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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:

The Application for Certification for the
Calico Solar Project

Docket No. 08-AFC-13

INTERVENOR DEFENDERS OF WILDLIFE

Comments on the Presiding Member's Proposed Decision

October 21, 2010

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Comments on the Presiding Member's Proposed Decision

Intervenor Defenders of Wildlife ("Defenders") submits these comments on the Presiding Member's Proposed Decision ("PMPD") pursuant to the Committee's order of September 25, 2010. Although the Committee adopted a reduced acreage project, identified as Scenario 5.5, many significant environmental impacts remain. Scenario 5.5 reduces impacts to east-west movement corridors for desert tortoises but does nothing to relieve the obstruction of north-south movement corridors for desert tortoises or bighorn sheep. Additionally, Scenario 5.5 does not avoid or mitigate the impacts to white-margined beardtongue occurrences or Mojave fringe-toed lizard. BLM and USFWS still have not finalized the desert tortoise translocation plan for the project.

1. The PMPD Does Not Adequately Assess the Project's Impact on Bighorn Sheep Movement Corridors.

The PMPD determined that Scenario 5.5 would not contribute to the loss of bighorn sheep habitat nor have significant impacts on bighorn sheep. Such findings are unfounded considering the evidence in the record. BIO 23, the only condition of certification adopted for Scenario 5.5, provides for daily monitoring and delaying

construction if bighorn sheep are observed within 500 feet of the project. This condition is intended to reduce impacts to bighorn sheep foraging habitat. It does not, however, reduce the significant impact to movement corridors.

The administrative record for this case contains considerable evidence demonstrating the failure to identify and mitigate for impacts to bighorn sheep movement corridors. Attachment A to Scott Cashen's September 17, 2010 testimony shows bighorn sheep scat observed on the site. The PMPD itself acknowledges on page 12 the observance of sheep scat and bighorn remains on the site and that such observances are evidence of possible intermountain movement:

In addition, two bighorn sheep horns, two bighorn sheep skeletons and one occurrence of bighorn sheep scat were detected during surveys conducted for desert tortoises and botanical resources between April 5 and April 15, 2010. These occurrences were observed north of the project detention basins between the Cady Mountains and the proposed project. In addition, staff observed bighorn sheep scat on the top of one of the large volcanic rock outcroppings that occur adjacent to the proposed detention basin at the north boundary of the project. It is likely that bighorn sheep use portions of the site for foraging and possibly intermountain movement to some degree. (Ex. 300, p. C.2-40.)

However, the PMPD inexplicably fails to consider the totality of this evidence. Instead, it comes to an arbitrary conclusion regarding impacts to bighorn movement:

Scenario 5.5 would not contribute significantly to the loss of bighorn sheep habitat, as most occupied habitat for Nelson's bighorn sheep within the Cady Mountains does not overlap the northern portion of the scenario's development area.

This conclusion refers to potential impacts to foraging habitat in the northern portion of the site. The PMPD also discussed Bighorn movements from the Cady Mountains to "adjacent mountain

ranges” (PMPD page 50), it appears those movements considered were to the east toward the Bristol Mountains. However, lacking from the PMPD is any discussion of potential movements to the south toward the Rodman, Newberry and Ord Mountains across the project site.

Testimony of Dr. Bleich (August 5, 2010 hearing p. 306) at the hearings addressed the possibility that Bighorn move between the Cady Mountains and the ranges to the south and southwest of the project area, and that genetic testing may not be sufficient to detect such movement, especially those occurring at a low-level. The potential for inter-mountain movements of Desert Bighorn from the Cady Mountains has increased significantly because the Cady Mountains herd has increased from an estimated 50 individuals in 1990 to over 300 today. We urge the Commission to reconsider the potential significant adverse impacts to north and south Bighorn movements between the Cady Mountains and the Rodman, Newberry and Ord Mountains herds, and to identify mitigation measures that would allow for potential movements to occur.

2. The PMPD Does Not Adequately Assess the Project’s Impact on Tortoise Movement Corridors.

The PMPD indicates Scenario 5.5 would result in the loss of 4,614 acres of desert tortoise habitat that supports an estimated 22 individuals of this species. Direct impacts to desert tortoises and their habitats under the proposed decision are substantially less than under the applicant’s previously proposed project configurations. We appreciate that the Committee members called for further reductions in the size of the project as a means of providing a greater degree of protection for this threatened species.

However, we remain concerned that the impact of the proposed project on desert tortoise movements under the railroad and under I-40, in both directions, has not been given adequate consideration. We request that the Committee address desert tortoise habitat connectivity and movements throughout the project area, including those between the project area and the Ord-Rodman Critical Habitat Unit or Desert Wildlife Management Area, through further studies and/or modifications to the project. The PMPD on page 25 recognizes that numerous passages (seven trestles) under the railroad provide opportunities for desert tortoises and other animals to

move throughout the area. Although not addressed, there are also several culverts and drainage crossings under I-40 that also provide opportunities for desert tortoise movement.

In fact, the Applicant admitted during the hearings that such trestles may provide access for tortoises moving to the southern part of the project site (*see* September 20, 2010 hearing transcript, page 494):

MS. MILLER: There are burrows -- yes, there are burrows located in those areas. They're the 4's and 5's though. They're the older burrows.

MR. BASOFIN: Are there any 1's, 2's, or 3's?

MS. MILLER: There's one -- there's one or two of them.

MR. BASOFIN: Okay. So is it possible the tortoises could -- though they're inhabiting those burrows, could move through those trestles in the railroad tracks to the south?

MS. MILLER: Absolutely.

MR. BASOFIN: Okay. And is it possible the tortoises could then move from the area between the railroad tracks and the highway through the culverts to the south?

MS. MILLER: It's possible.

The potential for tortoises to move through the railroad trestles to the south and establish active burrows (i.e. 1's, 2's, or 3's) is *prima facie* evidence of tortoises moving south from the site, certainly to areas south of the railroad and perhaps to areas south of I-40. Scenario 5.5, notwithstanding its reduced impact on tortoise individuals, would obstruct and impact that potential movement corridor.

3. The Committee Must Require a Specific Habitat Connectivity Study.

Although the PMPD addressed general wildlife movements and habitat connectivity, and would establish a considerable buffer between the base of the Cady Mountains and the project

boundary by adopting the reduced project scenario 5.5, north-south movements and habitat connectivity was not adequately addressed.

This shortcoming in the analysis and PMPD is significant given that the project is located in an essential habitat connectivity area identified in a 2010 report commissioned by the California Department of Transportation and the California Department of Fish and Game. This report, the California Essential Habitat Connectivity Project, was presented into evidence and discussed by several witnesses at recent hearings on the proposed Calico solar project.

Furthermore, no wildlife movement and habitat connectivity study was prepared in support of the environmental review of the proposed project. This is in contrast to the study prepared to support the environmental review for the proposed Palen solar project. Such a study was performed for Palen and a report submitted for consideration in the review of the effects of that proposed project. Defenders of Wildlife submitted a copy of the report on this investigation into evidence at the hearings for the proposed Calico project (*see* Exhibit 616). That study involved analysis of approximately 35 miles of Interstate 10 for identification and analysis of structures (culverts and bridges) and their use by wildlife. The report concluded that the proposed Palen project would impact wildlife movement and habitat connectivity in certain locations, and the proposed project was subsequently modified to mitigate impacts to wildlife movements.

The Palen project is proposed on a site that is less than a mile from I-10 and on approximately 5,000 acres of BLM land. It is similar to the Calico project in its scope and proximity to a major highway. The potential for wildlife to use underpasses associated with I-10 is similar to the Calico project. Therefore, it is reasonable for the CEC to conduct this type of study for the Calico Project, particularly considering the evidence of potential desert tortoise and bighorn sheep movement under I-10. We strongly urge the Commission to have such a study performed for the proposed Calico project, and that the results and recommendations for any required mitigation be approved by a joint committee comprised of representatives from the California Department of Fish and Game, the California Department of Transportation, the U.S. Fish and Wildlife Service and the Bureau of Land Management. Such a study and finding

should be completed and considered by the Commission before reaching a final decision on the project.

4. The Desert Tortoise Draft Translocation Plan Is Inadequate and Has Not Been Finalized.

Desert tortoise mortality that would result from proposed translocation off the project site remains one of our serious concerns. The agency biologists, including those in the U.S. Fish and Wildlife Service, continue to view translocation as an experimental procedure that has resulted in significant mortality not only to translocated individuals but also those naturally occurring in the translocation sites (host populations). Defenders urges the Committee to not view the dramatic loss of translocated desert tortoises from Fort Irwin as an isolated event. The Fort Irwin translocation, notwithstanding it was considered “state of the art,” has resulted a mortality rate of approximately 50 percent during the first two years of the project, with the possibility that mortality will continue to rise over time.

Testimony from Kristin Berry at the hearings highlighted the ineffectiveness of translocation practices:

The second point I'd like to make is that the writers of the translocation plan used layers of assumption unsupported by scientific evidence, and I'd like to give some examples. And these include but are not limited to such subjects as carrying capacity, phrases and topics like compromising a resident population, the potential spread of invasive alien plants such as Brassica tournefortii or the Sahara Mustard, distances that tortoises are likely to move, and likelihood of encountering a zero positive tortoise, zero positive specifically for mycoplasma agassizii.

The draft translocation plan has not been finalized. It contains assumptions and hypotheses that are not based in science. CEQA requires mitigation efforts to be final before approval.

Therefore, this project should not be approved as designed due to the lack of a final translocation plan.

5. The PMPD Fails to Address Impacts to White-Margined Beardtongue.

On page 15 of the PMPD and page C.2-31 of the Supplemental Staff Assessment, the following statement is made with regard to the white-margined Beardtongue on the proposed project site: “Due to varying habitat and rainfall, white-margined beardtongue may exist as “metapopulations,” where local occurrences are extirpated by poor conditions but are replaced by new occurrences when seedlings become established at new sites during favorable conditions. In future years, white-margined beardtongue may have the potential to occur anywhere in the lower elevation wash and sandfield vegetation on the Calico project site.”

The proposed mitigation measure to establish a 250 foot buffer around known occurrences of this at-risk species, and development of additional protection measures stemming from summer and fall season rare plant surveys in 2010 are insufficient to provide assurances that this species will be adequately protected within the project site. CEQA requires description of feasible mitigation measures “which could minimize significant adverse impacts.” 15126.4(1)(a). Jim Andre’s testimony indicated the underlying problem with the 250 foot buffer mitigation strategy:

The Committee should not consider the 250-foot buffer zone as "avoidance" or as an onsite mitigation measure that will result in long-term, self-sustaining populations of rare plants. Mitigation practices certified on this project will be precedent-setting for subsequent project applications and should be based on sound scientific information. The extent of protection afforded to plants within isolated halos remains speculative at best. Preserving intact habitat and connectivity with surrounding areas are inherent to the most basic principles of conservation biology (*see* exhibit 600, page 6).

Without specifying minimum standards for development of impact avoidance measures for rare plants discovered during “follow-up surveys” other than that they will be applied “to the greatest extent feasible,” we are concerned that actual protection to be provided at some future date is uncertain due to the requirement that it be “feasible.” (PMPD page 38). Furthermore, pages 39-40 of the PMPD state that the project “would substantially alter soil, vegetation, and hydrology throughout the project area and would likely prevent new white-margined beardtongue colonizations within the project area. The above potential impacts to white-margined beardtongue and other CNPS List 1B species are mitigated to insignificant levels by our adoption of Condition of Certification BIO-12, which includes measures to provide buffer areas around white-margined beardtongue locations; monitor and manage direct and indirect project impacts and plant persistence within these areas; and monitor and manage indirect project impacts to occurrences off-site to the east, in the BLM Pisgah Crater ACEC.”

Defenders remains concerned that the long-term effectiveness of the buffers around known plant populations will be insufficient to allow for metapopulations of this species to persist. We are equally concerned with the effectiveness of the proposed requirement to “monitor and manage direct and indirect project impacts and plant persistence within these areas; and monitor and manage indirect project impacts to occurrences off-site to the east, in the BLM Pisgah Crater ACEC.” Considering the substantial amount of impact the project would have on soil, hydrology, sand transport and deposition, and hydrology, we question how monitoring and management could provide sufficient protection. We consider it highly likely that monitoring would reveal that significant impacts had occurred, but corrective management actions would be infeasible.

The PMPD states that “there is no known feasible horticultural method to propagate white-margined beardtongue.” Despite this statement, however, the PMPD lists seed collection and propagation measures as mitigation for the species under conditions 2(h) and 2(i) on page 83 of the PMPD. CEQA requires that mitigation be tied to specific impacts. Because the methodology for propagation of white-margined beardtongue is speculative at best, it is not appropriate mitigation for this species.

6. The PMPD Does Not Contain an Adequate Analysis of Impacts to Mojave Fringe-toed Lizard.

On page C.2-4 of the Supplemental Staff Assessment, the following statement is made with regard to the impacts of the proposed project on the Mojave Fringe-toed Lizard: “Staff estimates total acreage of suitable habitat, including sandy drainages and small patches of aeolian sand deposits and micro-dunes scattered throughout the southern portion of the site, as 164.7 acres. Staff believes that avoidance of habitat on-site would not prevent adverse impacts to Mojave fringe-toed lizards, due to habitat fragmentation, road kill, and increased predation (project facilities would serve as perch sites for foraging raptors, facilitating their ability to find and capture lizards and other ground-dwelling species). Staff has proposed Condition of Certification BIO-13 (Mojave Fringe-Toed Lizard Mitigation), which requires the acquisition of suitable dune/sand habitat at a 3:1 ratio to mitigate loss of suitable breeding habitat and at a 1:1 ratio for surrounding habitat suitable for foraging and cover. While this mitigation would reduce the project’s impacts below a level of significance, a residual adverse impact remains, including a net loss of habitat and interruption of suitable east-west movement habitat.”

Defenders remains concerned that the impacts to east-west movement of this species, including habitat connectivity with the adjacent BLM Pisgah ACEC will be lost due to insufficient avoidance of suitable habitats both north and south of the railroad.

7. Conclusion

The reduction in size of the Calico project was welcomed for its reduction of some biological impacts. However, Scenario 5.5 still would have significant adverse environmental impacts to desert tortoise and bighorn sheep movement corridors, white-margined beardtongue, Mojave fringe-toed lizard, and desert tortoises requiring translocation. The Committee should not approve the project as designed.

DECLARATION OF SERVICE

I, Joshua Basofin, declare that on October 21, 2010, I served and filed copies of the Attached Comments on the Presiding Member's Proposed Decision, dated October 21, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[www.energy.ca.gov/sitingcases/calicosolar]**. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

X sent electronically to all email addresses on the Proof of Service list;

X by personal delivery or by depositing in the United States mail at Sacramento, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

X sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

 depositing in the mail an original and 12 paper copies, as follows:

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I declare under penalty of perjury that the foregoing is true and correct.





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APPLICATION FOR CERTIFICATION

For the CALICO SOLAR (Formerly SES Solar One)

Docket No. 08-AFC-13

PROOF OF SERVICE
 (Revised 7/12/10)

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