAMER: No. O is kind of
3 neutral, but two is --

4 MS. BURCH: O is intended to address the issues
5 raised by different parties at the hearings in August.
6 There was concern about -- on biology on infiltration, is
7 there some way to have detention basins that protect the
8 environment.

9 HEARING OFFICER KRAMER: And still let the sand
10 go through.

11 MS. BURCH: Exactly. So what they drafted here
12 in light of that was that we do need to size, locate, and
13 consider pass-through issues and make that a performance
14 standard that it would meet those needs. That's what --
15 that is why O is now in there, is to answer those
16 requirements -- meet those needs.

17 And then we brought up the concerns with the
18 increasing any quantity of runoff or sediment to the
19 right-of-way.

20 HEARING OFFICER KRAMER: Okay. Maybe -- well,
21 one of the, I think, kind of loaded words in two is
22 "feasibility," because that has -- that maybe implies that
23 things like project economics and other factors, maybe
24 even aesthetics for all I know, could get involved in the
25 determination, and I think the Commission is meaning to

1 say you'll do what you have to do to make sure the
2 standards are met. So "feasibility" maybe isn't the best
3 word there.

4 PRESIDING MEMBER EGGERT: I think -- I mean, I
5 don't know if this adds any additional value to this
6 condition, but, I mean, would it be enough to say that in
7 the event that debris and detention basins are not
8 included in the proposed project, the design shall meet
9 the above performance standards?

10 MS. HOLMES: Or you could say shall identify the
11 specific measures required to meet the performance
12 standards?

13 Now we're really at the wordsmithing level here.

14 MS. FOLEY GANNON: But it seems more
15 fundamentally unnecessary. I mean, you've established
16 performance standards and say that you have to meet them.
17 And as you said, whatever you need to do to meet them --

18 HEARING OFFICER KRAMER: Right.

19 MS. FOLEY GANNON: -- that's what's necessary.

20 PRESIDING MEMBER EGGERT: Yeah, that's right. I
21 guess that was my question, is whether or not that adds
22 additional comfort.

23 MS. HOLMES: Right, there is an honorable
24 tradition at the Energy Commission of adding words to
25 conditions to provide parties comfort. So --

1 MS. FOLEY GANNON: So that's fine.

2 MR. LAMB: Isn't the problem, though, that the
3 performance standards were designed based on a study that
4 entailed and laid out detention basins and not any other
5 storm water measures that were analyzed, no environmental
6 analysis for those? It's like if you do a study that
7 analyzes use of an automobile and then you develop
8 performance standards, you can't say, well, we're just
9 going to use airplanes, but you still have to meet the
10 same performance standards. It hasn't been analyzed.

11 HEARING OFFICER KRAMER: I think the performance
12 standards are supposed to be fixed external --

13 PRESIDING MEMBER EGGERT: Right, independent.

14 HEARING OFFICER KRAMER: -- independent actors
15 that don't -- they're not modified.

16 MR. LAMB: But you cannot have performance
17 standards that aren't feasible. So there has to be a
18 determination of feasibility initially on their
19 performance standards. These performance standards were
20 tailored to detention basins, they were not tailored to
21 any other storm water prevention measures.

22 HEARING OFFICER KRAMER: Not the way we mean
23 performance standards. We mean they're --

24 MS. BURCH: I think it's more general.

25 HEARING OFFICER KRAMER: They're either the

1 standards or perhaps the regional board's, and then the
2 sort of general --

3 MS. BURCH: I think the awkwardness here,
4 Mr. Kramer, is the applicant is relying on the feasibility
5 determination on debris and detention basins to support
6 standards, minimum performance standards for a -- an
7 alternative that doesn't include them. That's the
8 discomfort that we all -- that the rest of us have.

9 MS. FOLEY GANNON: I think the answer is if the
10 only way to meet these performance standards is by
11 detention basins, then that's what the studies are going
12 to show and that's what we're going to do. You have
13 standards, they have to be met. If the only possible way
14 to meet those standards we don't agree with it, we don't
15 think that's accurate, but if that was -- turned out to be
16 the case, then that's the answer.

17 MS. BELLOWS: And just like all the compliance
18 conditions that we have now, even the ones that we're
19 shooting through the compliance area now, to the extent
20 that something's not appropriate or not fully fleshed out,
21 comes back to me, readdress it, and ship it back in and
22 try again.

23 HEARING OFFICER KRAMER: Yeah, take, for
24 instance, paragraph K above there; all basins, et cetera,
25 or other flood control structures --

1 MS. BURCH: We added those words at the request
2 of the applicant.

3 HEARING OFFICER KRAMER: Which allow things other
4 than detention or debris basins shall -- and then the
5 standard is "no net increase in storm water increase at
6 the boundary to the railroad's right-of-way." So that's a
7 standard that isn't specific to detention basins or debris
8 basins, it could allow something else.

9 MS. BURCH: I definitely reworked them to leave
10 open the option that they would apply to any good
11 engineering, good science analysis. We are concerned, we
12 can't understate that, that the alternative being approved
13 excludes the very detention basins on which the current
14 feasibility has been established. And --

15 HEARING OFFICER KRAMER: Well, then that review
16 is probably moot, isn't it?

17 MS. BURCH: I'm sorry?

18 HEARING OFFICER KRAMER: Isn't that report then
19 moot, irrelevant to the work staff is going to have to
20 perform to review the new design?

21 MS. BURCH: No. I think that's where you start.
22 I mean, that work was basic engineering work. It's --
23 alluvial fans are complex places to place something like
24 this, and, you know, those reports are a thousand pages,
25 and they used good methodology. That's -- that being

1 said, if they can find something that works, that meets
2 these standards and uses the rules and uses the right
3 models, the staff can select them.

4 HEARING OFFICER KRAMER: So when you use the
5 phrase "feasibility," are you simply talking about the
6 ability of this design that does not include basins to be
7 able to meet the performance standards?

8 MS. BURCH: Right. That there's no evidence to
9 support that there's any other; there is no evidence, and
10 there was extensive work done to support that. So they
11 need to prove that it's feasible just as the debris
12 basins, frankly, had to be proven to be feasible.

13 HEARING OFFICER KRAMER: And the applicant
14 objects, still objects to this paragraph?

15 MS. FOLEY GANNON: Absolutely. It implies again
16 that you don't know whether a performance standard's going
17 to be met. By requiring the performance standards to be
18 met, you do know that they're going to be met, so it
19 doesn't matter if it turns out that a particular method
20 couldn't feasibly meet the standard, then you can't meet
21 the standard.

22 So this condition adds nothing as a substantive
23 requirement and implies that you as a Commission have not
24 done the legal evaluation that you need to do. That's not
25 accurate based on the record, and it shouldn't be

1 included.

2 MS. BURCH: I would disagree. The debris basins
3 are not in 5.5, the work has not been done, and it's an
4 inaccurate statement of the current set of facts. I
5 believe a correction that could be made by the Commission
6 on its own is to amend 5.5 to put the basins in with the
7 option of deleting them if a study shows otherwise.
8 That's really what should be done based upon the work to
9 date.

10 MR. LAMB: If you did a performance standard that
11 says you've got to go a hundred miles in ten hours and it
12 was designed because you knew you were going to use a
13 bicycle, and then the applicant turned around and said,
14 well, no problem, we're going to drive cars, we can make
15 it in under ten hours, it's a different environmental
16 consideration; it hasn't been analyzed. That's the
17 problem.

18 MS. FOLEY GANNON: There is testimony in the
19 record that indicates that these standards can be met in
20 other ways than detention basins. It's not for sure how
21 it's going to happen there, but you have established
22 performance standards, those are adequate; we are not
23 talking about the difference between cars and bicycles.

24 MS. BURCH: I disagree, I disagree that the
25 record states that it can. It said it may be -- the

1 testimony is it may be possible. "May" does not reach the
2 standard that's required under CEQA to defer a mitigation
3 decision.

4 MS. FOLEY GANNON: Performance standards.

5 HEARING OFFICER KRAMER: Okay. Well, we could do
6 this for a while, I think, but I think we understand your
7 positions. So we'll take that under advisement. And it
8 looks like right below there is where most of the
9 standards are described very precisely, and that's a good
10 thing.

11 Anything else about condition 8 or --

12 MS. BURCH: I believe, Mr. Kramer, that by and
13 large, maybe some small omissions on my part for which I
14 apologize, but I believe these were all agreed upon. We
15 moved things around and organized things differently; I
16 think they're there.

17 PRESIDING MEMBER EGGERT: I have a note from, at
18 least comments from my advisor on some of these. She
19 thought there was some improvements in clarity in terms of
20 some of the standards, so that's -- I think that's very
21 helpful.

22 HEARING OFFICER KRAMER: Okay. So is it fair to
23 say that the applicant and staff would like a little more
24 time to be able to digest this and then report back to see
25 whether their -- their thoughts were captured?

1 MS. HOLMES: I think that's accurate. I think
2 what I'd like to do is to sit down with the other parties
3 after the Committee goes off to the -- Committee members
4 go off to the business meeting and go through this line by
5 line. I'd like to have it up on a computer so I can do a
6 word search. And I think that -- I think that after an
7 hour or two we'll be able to really crystallize for the
8 Committee whether or not there's any additional
9 disagreement other than the disagreement that we've
10 discussed here. I'm hoping there won't be.

11 HEARING OFFICER KRAMER: Okay. Is Civil 1 in
12 here? I didn't look.

13 MS. BURCH: We did submit that on Friday, and I
14 did not resubmit it, and I, frankly, didn't get -- we
15 discussed it in the workshop yesterday, but I didn't get
16 to it. Those are really easy fixes, however; we could do
17 that after.

18 HEARING OFFICER KRAMER: Okay. If you could
19 start that as a plain old Word document.

20 MS. BURCH: Okay.

21 MR. MEYER: Hearing Officer Kramer, what I'll do,
22 I'll provide a Word version of the civil conditions to
23 BNSF or work with them on that so that they give you a
24 version right from the PMPD that has strike-through on it.

25 HEARING OFFICER KRAMER: Okay. Or I can send

1 them the -- actually, the PMPD Word file.

2 MS. BURCH: That would be really appreciated.

3 HEARING OFFICER KRAMER: Okay. Does that take
4 care of all of the discussion of the soil and water
5 conditions?

6 MS. HOLMES: I don't believe we've discussed the
7 phasing proposal.

8 HEARING OFFICER KRAMER: Oh, that's right, yes.

9 MS. HOLMES: Which we received at 7:40 this
10 morning and have not had time to look at. I guess just
11 without weighing in on the merits, let me just say that we
12 found working through phasing on other aspects of this
13 project and other projects to be more challenging than we
14 had anticipated. And so I guess a fair way to say it is
15 our antenna are wiggling about not creating -- we want to
16 be sure we don't create some sort of unintended problems
17 with it.

18 So we'll take a look at that presumably after we
19 walk through the soil and water conditions that we just
20 discussed and try to get back to the Committee on that
21 when we can.

22 HEARING OFFICER KRAMER: Okay. Well, I think
23 we'd want to hear a little bit about the principles to
24 help us understand it, but before we do that, let me ask,
25 there was talk on Friday of splitting out the two -- the

1 one SWPPP condition into two conditions; one for the
2 industrial and one for the construction permit, I believe.
3 Am I remembering that correctly?

4 MR. MEYER: Yes, we did talk about that. And my
5 preference, this is just preference from what I'm used to
6 dealing with, is having one condition that calls for both
7 plans, but then in the verification, just have a
8 verification A and a verification B that just -- you know,
9 all it is, you're looking at the timing for the
10 construction and then the industrial sort of getting
11 submitted to the CPM.

12 HEARING OFFICER KRAMER: Yeah, I think that would
13 be fine. Can you just get that to us as part of the next
14 deliverable?

15 MR. MEYER: We can do that.

16 Hold on just a second. I think in our rewrites
17 we may have actually split it out into two conditions in
18 10 and 11 of the ones that staff worked on.

19 MS. HOLMES: So we'll address that this
20 afternoon.

21 HEARING OFFICER KRAMER: Okay.

22 MR. MEYER: So it's ready. It may be in two
23 conditions, and we'll just deal with that.

24 MS. FOLEY GANNON: That's your preference.

25 HEARING OFFICER KRAMER: Okay. Ms. Gannon,

1 background for the -- for the suggested revisions to allow
2 Phase 1 to go ahead, Phase 1A, that is.

3 MS. FOLEY GANNON: You can see from these
4 proposed revised conditions, there is a great deal of more
5 detail and refinement that's being required in the plans
6 prior to construction under these revised conditions. And
7 again, as we have said, while we didn't think that was
8 necessary, we don't object to it for going forward for
9 Phase 1B and beyond.

10 But for Phase 1A, which as you are aware is a
11 limited disturbance, 250 acres, essentially the access
12 road and 60 SunCatchers, it was never contemplated that
13 the debris basins would be installed prior to or as part
14 of Phase 1A even in the earlier configurations; it was
15 always shown that the detention basins were going to be
16 part of Phase 1B or beyond, that they wouldn't be
17 necessary to -- if they were part of the project, that it
18 certainly wouldn't be necessary to address the storm water
19 controls associated with that.

20 With that in mind, we suggested utilizing the
21 performance standards and conditions that were included in
22 the PMPD in Soil and Water 1 and 8, which is what is
23 addressing specifically the potential construction related
24 storm water sedimentation and other impacts. So again, we
25 used specifically the wording from the PMPD, we changed it

1 to just simply reflect the fact that this would be prior
2 to site mobilization. And we don't mind using the
3 pre-site mobilization -- pre-construction site
4 mobilization used, suggested by BNSF, as the trigger. And
5 the only things that we changed were just clarifications
6 that the demonstrations and the reports that would be
7 needed to be submitted would be related to the Phase 1A
8 project area and activities. And we deleted the
9 requirements about -- that related to a -- if there were
10 debris basins that were called for, because there are not
11 going to be detention basins as part of Phase 1 -- or
12 detention basins that were called for in Soil and Water 8
13 because they will not be part of Phase 1A. So that is
14 what we've proposed.

15 Again, we think it meets the requirements. It
16 will ensure that these limited construction activities
17 that would occur prior to Phase 1B pre-construction site
18 mobilization when all these other plans would need to be
19 done, is mitigated to less than significance.

20 MS. BELLOWS: And just a clarification on that.

21 In terms of the actual work that's going to be
22 done in Phase 1A, it's actually 60 pedestals that are
23 being put up rather than 60 SunCatchers, which is a big
24 difference. So primarily, you know, in terms of 2010,
25 what we're looking at doing is the primary access road,

1 the 60 pedestals, from a DOE treasury grant perspective,
2 that's what we need to do, we've determined, in order to
3 get the grant.

4 Then we need to show a continuity of
5 construction. So in 2011 we'll be doing some minimal
6 amount of work. Again, we have a funding issue. So we'll
7 be working sufficiently to show that we're working, but
8 hopefully not spending too much money finishing out the
9 area within Phase 1A, so working within the 250 acres.
10 And one of the areas that we'll be working on is the
11 bridge, and again, access right there.

12 HEARING OFFICER KRAMER: So the bridge is part of
13 the Phase 1A?

14 MS. BELLOWS: Yes.

15 HEARING OFFICER KRAMER: Okay.

16 Now, this version doesn't have all of the -- all
17 of the new language that was proposed by the applicant
18 late this morning, right?

19 MS. FOLEY GANNON: That's a separate submittal;
20 that came in this morning.

21 HEARING OFFICER KRAMER: Not from the applicant,
22 I mean, by the -- by BNSF.

23 MS. FOLEY GANNON: Right. This was just language
24 that we included; and then, as we said, we were prepared
25 to discuss, based on BNSF's proposed revisions, which

1 conditions would need to say 1B.

2 Many of the soil and water conditions would not
3 need to because there's things like groundwater monitoring
4 reports, which we're not asking for any changes,
5 compliance with the WDRs, we're not asking for any
6 changes. It's really predominantly Soils and Water 1 and
7 8, and then if there are going to some of these revisions
8 to what's in three, that may need to carve this out as
9 well.

10 MS. HOLMES: What about the construction SWPPP?

11 MS. FOLEY GANNON: We have to do -- the
12 construction SWPPP is required for any construction
13 activity that serves more than one acre, so obviously we
14 would be complying with that.

15 MS. HOLMES: Right. So are you doing the
16 construction SWPPP for the entire site?

17 MS. FOLEY GANNON: It would just be for Phase 1A.
18 But that's consistent with the requirements of the NPDS,
19 general construction permit; so I don't think we have to
20 call that out, because this just says that you have to do
21 it as according to the permit, and that's -- phasing is
22 allowed. So I think it's really 1 and 8, and if possibly
23 some of the reports that are required in May 3 now say
24 that we want that carved out.

25 PRESIDING MEMBER EGGERT: Question: Is it --

1 just kind of reading through here, would you require to
2 repeat all of these conditions for each of the phases?

3 MS. FOLEY GANNON: No, this would just be for
4 Phase 1A and then the new conditions, the BNSF and revised
5 conditions would address 1B and beyond.

6 PRESIDING MEMBER EGGERT: I see. So these would
7 be additions to the conditions specifically for 1A, and
8 then everything else would begin in 1B?

9 MS. FOLEY GANNON: Correct, that's why I just
10 called it condition "XX," because it depends on where
11 the condition numbers end. We would just say add that as
12 a new condition.

13 PRESIDING MEMBER EGGERT: Any thoughts from the
14 parties and staff?

15 MS. HOLMES: Well, it's too early for us to think
16 really to respond. We'll do the best we can.

17 PRESIDING MEMBER EGGERT: Yeah.

18 MS. BURCH: Having just spent an inordinate
19 amount of time with Soil and Water 1 and 8 and the level
20 of detail, what those reports are needed for, the timing,
21 what needs to come first, second, and third, what they
22 pertain to, and as we stressed last night in the
23 reorganizing of this, there are reports here that
24 basically inform all the other work; work such as the
25 infiltration report, the hydraulic report, the geology

1 report, we believe the Pull study and the -- what's it
2 called -- the scour analysis, all of these pieces provide
3 critical data to lay the foundation for what you're
4 designing, every part of what you're designing. 1A is a
5 part of what's being designed. And we believe that if you
6 look at what's needed, this has nothing to do with getting
7 done by December, unfortunately it just doesn't.

8 The change in the plans in September and the
9 inadequacy of the plan to that point in time are the
10 reason why there is 60 to 90 days of aggressive work to be
11 done here to get where you are, to get to design of this
12 project. So we just cannot support breaking it out.

13 And I would be glad, you know, to talk with staff
14 or begin a discussion, but -- document by document, you
15 don't do it, you don't do a piece of -- you don't pick out
16 nine acres when you do these reports, you do them on
17 watersheds and sub-watershed, and it's just a significant
18 process. So that's the gist of our comments.

19 MS. FOLEY GANNON: And you will note we did
20 utilize again the reports that were required in the PMPD
21 in Soil 1 and 8. So when it said things like you have to
22 be able to demonstrate you're not going to be impacting
23 watersheds or sub-watersheds, we have said that that has
24 to be shown, that construction work in Phase 1A will not
25 be impacting any watersheds or sub-watersheds. I mean,

1 those types of conditions we had that addressed
2 specifically for the limited area of disturbance that
3 would be associated with 1A.

4 So we did keep all of the performance standards
5 and the requirements that were included in the PMPD, and
6 but just again acknowledging that it was limited to this
7 smaller area, and obviously the potential impact
8 associated with that is not the same magnitude as when
9 you're looking at a 4,000-acre site.

10 HEARING OFFICER KRAMER: Is there going to be
11 road paving in Phase 1A?

12 MS. FOLEY GANNON: There is no paving. There
13 would be construction of the access road, and there would
14 be stabilization that goes with that, but it is not a
15 paved road.

16 HEARING OFFICER KRAMER: So its permeability
17 would be affected a little bit.

18 MS. FOLEY GANNON: It would be, yes.

19 HEARING OFFICER KRAMER: Staff -- oh, staff,
20 you're thinking about it.

21 Okay. CURE, you've been relatively quiet.

22 MS. MILES: Well, I do have a comment regarding
23 the -- I don't believe that there's anything restricting
24 the applicant from putting SunCatcher dishes on the
25 pedestals. And my understanding from all the filings

1 earlier were that the project was going to come online as
2 construction was completed. And so as the first -- and I
3 believe it's stated in documentation, that as the first 60
4 units were completed, then it would come online.

5 And so I don't believe there's any -- can you
6 point to somewhere in the record that would restrict the
7 project from having SunCatcher dishes?

8 MS. FOLEY GANNON: Well, the SunCatchers cannot
9 come online until the main service complex is constructed,
10 and that does not happen until Phase 1B.

11 MS. MILES: Okay. That answers my question, I
12 believe.

13 HEARING OFFICER KRAMER: But might they be placed
14 there, just to be ready?

15 MS. FOLEY GANNON: They could be, but we can --

16 MS. BELLOWS: From a financial -- from a
17 financial, capital perspective, it makes no sense to put
18 them up until the transmission is ready. So the earliest
19 transmission's going to be ready is 7/31/2011, so you're
20 not going to see SunCatchers until, you know, 7/29.

21 MS. FOLEY GANNON: And we wouldn't object to
22 having a restriction that says Phase 1A will not include
23 the placement of any SunCatchers on poles installed, I
24 mean, we don't have any problem with that.

25 MS. MILES: And another issue that I wanted to

1 raise was the regarding the permeability of the roads. I
2 don't believe that there's any studies that explain how
3 the permeability has changed based on whether a road paved
4 versus whether it is stabilized with gravel or soil
5 tackifiers. And in particular, I'm interested in knowing
6 the soil tackifier's permeability factor; and I don't
7 believe that's in the record, and I think that's a really
8 important critical piece of evidence that needs to be
9 there because it's a huge assumption in the PMPD and it
10 relates as well to the Phase 1A.

11 MS. FOLEY GANNON: You know, those questions were
12 not asked during the proceedings. Ms. Bellows says she
13 thinks it's in the AFC. I don't know off the top of my
14 head if there's things that are specific to the soil
15 tackifiers.

16 MS. BELLOWS: Yeah, there is information on soil
17 tack that was submitted way back when in the AFC original
18 filing. So, you know, there's sort of product information
19 that talks about the product and how it works and its
20 permeability and that sort of thing.

21 MS. MILES: I do remember there being information
22 in the record about soil tackifiers, but I don't believe
23 there's anything about permeability.

24 MS. BURCH: And that would be addressed in the
25 new Soil and Water 13 which requires an infiltration

1 report, and that's one of the called-out issues to be
2 addressed.

3 MS. MILES: And personally, I believe that that
4 is something that needs to be in the analysis prior to the
5 project approval because that relates to what is the
6 baseline and what is the actual effect of the project on
7 the environment.

8 And I think I'd just like to support what
9 Mr. Lamb had said, the analogy about, you know, how are
10 the -- how are the applicant's proposed mechanisms for
11 capturing water going to impact the environment because
12 there may be significant impacts to biological resources,
13 for example. And I know prior detention basin designs
14 were modified significantly as a result of concerns for
15 biological resources, and I think that that loop is not
16 really closed here when we're looking specifically at the
17 soil and water conditions and not looking at the
18 biological ramifications of how the applicant's changes to
19 the drainage may affect the biological resources.

20 HEARING OFFICER KRAMER: Okay. Anything else
21 from anyone?

22 MS. FOLEY GANNON: Can I just respond to the
23 biological resource issues?

24 That was an issue that staff was asked about
25 during the evidentiary hearing and they responded to. And

1 I don't, unfortunately, have those pages, references of
2 the transcript right here; but that was an issue that was
3 discussed, and there was specifically a performance
4 standard included in the soils and water conditions that
5 was addressing what their concern was about the potential
6 storm water controls, which was primarily related to
7 the -- allowing the sufficient sediment transport,
8 particularly the fine sands through.

9 And so there is a performance standard that was
10 included, and that was done at the direction or at the
11 advice of the biological experts of staff.

12 MS. MILES: Right. And that may -- it
13 potentially deals with one, you know, impact that may
14 result to biological resources, but when we don't know
15 what the mechanisms that the applicant would propose are,
16 we really cannot address any other impacts that could
17 occur to biological resources.

18 HEARING OFFICER KRAMER: Okay. Let's see.

19 Last time we took care of the motion to take the
20 donated lands, BLM memo into evidence, and that was
21 Exhibit 318. And then we took official notice of the ROD.
22 And did we take official notice of the biological opinion?

23 MS. FOLEY GANNON: That was the appendix to the
24 ROD, so it was the --

25 (Cell phone ringing.)

1 ASSOCIATE MEMBER BYRON: I'm sorry.

2 MS. MILES: It's not just me.

3 HEARING OFFICER KRAMER: So that's its good night
4 music.

5 MS. FOLEY GANNON: All right. We'll talk through
6 it.

7 The biological opinion was one of the appendices
8 to the ROD, and the official notice, I believe, included
9 the ROD and its appendixes.

10 HEARING OFFICER KRAMER: Okay. So now let's talk
11 about where we go from here.

12 Is this any other business that anyone wishes to
13 bring before us?

14 Okay. We -- somebody asked earlier when we were
15 going to get the errata out. It will be sometime -- well,
16 actually, let's go off the record for a minute.

17 (Discussion off the record.)

18 HEARING OFFICER KRAMER: Okay. Back on the
19 record.

20 So we're going to try to get an errata out
21 tomorrow. And I'm not sure we'll wait for your -- you
22 know, your additional soil and water comments; so if you
23 can give us the version of the conditions that you think
24 satisfy your needs when you're making a comment, then it
25 may be -- if you get them in soon enough, maybe we can

1 deal with them and rule on them in the errata; otherwise,
2 we may have to just discuss them and have perhaps a second
3 errata or just refer to them by reference to your
4 documents when we get to the business meeting.

5 And that -- so that will be easier if you
6 basically have, say, a complete copy of the whole
7 condition, unless you're just making some minor changes
8 to, say, the verification or something, maybe you can just
9 reprint the verification, but don't just give us one
10 sentence out of context, that's hard for anyone to really
11 process efficiently. So the sooner the better on your
12 responses.

13 We will leave you with the room and the Committee
14 authorizes the staff to conduct a workshop -- to conduct a
15 continuation of this event as a staff workshop to discuss
16 the -- some more of your details, comments on these same
17 conditions.

18 MS. HOLMES: Are there any people left on the
19 phone that we would need to try to loop in if we got a
20 conference room?

21 HEARING OFFICER KRAMER: Let's see.

22 Travis Ritchie, are you still with us?

23 Mr. Brizzee?

24 MS. HOLMES: We bored them to death.

25 HEARING OFFICER KRAMER: Ms. Cunningham?

1 We have four unidentified callers.

2 (Click heard.)

3 MS. HOLMES: Make that three.

4 HEARING OFFICER KRAMER: No, somebody was
5 unmuting.

6 MS. CUNNINGHAM: Laura Cunningham here. I was on
7 mute.

8 HEARING OFFICER KRAMER: Okay. Are you going to
9 stick around for the soil and water discussion?

10 MS. CUNNINGHAM: If it's this afternoon, no, I
11 can't.

12 HEARING OFFICER KRAMER: Okay. Yeah, it's going
13 to actually go right now. What they want to know is who
14 they would have to tell if they have to change rooms. But
15 for a while they'll be in the room that we're in now.
16 They have to vacate it at 1:30 -- in the 1:30 to 1:40
17 range.

18 MS. JENNINGS: This is Jennifer Jennings. I'll
19 call the people who were on it earlier and just tell them
20 of the new room once it's decided.

21 MS. HOLMES: We may need to take some time to
22 find -- I don't think we're going to be able to finish in
23 45 minutes. I think that's optimistic. So I think we
24 should maybe take some time, find a room, and, dare I say,
25 eat?

1 MS. JENNINGS: Caryn, I've been looking for a
2 room. At this point we'd have to kick someone out or use
3 the two south conference room C, which is somewhat
4 inadequate.

5 MS. HOLMES: Two south C?

6 MS. JENNINGS: Yes.

7 HEARING OFFICER KRAMER: Okay. Tell you what,
8 we'll -- so we will adjourn this authorizing the staff to
9 conduct a workshop without anything more than telephonic
10 notice to those who participated earlier, and --

11 MS. HOLMES: My concern is that if we need to get
12 a conference line, I mean, I'm sure you saw the memo from
13 IT. We're supposed to do this a day in advance. So
14 that's why I'm trying to get a sense of how many people we
15 may need to call in. It sounds like it's not Basin and
16 Range, so we could pull in two people --

17 HEARING OFFICER KRAMER: No, I can keep the WebEx
18 going.

19 MS. HOLMES: And we can log in at another
20 location.

21 HEARING OFFICER KRAMER: Yeah.

22 MS. HOLMES: Okay. That would probably be best.

23 HEARING OFFICER KRAMER: Okay. And then I'll be
24 hosting it without listening, so you'll need to come tell
25 me when you're done so I can hang up. I don't want to be

1 stuck on my phone trying to figure it out. And I can give
2 host rights to one of you to be the controller. Maybe
3 that's what we can do. We'll work it out.

4 MS. HOLMES: Okay.

5 HEARING OFFICER KRAMER: Anyway, we're tying up
6 the record with all this procedural stuff.

7 So the Committee conference is adjourned.

8 (Thereupon the California Energy Commission,
9 Calico Solar Project Committee Conference
10 adjourned at 12:43 p.m.)

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CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Committee Conference; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of October 2010.

PETER PETTY