

STATE OF CALIFORNIA
**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

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In the Matter of:

The Application for Certification for the
Abengoa Mojave Solar Power Plant
Licensing Case

Docket No. 09-AFC-5

**COMMENTS BY INTERVENOR COUNTY OF SAN BERNARDINO
ON THE PRESIDING MEMBER'S PROPOSED DECISION**

August 26, 2010

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I.

Introduction

San Bernardino County ("County") appreciates the opportunity to have participated in the permitting process and to provide comments about the recommended conditions of certification on the application for certification of the Abengoa Mojave Solar Project, ("Abengoa" or "Project"), a nominal 250 MW solar electric generating facility to be located on 1,765 acres of private land located near Harper Dry Lake in an unincorporated area of San Bernardino County.

The County supports all forms of renewable energy, if appropriately sited, with mitigation that provides protection for existing property owners and vital County interests. Evidence of this commitment exists in at least three actions taken by the County. First, the County's Greenhouse Gas Emissions Reduction Plan that is currently under development, with renewable energy likely to be a key component of those efforts. Second, the County's adoption in 2007 of the "Green County San Bernardino" program, designed to spur the use of the so-called "green" technologies and building practices, including the use of renewable sources of energy. Third, the County entered a Memorandum of

Understanding with the Bureau of Land Management (“BLM”) in order to expedite the review of development on public lands within the County’s boundaries.¹

In April and July of this year, the County Board of Supervisors took further public action to articulate a clear position on renewable energy projects that are being proposed for construction in the desert portions of the County². A copy of this position statement is Attachment “1.” In this policy statement, the County identifies four critical issues it faces from the proliferation in the desert of renewable energy projects such as Abengoa: (1) Endangered species mitigation which frequently requires the acquisition of acreage in multiples of the project area; (2) Infrastructure impacts, such as those to emergency services; (3) Impacts to ongoing operations and maintenance of infrastructure; and (4) Impacts to historical and recognized land use impacts.

In light of this position statement, this Project may be as optimal a large renewable energy project as the County could reasonably hope. Since the Project is located on previously disturbed agricultural land, it does not have the characteristics common to other large projects concurrently making their way through the certification process, most notably the Ivanpah Solar Electric Generating System (07-AFC-5) and the Calico Solar Project (08-AFC-13) which are to be sited on essentially undisturbed biological habitat sites that also have, to some degree, value for wilderness or recreational uses. Thus, this Project is

¹ <http://www.sbcounty.gov/sbco/cob/AG031808/agenda.pdf>

² http://sanbernardino.granicus.com/MediaPlayer.php?view_id=13&clip_id=1712

tasked with the relatively modest mitigation requirement of 118 acres of biological habitat.

Nevertheless, by its very nature as an industrial operation, this Project creates an impact upon County emergency services for which adequate mitigation should be required. For the reasons set forth below, the County posits that proposed Conditions of Certification WORKER SAFETY – 6 and WORKER SAFETY – 7 are improper under the California Environmental Quality Act (“CEQA”).

II.

WORKER SAFETY – 6 and WORKER SAFETY – 7 Constitute Improper Deferred Mitigation under CEQA

As a prelude to the discussion of this topic, the County and the Project applicant had commenced negotiations related to this topic prior to the evidentiary hearing on July 15, 2010. The tenor and content of those discussions led County representatives to believe that a resolution favorable to the applicant and to the County was imminent. Thereafter, for reasons that have not been explained, communications from the applicant ceased. Even so, the County wishes the applicant and the Commission to know that the County believes, with all due respect to the Commission, that the most favorable outcome on this issue will come as a result of negotiation and not as a result of a CEC mandate. But, the County also understands that the applicant is under no obligation to further

involve itself in these discussions, and so the County is compelled to go on record as to these two conditions of certification.

The County posits that the PMPD recognizes that the both the construction and operation of the Project constitutes a dangerous industrial environment. “Workers at the [Project] will be exposed to loud noises, moving equipment, trenches, and confined space entry and egress problems. They may experience falls, trips, burns, lacerations, and various other injuries. They may be exposed to falling equipment or structures, chemical spills, hazardous waste, fires, explosions, electrical sparks, and electrocution.” (PMPD, p. 176)

Similarly, the PMPD recognizes that the very nature of the Project poses the risk of fires, large and small. (PMPD, p. 179) As the Project requires the handling of large amounts of natural gas, a risk of fire and explosion exists. (PMPD, p. 196) The heat transfer fluid, also in large quantities on site, is highly flammable. (*Id.*) A possible fire risk exists due to the transmission tie-line (PMPD, p. 103) and inspection of the transmission line rights of way is included in TLSN – 4. (PMPD, p. 110-11) This fire risk is further evidenced in the requirement that the Project include a fire protection water system and portable fire extinguishers. (PMPD, p. 19) Although some of the conditions of certification require that the project applicant address both fire and emergency conditions on site, it is left to the San Bernardino County Fire Department (“SBCFD”) to provide the local public fire protection and emergency services. (PMPD, p. 179)

The PMPD appropriately concludes that the incremental impact of the Project, together with the environmental changes anticipated from past, present, and probable future projects, is cumulatively considerable with respect to fire and emergency services. (PMPD, p. 184)

But fire protection and emergency response are not the only services of the County on which the Project relies. The Commission will charge the SBCFD with:

- reviewing and commenting upon the Construction Emergency Action Plan and the Construction Fire Prevention Plan (PMPD, p. 187, WORKER SAFETY – 1);
- reviewing and commenting upon the Operations Fire Prevention Plan and Emergency Action Plan (PMPD, p. 188, WORKER SAFETY – 2);
- participate in joint training exercises with the applicant and other CEC-licensed solar power plants within the County on an annual basis (PMPD, p. 193, WORKER SAFETY – 9)
- review and comment upon the Hazardous Materials Business Plan, a Spill Prevention, control, and Countermeasure Plan, and a process Safety management Plan (PMPD, p. 201, HAZ – 1);
- review and approve the removal of any underground storage tanks (PMPD, p. 222, WASTE – 1); and

- acting as the Certified Unified Program Authority (PMPD, Appendix A – 36)

The County fully concurs in the PMPD finding of cumulative impact.

Thus, the incremental impact of the [Project], together with the environmental changes anticipated from past, present, and probable future projects, is cumulatively considerable with respect to fire and emergency services. We are persuaded by Staff's evidence (developed in consultation with SBCFD) showing that these impacts can be fully mitigated to less than significant levels if the [Project] funds its proportionate share of SBCFD mitigation activities. At some future time, as indicated by the evidence, there may be need for SBCFD to construct additional fire infrastructure or improve existing fire stations, related fire equipment and staff, or related alternative mitigation measures. (Exs. 301, pp. 5.14-20 – 5.14-21, 306, 313.) (PMPD, p. 184)

To pass muster under CEQA, mitigation that is required to bring the impact level of the Project to below a level of significance cannot be deferred.

In 2010, the California Court of Appeal in *Communities for a Better Environment v. City of Richmond*, 184 Cal. App. 4th 70, re-stated the current legal standard for determining improper deferred mitigation under CEQA and the related policies and goals behind the standard. The Court quotes the relevant standard and authority as follows:

“Formulation of mitigation measures should not be deferred until some future time.” (Guidelines, § 15126.4(a)(1)(B).) An EIR is inadequate if “[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.” (*San Joaquin Raptor*, *supra*, 149 Cal.App.4th at p. 670.) “A study conducted after approval of a

project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA. [Citations.]” (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.)” *Communities for a Better Environment v. City of Richmond*, 184 Cal. App. 4th 70, 92.

In the PMPD, the Presiding Member directs the project owner, in the event no agreement is reached with SBCFD, to fund a study to evaluate funding responsibility for mitigation measures and to project proportionate allocated costs of response services while taking into account tax revenue. The only protocols delineated are: (1) that the consultant be “independent” (project owner is to provide a list); (2) funded by the project owner; (3) the project owner provides the protocols for the study (reviewed by SBCFD, reviewed and approved by CPM); and (4) study is consistent with approved protocols. CPM shall make the final determination on the mitigation.

Worker Safety -6 also calls for a protocol, scope and schedule of work for the independent study and the qualifications of proposed contractor(s), a copy of the completed study showing the precise amount the project owner shall pay for mitigation, and documentation that the amount has been paid. This must be done at least five days before construction.

What is concerning about this condition, is that no criteria or alternatives (besides an agreement between the parties) to be considered are set out. It does no more than require a report be prepared and followed, or allow approval by a state commission without setting any standards. The times are unspecified, except that verification is required at least five days prior to “construction”.

The Court in *Communities* goes on to list examples of cases of improper deferral:

“Numerous cases illustrate that reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA’s goals of full disclosure and informed decisionmaking; and consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment. (See, e.g., *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1396 [conditioning a permit on “recommendations of a report that had yet to be performed” constituted improper deferral of mitigation]; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275 [deferral is impermissible when the agency “simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report”]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [“mitigation measure [that] does no more than require a report be prepared and followed, ... without setting any standards” found improper deferral]; *Sundstrom, supra*, 202 Cal.App.3d at p. 306 [future study of hydrology and sewer disposal problems held impermissible]; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1605, fn. 4 [city is prohibited from relying on “postapproval mitigation measures adopted during the subsequent design review process”].)

Worker Safety -6 appears to do what the Court describes as improper deferral of environmental assessment. The mitigation measure calls for a future study to be done by a consultant selected at an undetermined later time, according to protocols provided by the project owner at some unspecified time. It is labeled as a Condition of Certification, but the Proposed Decision requires that mitigation measures commence with an implementation funding of \$200,000 per Worker Safety -7, without knowing what mitigation measures and costs will actually be determined. Having the costs determined at an unspecified time makes it impracticable for SBCFD to plan, and then

to budget and allocate its resources in furtherance of that plan when the extent of determined mitigation measures is unknown. Hence, the project seems to already have been “rubber stamped”. Even though the study may provide an independent analysis of the cost of mitigation measures, Worker Safety -6 is not truly a condition, but an improper deferral of mitigation.

Moreover, the CEC, through the CPM, will presumably make its decision outside of any public process as the completed study and payment of full costs is to be provided to the CPM at least, and only, five days prior to construction, whereas, all other Worker Safety Conditions subject to approval by the CPM require thirty to sixty days notice. Fundamentally, the development of mitigation measures, as envisioned by CEQA, is not meant to be a bilateral negotiation between a project proponent and the lead agency after project approval, but rather, an open process that also involves other interested agencies and the public. *Communities, supra*, at 93.

Deferred mitigation should be rejected when the onus of mitigation is placed on the future plan and the public is left “in the dark about what land management steps will be taken, or what specific criteria or performance standard will be met” *San Joaquin Raptor, supra*, at 670.

The lead agency and/or project owner is likely to defend the mitigation plan under the same rationale that the oil company articulated in *Communities*:

In defending the greenhouse gas mitigation plan, Chevron emphasizes that CEQA does not always require the details of mitigation measures to be laid out prior to project approval, and in some cases, the best method for mitigating an impact will not be known until after project construction begins. (See Guidelines, § 15126.4.) Deferred selection of mitigation measures is permissible under the following circumstances: “

'[F]or kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process ..., the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. ...' ” (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028–1029.

The lead agency here will likely point to the facts that Worker Safety -7 provides for initial funding to implement mitigation measures, and that no permanent above-ground construction can occur until funding of mitigation pursuant to Worker Safety -6, as arguments why the conditions are not deferred mitigation.

However, the standard for permitting deferred mitigation measures due to practical considerations is a qualified exception, as stated in *Communities*. “[F]or kinds of impacts for which mitigation is known to be feasible, the EIR may give the lead agency a choice of which measure to adopt, **so long as the measures are coupled with specific and mandatory performance standards to ensure that the measures, as implemented, will be effective.**” *Supra*, at 94 (emphasis added). Thus, Worker Safety -6 is devoid of specific and mandatory performance standards, and is arguably improper deferred mitigation.

Also, as addressed earlier, the fact that there is \$200,000 in implementation funding creates an impracticability when the determinative costs of mitigation are unknown at time of project approval. Moreover, the fact that no permanent construction can occur until mitigation funding does not allow precommitment to the project or post-

approval environmental review. CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences. This principle is expressed in section 15069 of the Guidelines.” *Bozung v. Local Agency Formation Com.*, 13 Cal. 3d 263, 283-284 (1975).

Per the foregoing analysis, WORKER SAFETY -6 does constitute an improper deferred mitigation.

III.

The County Should Have Input on the Consultants

Assuming without conceding that WORKER SAFETY – 6 AND -7 pass CEQA muster, fairness dictates that the County be allotted some input on the consultant selected to complete the financial impact analysis.

WORKER SAFETY – 6, section (2) prescribes that the independent contractor be selected and approved by the CEC CPM. Under the second subsection (a) the condition prescribes that the independent consultant shall be selected by the project owner and approved by the CPM. At first glance this is an inconsistency. However, the second subsection (a) is qualified by its next sentence: “The project owner shall provide the CPM with the names of at least three consultants ... from which to make a selection”. Hence, what the project owner is selecting is the list from which the CPM will choose from. Thus, the CPM is selecting and approving the independent contractor as stated in section (2). On the basis of fundamental fairness, the County should request that it may also submit a list of independent contractors, along with their qualifications, from which the CEC CPM may choose. Alternatively, the Project applicant and the

County could each select a consultant who would then together select a consultant, subject of course to the approval of the CPM.

IV.


Conclusion

As industrial scope solar energy projects go, the County has fewer issues in endorsing this than perhaps any others. However, unless the real impacts on County services can be adequately mitigated, that endorsement cannot be unconditional. The proposed conditions WORKER SAFETY – 6 AND WORKER SAFETY – 7 do not satisfy that requirement.

Dated: September 2, 2010

Respectfully Submitted,

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APPLICATION FOR CERTIFICATION
FOR THE **ABENGOA MOJAVE**
SOLAR POWER PLANT

Docket No. 09-AFC-5
PROOF OF SERVICE
(Revised 7/21/2010)

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DECLARATION OF SERVICE

I, Michelle R. Moreno, declare that on September 3, 2010, I served and filed copies of the attached **Comments by Intervenor County of San Bernardino on the Presiding member's Proposed Decision (Docket No. 09-AFC-5)** dated September 2, 2010. The original documents, filed with the Docket Unit, are accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [<http://www.energy.ca.gov/sitingcases/abengoa/index.html>]. 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:

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:

- Sent electronically to all email addresses on the Proof of Service list;
- By personal delivery;
- By delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

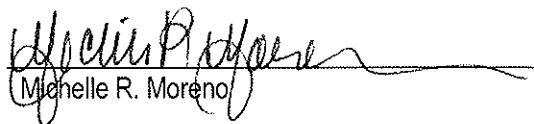
- sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

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

CALIFORNIA ENERGY COMMISSION
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.


Michelle R. Moreno