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May 26, 2010

Christopher Meyer, Project Manager
Siting, Transmission and Environmental Protection Division
California Energy Commission, 1516 Ninth Street, MS-15
Sacramento, California, 95814.
via email to Cmeyer@energy.state.ca.us

DOCKET
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DATE MAY 26 2010

RECD. MAY 27 2010

Re: Comments on the Draft Environmental Impact Statement/Staff Assessment for the Stirling Energy Systems Solar Two Project and Possible California Desert Conservation Area Plan Amendment, 75 Fed. Reg. 7624 (Feb. 22, 2010).

Dear Mr. Meyer:

Thank you for the opportunity to submit comments on the Staff Assessment/Draft Environmental Impact Statement (SA/DEIS) for the proposed Solar Two Project. These comments are submitted on behalf of Defenders of Wildlife (“Defenders”), a non-profit public interest conservation organization with over 1,000,000 members and supporters nationally, 200,000 of whom are in California.

Defenders is dedicated to protecting wild animals and plants in their natural communities. To achieve this end, Defenders employs science, public education and participation, media, legislative advocacy, litigation, and proactive on-the-ground solutions in order to impede the accelerating rate of extinction of species, associated loss of biological diversity, and habitat alteration and destruction.

Defenders strongly supports the emission reduction goals found in the Global Warming Solutions Act of 2006, AB 32, including the development of renewable energy in California. However, we urge that in seeking to meet our renewable energy portfolio standard in California, project proponents design their projects in the most sustainable manner possible. This is essential to ensure that project approval moves forward expeditiously and in a manner that does not sacrifice our fragile desert landscape and wildlife in the rush to meet our renewable energy goals.

We strongly support renewable energy production and utilization, but we do not consider the construction of large-scale projects, and especially the very large solar energy projects proposed on undisturbed public lands in the California Desert Conservation Area, to be the primary way to meet our renewable energy goals. We believe such large scale solar projects must be located on degraded or disturbed land such as abandoned agricultural fields, industrial sites, and near existing structures before public lands containing natural plant and animal communities are considered.

The proposed project would entail the exclusive use of approximately 6,500 acres, nearly all of which is public land administered by the Bureau of Land Management (BLM). The project would entail the construction, operation, and eventual decommissioning of a Sterling solar dish engine facility with a rated power output of up to 750 MW. The proposed project would entail the

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construction, installation and operation of approximately 30,000 dish engine units. Various alternatives to the applicant's proposed project are identified in the SA/DEIS, some of which would be located on smaller land areas, have fewer dish engine units and have reduced electrical energy generation.

Our comments on the DEIS are as follows, arranged by subject:

I. National Environmental Policy Act (NEPA)

Purpose and Need: In specifying their EIS obligations under the National Environmental Policy Act (NEPA), federal agencies must "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Courts "have interpreted NEPA to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow that they can be accomplished by only one alternative (i.e. the applicant's proposed project)." *Colorado Environmental Coalition v. Donbeck*, 185 F.3d 1162, 1165, 1174 (10th Cir. 1999), at 1174 (citing *Simmons v. United States Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997)).

BLM Purpose and Need: According to the DEIS, the stated purpose and need for the proposed project is to "...respond to the SES Solar II, LLC's application under Title V of the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. § 1761) for a right-of-way grant to construct, operate and decommission a solar thermal generation facility and associated infrastructure in accordance with FLPMA, BLM right-of-way regulations, and other applicable federal laws. (SA/DEIS at A-12)." The purpose is also to "use BLM's authority under the Energy Policy Act "...to approve at least 10,000 MW of renewable energy on public lands by 2015." (SA/DEIS at A-12).

Recommendation: Instead of the current purpose and need statement focusing on the BLM responding to a right of way application under Title V of FLPMA, we recommend that the purpose and need statement focus on the need to generate and greater amounts of electrical energy from renewable energy sources so that dependency on carbon-based fuels is reduced, and to contribute to the requirement to generate certain minimum amounts of renewable energy to comply with State and federal standards. By providing a broader statement of purpose and need, BLM ensures the NEPA documents are legally defensive documents.

By so radically narrowing the scope of the project's purpose, BLM has impermissibly constricted the range of alternatives considered. *See Carmel by the Sea v. U.S. DOT*, 123 F.3d 1142, 1155 (9th Cir. 1995). Further, BLM has misinterpreted the intent of Congress in the Energy Policy Act in stating that the law mandates BLM to approve at least 10,000 MW of renewable energy from public lands by 2015. (SA/DEIS at A-13). Rather, the Act encourages the Secretary of the Interior to approve a minimum of 10,000 MW of renewable energy from the public lands by the year 2015, which is correctly stated elsewhere in the document (*see* SA/DEIS at B.2-10).

Department of Energy Purpose and Need: According to the DEIS, the stated purpose and need for proposed action is "...to comply with its mandate under the EP Act by selecting eligible projects (potentially suitable for funding support) that meet the goals of the EP Act." (SA/DEIS at A-12).

U.S. Army Corps of Engineers (USACE) Purpose and Need: USACE uses two purpose and need statements to identify and analyze a reasonable range of alternatives under Section 404(b)(1) of the Clean Water Act. These include the basic project purpose and the overall project purpose. The basic project purpose is producing energy. The USACE determines whether or not and to what degree the proposed project would affect wetlands or waters of the United States subject to provisions of the Clean Water Act. (DEIS at A-13).

Project Alternatives: In addition to properly defining the purpose and need of an agency action, agencies must consider a range of reasonable alternatives to the agency action in the EIS. *See* 42 U.S.C. § 4332(2)(E). The range of alternatives is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. NEPA requires BLM to “rigorously explore and objectively evaluate” a range of alternatives to proposed federal actions.” *See* 40 C.F.R. §§ 1502.14(a) and 1508.25(c). The purpose of this requirement is “to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means.” *Environmental Defense Fund v. Cops of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974); *see also Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *rev’d on other grounds*, 490 U.S. 332 (1989) (agency must consider alternative sites for a project).

We are pleased that several alternatives are considered and analyzed by the California Energy Commission (CEC) staff under the standards of the California Environmental Quality Act. We are particularly pleased that the CEC considered alternatives that entail the use of degraded private land, and two smaller-sized projects within the proposed project boundary. Unfortunately, the private land alternative was dismissed by BLM because the applicant is unlikely to secure project permits in time to receive federal government assistance for project development pursuant to the American Recovery and Reinvest Act of 2009. Dismissal of a private land alternative is unfortunate because it would very likely result in far fewer environmental impacts to significant cultural and biological resources found on the public land alternative that was proposed by the applicant.

BLM appears to have severely limited consideration of what constitutes a reasonable alternative by rejecting those involving private lands. We are pleased the CEC staff have identified and analyzed private land alternatives as a means of avoiding and minimizing the impacts of the project to sensitive resources, both biological and cultural. We are pleased, however, that BLM has determined that three public land alternatives, all of which would result in reduction in biological resources and ephemeral wash impacts, are reasonable and are addressed in the SA/DEIS. Two of these alternatives were recommended by the USACE. We are pleased the USACE has identified two alternatives that would significantly reduce impacts to jurisdictional waters of the U.S. that discharge into the Salton Sea, namely the New and Alamo Rivers.

Recommendation: BLM should reconsider and include private land alternatives found to be feasible by the CEC staff as reasonable under NEPA. While we understand BLM has no jurisdiction over the use of private lands, by automatically dismissing all such alternatives as “unreasonable” (SA/DEIS at B.2-1), BLM appears to be acting arbitrarily. BLM has a duty to work jointly with the CEC staff in considering all potentially viable alternatives that would avoid or minimize significant impacts to public land resources and values. NEPA regulations require inclusion of reasonable alternatives not within the jurisdiction of the lead agency. *See* 40 C.F.R. § 1502.14(c).

Cumulative Impacts Analysis: Cumulative impact is defined as the impact on the environment which results from the incremental impacts of the action when added to other past, present, and reasonably foreseeable future action regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7.

Although the SA/DEIS identifies a substantial number of existing and proposed land use activities that have and would add to the cumulative loss of significant cultural and biological resources, the depth of the analysis appears insufficient to establish a clear condition and trend with regard to how imperiled certain at-risk resources are in the region.

Cumulative impacts on species at risk and their habitats is particularly important for this proposed project. The Flat-tailed Horned Lizard, currently proposed for listing under the Endangered Species Act, is considered to occur throughout the project area, although its population size has not been precisely determined. Similarly, the Peninsular Bighorn Sheep, federally listed as Endangered and State-listed as Threatened, has been observed on-site on one occasion.

Recommendation: A cumulative effects analysis of the impact of the past, present and reasonably foreseeable activities that have and will adversely impact at-risk biological resources, such as the Flat-tailed Horned Lizard and the Peninsular Bighorn Sheep, needs to be included. The cumulative impact analysis should reveal the condition and trend of these resources and whether or not the current situation is one in which additional impacts due to projects on public land would conform to BLM policy as expressed in Manuals 6500 (Wildlife Habitat Management) and 6840 (Special Status Species Management).

II. Biological Resources

Flat-tailed Horned Lizard: Although the Flat-tailed Horned Lizard Management Plan¹ addressed mitigation for the effects of multiple use activities that would impact the species and its habitat, including habitat replacement at a 1:1 ratio outside of designated management areas, it appears the management plan approach to habitat loss and mitigation was based on the assumption that projects that would impact the species and habitat over time would be relatively small and that net losses of habitat and the populations of the species would be greatly minimized by the habitat compensation requirements. The proposed project is unprecedented in scale and perhaps beyond the scope of the analysis and conservation strategy in the management plan with regard to habitat loss impacts for an individual project. Conformance with the policies established in Manual 6840 is particularly important for this species because on March 2, 2010, the Fish and Wildlife Service proposed that it be listed as threatened under the provisions of the Endangered Species Act.

Peninsular Bighorn Sheep: The potential loss of seasonal foraging habitat and potential movement corridors for Peninsular Bighorn Sheep is a concern. Very little information was presented in the SA/DEIS about bighorn populations and movements on a regional basis, which ranges are currently occupied and where potential movement corridors may be located. The documented sighting of several Peninsular Bighorn in a wash within the central portion of the project area may be a significant event. No other information is provided which would indicate that

¹ Flat-tailed Horned Lizard Interagency Coordinating Committee. 2003. Flat-tailed horned lizard rangewide management strategy, 2003 revision. 78 pp. plus appendices.

these animals were studied to document their use of the habitat for foraging, movements, duration within the project area, and other behaviors. The permitting agencies and the California Department of Fish and Game have addressed the bighorn sheep occurrence and impact issue and concluded that presence of bighorn sheep within the project area in the spring of 2009 was "...an unusual occurrence and is unlikely to occur again." (DEIS at C.2-40).

Recommendation. Analysis of impacts to these two species should be rigorously performed, and the mitigation identified should be to avoid, minimize or compensate for the effects of the proposed project, in priority order. Habitat enhancement opportunities for both species should be identified as part of the impact mitigation strategy involving compensation for habitat loss. Habitat enhancements needed to achieve the no net-loss standard should be identified and included as proposed mitigation measures in addition to compensation for lost habitat. Due to the size of the proposed project, the adequacy of the 1:1 habitat loss compensation ratio should be analyzed and adjusted if deemed necessary to achieve the no net loss outcome. BLM should determine whether or not the proposed project would be consistent with management policy contained in Manuals 6500 and 6840.

Recommendation. Additional studies of the ephemeral washes on the proposed project site for use and occupancy by Peninsular Bighorn should be conducted if their accessibility to Bighorn would be precluded due to the project. Any additional information available on the activities and behavior of the bighorn observed on the proposed project site in the spring of 2009 should be provided, such as feeding, resting, direction of travel, and duration within the proposed project area.

Recommendation. The larger ephemeral washes coursing through the proposed project area plus a corresponding buffer zone may be warranted as a means to allow for continued use of the area by Bighorn. The specific washes and the necessary width of a buffer to allow for Bighorn feeding and movement should be determined by subject matter experts from the California Department of Fish and Game and U.S. Fish and Wildlife Service.

Recommendation. Compensation for lost habitat should include replacement habitat and enhancement of sufficient habitat to fully offset the net loss. Enhancement may require establishment of protected reserves within habitats occupied by the species that are being adversely impacted by multiple use activities.

III. Climate Change

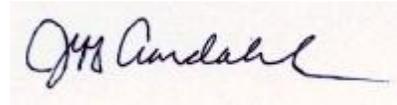
The SA/DEIS addresses the need to address the effects of climate change largely through reduction of greenhouse gases and development use of renewable energy sources. The BLM has failed to analyze the impacts climate change will have on species, and the resources required ensure sufficient habitat as the species adapt.

Recommendation. BLM should expand the analysis of the effects of the proposed project and each alternative on biological resources and their ability to adapt to climate change, such as occupation and use of habitat on a regional scale that may be essential in sustaining at-risk species. Such an

expanded analysis should include cumulative effects and mitigation measures, including those associated with climate change.²

Thank you for considering our comments. If you have any questions, please contact me at (916) 313-5800 x110 or via email at jaardahl@defenders.org.

Sincerely,

A handwritten signature in black ink on a light-colored background. The signature is cursive and appears to read "Jeff Aardahl".

Jeff Aardahl
California Representative

² See Secretarial Order 3226, *Evaluating Climate Change Impacts in Management Planning* § 4 (January 16, 2009) (“Each bureau and office of DOI shall, in a manner consistent and compatible with their respective missions: Consider and analyze potential climate change impacts when undertaking long-range planning exercises, setting priorities for scientific research and investigations, and/or when making major decisions affecting DOI resources”); Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act* 24, 42 (1997) (including documentation and analysis of global warming in the affected environment and effects), available at <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm> (last visited Apr. 20, 2010).