**STATE OF CALIFORNIA**

**Energy Resources Conservation and Development Commission**

| In the Matter of: | |
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| APPLICATION FOR CERTIFICATION FOR THE GENESIS SOLAR ENERGY PROJECT | DOCKET NO. 09-AFC-8 |

# OPENING BRIEF OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

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Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104
Phone: 415-436-9682 x 307
Direct: 415-632-5307
Cell: 415-385-5694
Fax: 415-436-9683
lbelenky@biologicaldiversity.org

Ileene Anderson
Public Lands Desert Director
Center for Biological Diversity
PMB 447
8033 Sunset Boulevard
Los Angeles, CA 90046
(323) 654-5943
ianderson@biologicaldiversity.org

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## INTRODUCTION

The Center for Biological Diversity intervened in this proceeding in order to ensure the conservation of rare and imperiled species that may be affected by the proposed project including, but not limited to: the Mojave fringe-toed lizard and its habitat; desert tortoise and its habitat; other rare and imperiled species found in this area including migratory birds, golden eagles, and native plants. The proposed project is sited in an extremely remote area on federal public lands that is an integral part of the dry lake and dunes ecosystems. These wild lands are situated in an area that is currently largely untouched by modern human development, has no designated routes providing motorized vehicle access, and is adjacent to a designated wilderness area. The proposed site covers approximately 1,800 acres (nearly 3 square miles) of federal public lands and includes a new transmission line, gas pipeline, and paved access road each approximately 6.5 miles long.

Because there are feasible alternatives to the proposed project, including alternative project sites and distributed renewable energy generation, that would substantially avoid many of the significant impacts of the proposed project to species and habitats and other resources, the proposed project application should be denied in order to comply with the most fundamental substantive requirements of the California Environmental Quality Act ("CEQA"). (Public Resources Code §§ 21002, 21002.1(b).) As detailed below, the environmental review provided to date is inadequate and cannot be relied on by the Commission in approving the proposed project. Despite the Staff's findings to the contrary, constructing the proposed facility and access road in this location will have significant direct, indirect, and cumulative impacts to biological resources many of which have not been adequately addressed in the environmental review, most glaringly, the significant impacts of opening up access to this area to extensive and unregulated motorized vehicle use via the proposed access road.

## STANDARD OF REVIEW AND BURDEN OF PROOF

The Commission has exclusive power to certify sites and related facilities for thermal power plants in California. (Public Resources Code[1] § 25500.) A certificate issued by the Commission may operate in lieu of other permits and supersede most otherwise applicable ordinances, statutes, and regulations. (*Id.*) Accordingly, the Commission itself must determine whether the proposed project complies "other applicable local, regional, and state, . . . standards, ordinances, or laws," and whether the Commission believes the proposed project is consistent with Federal standards, ordinances, or laws. (§ 25523(d); *see also* Siting Regs. § 1752(a).) The Commission may not certify any project that does not comply with applicable LORS unless the Commission finds both (1) that the project "is required for public convenience and necessity" and (2) that "there are not more prudent and feasible means of achieving public convenience and necessity." (§ 25525; Siting Regs. § 1752(k).)

The Commission also serves as lead agency for purposes of CEQA. (§ 25519(c).) Under

[1] All statutory references herein are to the Public Resources Code unless otherwise specified. Citations to "Siting Regs." refer to the Commission's Power Plant Site Certification Regulations, codified in Title 20 of the California Code of Regulations. Citations herein to "CEQA Guidelines" refer to regulations codified in Title 14 of the California Code of Regulations.

CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that "mitigate or avoid" any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. (§ 21081; Siting Regs. § 1755.) These findings must be supported by substantial evidence in the record. (§ 21081.5; CEQA Guidelines § 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.) The Applicant bears the burden of providing sufficient substantial evidence to support each of the findings and conclusions required for certification of the Project. (Siting Regs. § 1748(d).) The Commission must determine whether sufficient substantial evidence is in the record to support its findings and conclusions. In this instance there is insufficient substantial evidence to support the required findings and, therefore, the Commission cannot certify the Project.

## ARGUMENT

## I. APPROVAL OF THE PROJECT WOULD VIOLATE CEQA

The Commission's power plant siting process is a certified regulatory program for purposes of CEQA. (See § 21080.5; CEQA Guidelines § 15251(j).) Although certification exempts the Commission from CEQA's environmental impact report requirement, the Commission still must comply with CEQA's substantive and procedural mandates. (Public Resources Code §§ 21000, 21002, 21080.5; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal.App.4th 656, 667-68.) The Commission must ensure adequate environmental information is gathered and that the environmental impacts of a proposed project are fully identified and analyzed before it is approved. "To conclude otherwise would place the burden of producing relevant environmental data on the public rather than the agency and would allow the agency to avoid an attack on the adequacy of the information contained in the report simply by excluding such information." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 724.) Environmental review documentation "is more than a set of technical hurdles for agencies and developers to overcome." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450.)

The environmental review documents must "contain facts and analysis, not just the agency's bare conclusions or opinions." (*Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 [and cases cited therein].) The environmental review documents "must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Id*.) Because the Revised Staff Assessment ("RSA") is deficient as an informational document the Commission has failed to comply with CEQA. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 717-718 [holding that a misleading impact analysis based on erroneous information rendered an EIR insufficient as an informational document]; *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 357-58 [where baseline was inaccurate "comparisons utilized in the EIRs can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts which would result."].)

### A. The Project Description in the RSA is Incomplete and Inaccurate

CEQA requires a statement of the objectives of the project and a description of the Project in sufficient detail so that the impacts of the project can be assessed. (CEQA Guidelines §15124.) CEQA requires an accurate, clear and stable description of the Project and its impacts. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655.)

#### *1. Project Objectives: The Commission's Objectives Can Be Met Without Approving the Proposed Project*

The Commission's objectives as stated in the RSA relate to specific goals for this project and fulfilling the goals for the California renewable energy portfolio in a timely manner. The specific objectives are: To construct a utility-scale solar energy project of up to 250 MW and interconnect directly to the CAISO Grid while minimizing additions to electrical infrastructure; To locate the facility in areas of high solar insolation; . . . To provide clean , renewable electricity to support California's Renewable Portfolio Standard Program (RPS); To assist in reducing greenhouse gas emissions as required by the California Global Warming Solutions Act; To contribute to the achievement of the 33 percent renewables RPS target set by California's governor and legislature; and To complete the review process in a timeframe that would allow the applicant to start construction or meet the economic performance guidelines by December 31, 2010 to potentially qualify for the 2009 ARRA cash grant in lieu of tax credits for certain renewable energy projects. (RSA at B.2-10.) The Commission has listed these same or similar objectives for other fast track projects for which a Staff Assessment has been released to the public. The RSA states that these objectives will be "used to evaluate the viability of alternatives in accordance with CEQA requirements." (*Id*.) For all of the fast-track solar projects the Commission has virtually the same objectives and approval (or partial approval) of some number of these projects which will further the Commission's goals and objectives. By the same token, however, the approval of *this* proposed project as envisioned by the applicant is not necessary to those goals and objectives.

Further, it is clear that the fast-track solar projects (and other large-scale solar projects) are each reasonable alternatives to the other and should be considered as alternatives to fulfill the Commissions objectives. (*See* CEQA Guidelines § 15126.6 (f) [alternatives should be considered that could feasibly attain most of the basic objectives of the project].) However, to the contrary, staff rejected comparison of the pending applications as part of the alternatives analysis at the outset of the process. (RSA at B.2-54 ["an alternative site on BLM-administered land with a pending application, such as the McCoy Alternative, would not be a reasonable alternative for the proposed GSEP project unless that other application is rejected or withdrawn."]).

Moreover, staff's conclusion that the No Action/No Project alternative "is not superior to the proposed project because it would likely delay development of renewable resources or shift renewable development to other similar areas, and could lead to increased operation of existing power plants that use non-renewable technologies" is both highly inaccurate and misleading. (RSA at B.2-2.) While the No Project alternative would delay development of *this project*, there is no evidence it would delay development of other renewable energy resources or any of the other "fast track" projects so as to increase the operation of existing non-renewable technologies. Further, there is no evidence that the No Project alternative would *shift* development to *similar*

*areas* because development may go forward in other areas where "fast track" projects are proposed *whether or not* this proposed project is approved. Rather, a denial of this application at this site might shift development to *dissimilar* areas that are less remote and/or to previously degraded and disturbed area. Staff's conclusory statements in the RSA and rejection of any analysis of the other "fast track" projects as alternatives to the proposed project not only undermines the Commission's stated objectives but also violates CEQA.

**2. *The Environmental Setting or "Baseline" Information***

The baseline or environmental setting is critical to identification and analysis of impacts. In order to assess the impacts of a project the agency must have detailed and specific information regarding the resources of the project site and the baseline should reflect the project's real-world physical setting—"real conditions on the ground"—rather than "hypothetical situations." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 121, 125; see also *Woodward Park Homeowner's Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-09.) The environmental setting or baseline information must be fair and accurate and cannot understate the value of the environmental resources so as minimize the significance of the impacts of the proposed project. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 725 [finding that failure to adequately describe adjacent riparian habitat and potential for wetlands on the project site "understates the significance of" the river adjacent to the site and avoiding discussion of those resources "precluded serious inquiry into or consideration of wetland areas adjacent to the site or whether the site contained wetland areas."].) Here, the RSA among other defects understated the value of the existing resources, failed to provide adequate baseline information (for example regarding summer/fall blooming plants, invertebrates, and cultural resources), and failed to accurately describe the remote location of the proposed project.

The RSA fails to provide adequate information regarding the biological baseline in order to analyze the impacts to the existing environment particularly information regarding summer/fall blooming plants, invertebrates, and other wildlife including golden eagles. *See* Exh. 830 [I. Anderson].) The RSA provides no specific information on the baseline status of many of these environmental resources that may be significantly affected by the proposed project. While surveys were later provided for golden eagles, essential baseline survey information for summer/fall blooming plants and cultural resources was deferred until after approval of the project. There was no recognition of the need to provide information regarding the potential presence of endemic invertebrates or other insects in the area. *See* Exh. 830 at 4; Exh. 810.

As a result the description of the environmental setting is flawed and these deficiencies "tainted" the impacts analysis, alternatives, and mitigation findings throughout the environmental review. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 742 n.13, 741-42 ["Beginning with an incomplete project description, continuing with an inaccurate and misleading description of the site followed by an inadequate discussion of alternatives and concluding with an incomplete and conclusionary discussion of the cumulative effects of the development project, the FEIR fails to comply with CEQA in all major respects."]; *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal. App. 4th 74, 95 [environmental resources in the project area must be quantified to the extent possible to provide accurate basis for analysis of relevant impacts; "failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals" of CEQA] .)

For example, the RSA consistently downplays the importance of this area to desert tortoise as well as Mojave fringe-toed lizard by focusing narrowly on occupied habitat and attempts to sever the project site from the surrounding landscape. As a result, even the initial identification of the baseline fails to adequately address Aeolian transport, sand movement corridors, and other aspects of the habitat. The project site cannot be seen in isolation but must be analyzed as part of a larger landscape and habitat in which these and other listed, rare and imperiled wildlife and plants survive.

Accurate baseline information is critical to any analysis of the suitability of this site for the proposed project and to a fair comparison of this site and other alternative sites particularly as to feasibility. (*San Joaquin Raptor/Wildlife Rescue Ctr v. Co. of Stanislaus* (1994) 27 Cal. App. 4th 713, 741-42.) In general, the "environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." (CEQA Guidelines § 15125 (a).) Although determination of what constitutes existing physical conditions will vary with the facts of each case, the baseline should reflect the project's real-world physical setting—"real conditions on the ground"—rather than "hypothetical situations." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 121, 125; see also *Woodward Park Homeowner's Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-09.) An agency must clearly and conspicuously identify the assumptions guiding its choice of a baseline, and must support that choice with substantial evidence. (*San Joaquin Raptor v. Co. of Merced* (2007) 149 Cal.App.4th 645, 659.)

### B. The RSA Fails to Disclose and Analyze the Project's Impacts

#### *1. Environmental Review of Impacts to Biological Resources is Incomplete and Inadequate (Direct and Indirect Impacts)*

CEQA grants all lead agencies the right to require a project applicant to submit "data and information" that may be necessary so that the agency can determine whether the proposed project may have a significant effect on the environment. (Pub. Resources Code, § 21160; see also, *Sierra Club*, *supra*, 7 Cal.4th at p. 1220 (holding that section 21160 vests agency operating under a certified regulatory program with authority to require applicant to submit of information, if such information is necessary to enable the agency to determine whether a proposed project will have significant adverse impacts on the environment].) In this matter, the Commission failed to obtain much of the information needed for a full and fair analysis of the impacts of the proposed project particularly regarding impacts to late season summer/fall plants and cultural resources. Moreover, throughout the RSA the Staff failed to consider many direct and indirect effects of the project including the edge effects and habitat fragmentation that cause impacts that spread across the landscape. Because these impacts are not adequately identified or analyzed, the RSA also fails to require that such impacts be fully mitigated.

##### *a. Habitat Impacts Are Not Adequately Addressed*

Habitat loss and fragmentation are two related but different impacts to tortoise and other species in this area that both contribute to declines. The impacts to the desert tortoise habitat from the proposed project are identified but not fully mitigated. As biologists have long recognized, "habitat fragmentation is a major contributor to population declines."[2] Keeping

[2] (Desert Tortoise Recovery Plan at 3, 8.) The 1994 Desert Tortoise Recovery Plan is cited in the RSA and noticable. (available at http://ecos.fws.gov/docs/recovery_plans/1994/940628.pdf )

large blocks of intact habitat reduces edge effects and is one of the keys to recovery for the desert tortoise and to conserving other species in the area including the Mojave fringe-toed lizard. As testimony sponsored by the Center explains, disruption of sand transport corridor and edge effects to lizards and other species in the sand dune community may be significant but are not adequately addressed. *See* Exh. 830 at 4; Exhs. 804, 805. The RSA fails to identify habitat fragmentation as a significant impact of the facility site, the access road, and the transmission line. 7/12 Tr. at 317-18.

Direct impacts to 1,800 acres and the footprint of the paved road are addressed, however the other impacts are not. For example, the RSA provides no analysis of likely roadkill along the road due to construction and operations at either the initial 25 mph speed limit or the 45 mph speed limit staff agreed to as a change after the RSA was issued. 7/12 Tr. at 242.

The RSA also failed to address the impacts of bringing a new paved road 6.5 miles into a previously roadless, remote area that will terminate at the edge of a designated wilderness. *See* 7/12 Tr. at 240. The RSA also failed to disclose the potential impacts from the access road being used by recreationists and off-road vehicles to access areas of the valley that now have no designated routes or motorized vehicle access. The RSA failed to address how such increased human presence, off-road vehicle activity, and noise would affect the remaining wildlife and habitat.

The road is proposed to begin in the existing Wiley Well rest area off I-10 and it is highly likely that it will attract many off –road vehicle users and others seeking to access public lands. However, despite the staff's assertion at hearing that such analysis was undertaken (7/13 Tr. at 108-109) there is no information in the RSA about the likely number or impact of such users on the resources of this part of the valley or the wilderness adjoining the project site. No mitigation measures have been provided to prevent such use for example requiring that the road be gated and guarded with limited motorized vehicle access for the facility only. Notably, the Staff did make such a recommendation to mitigate potential impacts to cultural resources. *See* Exh. 71 Cul-16 ("With the approval of BLM, construct a security gate and/or guard at the south end of the access road to prevent unauthorized access."); 7/21 Tr. at 161-162. The biological section of the RSA should have identified and analyze the potentially significant impacts to biological resources from the access road and asked the Commission to adopt a gate and guard at the south end of the access road as well. In addition, construction workers and operations workers at the facility should be required to be educated about damage to habitats from route proliferation and ORVs use. Workers should be prohibited from bringing personal ORVs (green sticker) to the site and the access road and prohibited from leaving the paved access road, the facility area, or other designated routes (if any) in personal street legal vehicles or work vehicles. The Center does not agree with Staff that this is an issue solely for BLM to address (*see* 7/13 Tr. at 106, 109), because the impacts are significant under CEQA and mitigation for them should have been fully addressed but was not.

In addition to the failure to address habitat fragmentation, is the failure to discuss edge effects. Edge effects around the facility include changes to sand movement and sand sources as well as spread of weeds and other invasive species, and subsidies to predators such as ravens and coyotes. For example, many project features may increase perching opportunities for ravens and

other birds that would prey on Mojave fringe-toed lizards and other small wildlife but these impacts were not accounted for. The RSA and staff testimony also was confused as to whether there would be a "road" around the perimeter of the facility which would both have edge effects and attract use by other vehicles. (7/12 Tr. at 398-404.) It is clear that the applicant intends to access the exterior of the fence at least occasionally for maintenance and thus there will be a "road" around the perimeter of the facility. The edge effects of that road are not identified or analyzed in the RSA. Moreover, it is important to understand that driving even once across these fragile desert landscapes can create the appearance (and the impacts) of a road or route. *See* 7/12 Tr. at 314-15. As has been well documented and Ms. Anderson explained at hearing, "how the problem of route proliferation occurred, is one vehicle would make a track, others would see that and think that it was a legal route - or not, whatever – saw it as a route and took it." 7/12 Tr. at 315. As the RSA admits the area round the facility has no open routes and cross-country travel is not allowed on the public lands in this area. RSA at C.6-6. The access road and other disturbance in the area may attracted route proliferation in this area and those impacts should have been identified and analyzed but were not.

For sand source and sand habitat the RSA had included some additional mitigation at a 1:1 ratio the sand shadow area of 151 acres however the staff withdrew this requirement not based on any change in the impacts to habitat and sand sources but based only on the Applicant's survey data and testimony whether lizards were found in this shadow area on certain days. The issue is not only whether MFTL are found in the sand shadow area on a particular day but whether the area is currently occupied habitat. The larger question is how the presence of the facility on the landscape impacts MFTL habitat down wind and across the landscape—both direct and indirect effects. The sand shadow modeling in this habitat clearly shows that it will be directly impacted by the project and the CEC should *at minimum* require mitigation for those impacts of at least 1:1. In addition, the Center asserts that such impacts likely range far beyond the sand shadow modeled but were not adequately addressed in the RSA.

Edge effects from the road were not adequately addressed either, particularly the effects of increasing the speed limit to 45 miles per hour. It is well established that roads cause depressions in wildlife populations (including desert tortoise) for up to a mile on each side. Desert Tortoise Recovery Plan at pg. D12.

Because many impacts to habitats were not adequately addressed by the RSA, the RSA inevitably provides far too little mitigation for loss of habitat in this area. The 1:1 mitigation ratio proposed by staff is insufficient and the Center sponsored testimony (which was not rebutted) that the mitigation ratio should be at least 2:1. (7/12 Tr. 317-318; Exhs. 830 at 3, 4.) Quite simply, a 1:1 ratio will lead to a net loss of habitat for fringe-toed lizards, tortoise and other wildlife affected by the proposed project.

### *b. Impacts to Birds and Impacts of "Mitigation"*

The RSA does contain some baseline data on bird species that may frequent the area but minimizes the likely impacts and did not include sufficient monitoring requirements. For golden eagles, staff appears to assume that the only impacts are impacts to nesting (*see* 7/12 at 235 (monitoring within one mile of the facility sufficient to protect nests)—however, impacts to eagles also include loss of forage habitat and other impacts. The Center sponsored testimony showing that the RSA failed to adequately identify and analyze impacts to migratory birds from

the project and golden eagles and burrowing owls. (Exh. 830 at 4-5; 7/12 Tr. at 311-312.)

One of the potentially significant impacts of the proposed project that was not adequately addressed is the potential to kill large numbers of birds by singeing or burning or collisions with mirrors. The RSA notes this only in passing and without analysis dismisses this significant impact based on a mis-reading of the cited literature (McCrary et al. 1986, Exh. 820) and ignoring design features of the project. "Results of that study indicated that much of the bird mortality consisted predominantly of collisions with mirrors, in large part resulting from increased numbers of birds attracted to the adjacent evaporation ponds and agricultural fields. For the Genesis Project, staff has concluded that without such a nearby attractant, bird numbers, and hence likelihood of bird collisions, would be low.." (RSA at C.2-97.) While it is true that the McCrary study (Exh. 820) was based on a power tower design which is different, the Genesis Project will have evaporation ponds on site even with dry cooling. Although the testimony was unclear, it appears that the applicant intents to have two ponds of approximately 5 acres each under the dry cooling alternative. 7/12 Tr. at 145. To the extent that the McCrary observations noted that the presence of birds at the site was due in part to the evaporation ponds which attracted birds, the RSA should have noted that the even under the dry cooling alternative there will be large ponds on site that also attract birds and birds will be attracted even if the ponds are netted. 7/12 Tr. at 146 (Dr. Karl), 235 (staff); 312 (I. Anderson). Moreover the McCrary study does not conclude that bird mortality was only associated with the evaporation ponds and agriculture but rather found the following:

> "The most frequent form of avian mortality was from collisions with Solar One structures. . . . From the location of birds in relation to structures, most (>75%) died from colliding with the mirrored heliostats. . . . Thirteen (19%) birds (7 species) died from burning . . . "

(Exh. 820 at pp. 136-37.) Although the study assumed birds were burned or singed by flying into the "standby" points, there were no direct observations of when or how the birds were burned or singed. (Exh. 820 at pp. 137-38.) It is unknown whether birds could be singed or burned given the design of this plant—to our knowledge no bird studies have been undertaken or made public regarding the existing solar trough plants.

If the project is approved, the conditions of certification should include monitoring and reporting of impacts to all bird species, including frequent monitoring for migratory birds during migration seasons. If impacts to birds are greater than were expected in the RSA, a condition should be included to provide additional mitigation measures at a later time.

The RSA also fails to adequately address impacts from some of the "mitigation" measures including tortoise translocation and relocation of burrowing owls. Exh. 830 at 3, 5; Exh. 813, 814, 815.

### *c. Plants*

Under CEQA the terms "endangered," "rare" and "threatened" include species that have been formally listed under state or federal law. (CEQA Guidelines § 15380(c).) In addition, the CEQA Guidelines contain independent definitions of "rare" and "endangered" that expand the scope of species that fall within those terms. (*See* CEQA Guidelines § 15380(b)(2) [rare], (b)(1)

[endangered].) As a result, where a species meets CEQA's independent definitions for rarity or endangered, impacts to the species may be significant and avoidance, minimization and mitigation measures required for those species and, if the impacts remain significant, a mandatory finding of significance may be required pursuant to CEQA even for a species has no specific legal status under CESA or other laws. (See *San Bernardino Audubon Society v. Metropolitan Water Dist*. (1999) 71 Cal.App.4th 382, 391-392.)

For the special status plants already identified in the project area and along the access road and powerline corridors during spring surveys, the RSA properly identified impacts as potentially significant.

**i. Failure to obtain information on late summer or fall blooming plants.**

The RSA provides inadequate information on late summer and fall blooming plants at the proposed project site (RSA at C.2-2 to 2-3, 2-67, 2-101, 2-107 to 2-110.) Staff was aware of the need for summer/fall blooming plant surveys in 2009 and should have required them, but did not.[3] Instead of requiring adequate surveys to identify these resources and form a basis for analysis, Staff instead spent much time and effort first attempting to minimize the likelihood of any summer/fall blooming plants in the area and then crafting BIO-19 which requires that the applicant conduct late season surveys for plants in 2010 (after the evidentiary record is closed) and then mitigate for what is found. Staff concludes that impacts could be significant to late season flowering plants: "Based on consultation with recognized experts in the flora of the California Desert region staff has also concluded that potentially significant impacts to special-status plants could be missed unless additional late season surveys are conducted." RSA at C.2-207. This statement simply assumes that any such significant impacts that may be found, can be mitigated. "Specific triggers for mitigation of any special-status plant detected, and detailed performance standards for mitigation of impacts are included in BIO-19 to ensure that impacts to any special-status plants found during the late season surveys are mitigated to a level less than significant." RSA at C.2-207. This approach is completely backward, does not provide either adequate identification or analysis of impacts, and clearly does not comply with CEQA. As one court recently put it in a similar situation:

> This approach has the process exactly backward and allows the lead agency to travel the legally impermissible easy road to CEQA compliance. Before one brings about a potentially significant and irreversible change to the environment, an EIR must be prepared that sufficiently explores the significant environmental effects created by the project. The EIR's approach of simply labeling the effect "significant" without accompanying analysis of the project's impact . . . is inadequate to meet the environmental assessment requirements of CEQA.

(*Berkeley Keep Jets Over the Bay Committee v. Bd. Of Port Commissioners* (2001) 91 Cal. App. 4th 1344, 1371). Adding a requirement for surveys after CEQA analysis is completed does

[3] The same CEC staff members and contractors were involved in reviewing special status plant impacts for the Ivanpah project which is also in an area with late summer/fall blooming plants. Staff testified that they were aware by February 2009 that inadequate plant surveys had been performed for that project (Ivanpah Transcript for 1/12/2010 at pp. 194 – 196, 197-198.) Staff had sufficient time to require late season surveys for this project in 2009 but staff failed to do so.

nothing to cure the lack of identification and analysis of these resources as required by CEQA.

**ii. Restoration and Revegetation**

The Draft Decommissioning and Closure Plan is wholly inadequate. As explained in testimony sponsored by the Center, which was uncontested: "Desert lands are notoriously hard to revegetate or rehabilitate (Lovich and Bainbridge 1999 [Exh. 819]) and revegetation never supports the same diversity that originally occurred in the plant community prior to disturbance (Longcore 1997). The task of revegetating almost three square miles will be a Herculean effort that will require significant financial resources. In order to assure that the ambitious goals of this revegetation effort is met post project closure, it will be necessary to bond the project, so that all revegetation obligations will met and assured. The bond needs to be structured so that it is tied to meeting the specific revegetation criteria." (Exh. 830 at 7 [I. Anderson].)

Further, the Center raised questions regarding the scope of the plan that have not been addressed by the Commission. "The Draft Revegetation Plan appears to only address the 59.8 acres of temporary construction impacts due to project and transmission line construction. Clearly a more comprehensive revegetation strategy needs to be developed for the entire site of approximately 1800 acres. The strategy needs to include locally developed and collected plant palettes including annual flora, clearly laid out implementation and schedule, success criteria that will over time achieve habitat for species, and include long-term monitoring and weed management plans among other issues." (Exh. 830 at 7.) Again, the CEQA document fails to include essential and comprehensive revegetation plan for this project.

***2. Fire Threats are Not Adequately Identified or Analyzed nor are Impacts of the Proposed Use of Off-Road Fire Rescue Vehicles.***

The RSA mentions the impacts of fire on biological resources only in the context of proliferation of non-native weeds species that may occur due to the proposed project. (RSA at C.2-20.) The RSA fails to adequately identify or analyze the risk of fire or the potential impacts to the surrounding lands if a fire escaped from the site and accordingly also fails to address the mitigation of this impact. Despite the importance of this issue to wildlands, the RSA does not address it and provides only a Worker Environmental Awareness Program which requires "a discussion of fire prevention measures to be implemented." (RSA at C.2-219.)

After the RSA was issued, the staff and the applicant proposed a new "mitigation" regarding fire safety and access that included the applicant purchasing two fire rescue vehicles that would be capable of off-road cross country travel if the new access road or the I-10 are inaccessible in an emergency situation. Clearly, the impacts of such cross-country or off-road travel in this area by such vehicles were not identified or analyzed in the RSA and therefore the Commission has not complied with CEQA in this regard. The Center is aware that the Riverside County Fire Department will likely eventually develop a plan for such emergency access under a variety of scenarios, however, that evaluation has not yet been undertaken. At minimum, impacts to soils, Mojave fringe-toed lizard, and rare plants must be evaluated and restoration and revegetation plans must be required to be instituted after any emergency off-road access does occur.

As the Center's witness testified: "Fire in desert ecosystems is well documented to cause catastrophic landscape scale changes and impacts to the local species." (Exh. 830 at 7 citing

Exhs. 809, 819, 806, 807, 808, 811.) "A fire prevention and protection plan needs to be required to preclude the escape of fire onto the adjacent landscape (avoidance), lay out clear guidelines for protocols if the fire does spread to adjacent wildlands (minimization) and a revegetation plan if fire does occur on adjacent lands originating from the project site (mitigation) or caused by any activities associated with construction or operation of the site even if the fire originates off of the project site." (*Id*.; *see also* 7/12 Tr. at 316-317). This testimony regarding fire impacts is uncontroverted, nonetheless the Staff failed to adequately address this critical issue in the RSA or at hearing. As a result the environmental review is inadequate.

### *3. Cumulative Impacts are Significant and Unmitigated*

Cumulative impacts analysis is a critical part of any CEQA analysis. (*Joy Road Area Forest and Watershed Assoc. v. Cal. Dept. of Forestry* (2006) 142 Cal. App. 4th 656, 676.) Where, as here, the impacts of a project are "cumulatively considerable" for many resources including biological resources, land use, and cultural resources the agency must also examine alternatives that would avoid those impacts and mitigation measures for those impacts. (CEQA Guidelines §15130(b)(3).) In some cases the potential cumulative impacts will be best addressed by compliance with existing regulations (such as land use plans, conservation plans, or clean air act standards), in other cases avoidance and mitigation measures will be site specific, and in some cases new regulations or ordinances may be needed to address cumulative concerns. Here, because the project is inconsistent with the land use plan for the area the cumulative impacts have not been previously addressed nor have adequate alternatives been evaluated or mitigation measures been formulated by the BLM or the CEC.

It is clear that under CEQA cumulative impacts in each instance must be evaluated at the appropriate scale for the resource involved. Thus, for air quality impacts, air basins are generally the scale of the analysis and similarly for water quality and impacts to water resources; for impacts to land use the scale should be the CDCA as a whole. Under such an analysis, the so-called fast-track projects as well as other filed applications which may not yet have draft environmental documents yet are all cumulative to each other within the California desert. As such in considering the cumulative impacts of the proposed project, it is appropriate for the Commission to include analysis of the cumulative impacts of all proposed large-scale solar projects across the scale of the California desert as a whole.

The Center appreciates the change to the dry cooling alternative however cumulative impacts to water resources remain significant and while mitigation is expected, the amount of mitigation remains unclear. For impacts to listed, rare, and imperiled species cumulative impacts is particularly important and should take into account the survival and recovery of listed species, here the desert tortoise, as well as looking at cumulative impacts that may push other imperiled species towards listing, in this case for example, the Mojave fringe-toed lizard. Similarly for other protected species such as the golden eagle, migratory birds and rare plants, the scale of the cumulative impacts analysis should take into account the local, regional, statewide and range-wide impacts to the species of concern.

Cumulative impacts of the project to habitats, land use, and cultural resources are or may be cumulatively considerable in the northern portion of the valley surrounding Ford Dry Lake, the Chuckwalla valley as a whole, the Colorado desert in California, and the CDCA as a whole. For many environmental resources the cumulative effects analysis is inadequate including those

resources where staff had not appropriately identified and analyzed the impacts to the species from the outset such as the summer/fall blooming plants, migratory birds and cultural resources.

Land use impacts are also cumulatively considerable by shifting 1,800 acres from multiple use to an exclusive single use and by bringing a paved road 6.5 miles into a previously roadless, remote area that will terminate at the edge of a designated wilderness. No mitigation measures have been provided for these significant impacts to land use. As discussed above, at minimum, the Commission should require that the road be gated and guarded with limited motorized vehicle access for the facility only. If at some point in the future BLM decides to increase public motorized access to this area it must do so through a plan amendment that undergoes full and adequate environmental review.

For the Mojave fringe-toed lizard the staff found cumulative impacts to be significant and required mitigation which was later drastically reduced at the request of the Applicant seeking to redefine "habitat" as only "occupied habitat" which is incorrect. The impacts to the lizard and its habitat from the project's wind shadow did not change—they remain significant and are unmitigated. In addition, at the scale of the Ford Dry Lake area north of I-10, the cumulative analysis for the Mojave fringe-toed lizards (as well as the desert tortoise and other species) that remain in the area fails to adequately identify or analyze impacts from other industrial projects on these species' habitats due to fragmentation and edge effects (providing little more than a list—not analysis). Moreover, despite Staff's statements to the contrary at hearing, the record is devoid of any analysis of the impacts from the likely increase in off-road vehicle use in the area. As a result the cumulative impacts analysis is fatally flawed.

Although the Staff failed to apply cumulative impacts adequately to many aspects of this project including for example loss of habitat for imperiled species, the Center notes however that staff does appear to understand the most important fundamentals of cumulative impacts analysis (see, e.g., 7/12 Tr. at 451, – that cumulative impacts are particularly important in cases such as this where additional contributions to an already serious problem, are considerable even if they do not in and of themselves "cause" the exceedance. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 721 [concluding that "the standard for a cumulative impacts analysis is defined by the use of the term 'collectively significant' in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality."].) An environmental review is inadequate where it "avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling." (*Id*. [disapproving a "ratio" theory that would allow a conclusion that "the greater the over-all problem, the less significance a project has in a cumulative impacts analysis."].)

***4. Growth inducing impacts***

In addition to significant cumulative impacts, the proposed project will have significant growth inducing impacts. Environmental review documents "must discuss growth-inducing impacts even though those impacts are not themselves a part of the project under consideration, and even though the extent of the growth is difficult to calculate." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 368.)

Growth inducing impacts include "ways in which the proposed project could foster economic or population growth . . . either directly or indirectly, in the surrounding environment" and environmental review should "[a]lso discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment." (CEQA Guidelines § 15126.2(d).) The proposed project "will foster growth in the surrounding environment" and in conjunction with the 6.5 mile road and other facilities will remove obstacles to industrial growth in this remote area; as a result, this project has "characteristic" "which may encourage and facilitate other activities that could significantly affect the environment." (*Id*.) Growth inducing impacts are distinct from and must be analyzed in addition to cumulative impacts of a project.

In determining if a project has growth-inducing impacts, the agency must assess whether the project sets in motion forces that can lead to pressure for growth. In *City of Antioch v. City Council*, the Court found that "the sole reason to construct the road and sewer project is to provide a catalyst for further development in the immediate area" and found that the agency "must analyze [] the road and utility impacts in relation to the most probable development patterns." (*City of Antioch v. City Council* (1986) 187 Cal. App. 3d 1325, 1337, 1336 [holding that environmental review for a proposed road and sewer project was inadequate where "[c]onstruction of the roadway and utilities cannot be considered in isolation from the development it presages. Although the environmental impacts of future development cannot be presently predicted, it is very likely these impacts will be substantial."].) As the court put it, "The size, location and configuration of the roadway and utilities will influence not only the fact but the nature of later development." (*Id*. at 1335.)

So too here, the project as a whole is clearly growth inducing because the 6.5 mile access road it requires will likely provide a catalyst for *further* energy development in this. As a result, the remote placement of this project will likely be a catalyst to further growth in the area that, unfortunately, was not addressed. The proposed project and its new access road would likely steer additional development into remote and fragile desert lands and habitat changing forever the quality of the area from wildlands to an industrial zone. The additional industrial growth would also be inconsistent with the current land use planning in this area and this additional significant impact should have been addressed. Although it is clear that the RSA should have analyzed the growth inducing impacts of the project on the environment and in the planning and land use context, it did not. The failure to undertake such analysis violates CEQA.

The Applicant appeared to recognize the likelihood of the growth inducing impacts of the project placement when they sought a change in the new post-RSA condition Worker Safety-6 regarding funding the all-terrain fire engines such that if a second access road is created in the future (for example, for additional development) this project applicant would no longer be required to fund the all-terrain vehicles as part of the fire protection services. 7/12 Tr. at 394. In sum, the growth inducing impacts of the proposed project are significant and unmitigated.

### C. The Alternatives Analysis in the RSA Fails to Meet CEQA's Requirements

Under CEQA, a lead agency may not approve a project if there are feasible alternatives that would avoid or lessen its significant environmental effects. (Public Resources Code §§ 21002, 21002.1(b).) To this end, a CEQA document is required to consider a range of

potentially feasible alternatives to a project, or to the location of a project, that would feasibly attain most of the project's basic objectives while avoiding or substantially lessening any of the project's significant environmental impacts. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1456.)

Environmental review documents must provide "sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project." (CEQA Guidelines § 15126.6(d).) As the Supreme Court put it:

> The core of an EIR is the mitigation and alternatives sections. The Legislature has declared it the policy of the State to "consider alternatives to proposed actions affecting the environment." (Pub. Resources Code, § 21001(g); *Laurel Heights*, supra, 47 Cal.3d at p. 400.) Section 21002.1, subdivision (a) of the Public Resources Code provides: "The purpose of an environmental impact report is to identify the significant effects of a project on the environment, *to identify alternatives to the project*, and to indicate the manner in which those significant effects can be mitigated or avoided." (Italics added. See also Pub. Resources Code, § 21061 ["The purpose of an environmental impact report is . . . to list ways in which the significant effects of such a project might be minimized; *and to indicate alternatives to such a project*." ].)

(*Citizens of Goleta Valley v. Bd of Supvr's* (1990) 52 Cal.3d 553, 564-65 [italics in original].)

Environmental review documents must also contain sufficient detail to help "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935 [citations omitted].) The discussion of alternatives must be sufficiently detailed to foster informed decision-making and public participation, not simply vague and conclusory. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th at pp. 1456, 1460.) "Conclusory comments in support of environmental conclusions are generally inappropriate.[]" (*Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 [citations omitted].) "An EIR which does not produce adequate information regarding alternatives cannot achieve the dual purpose served by the EIR, which is to enable the reviewing agency to make an informed decision and to make the decisionmaker's reasoning accessible to the public, thereby protecting informed self-government." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 733 citing *Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 392.)

The same requirements apply to an environmental document, like an RSA, prepared as part of a certified regulatory program. (See *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1228-29.) Alternatives must be analyzed in an environmental review document even if measures intended to mitigate a project's significant impacts also are proposed. (See *Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1393-94.)

While the Center appreciates the inclusion of the dry cooled alternative that has now become the proposed project, this alternative alone is not sufficient to provide the needed range.

Staff's conclusory assertions are not supported by specific facts and analysis in any meaningful detail and therefore are insufficient to support a finding that an alternative is infeasible. (See *Preservation Action Council v. City of San Jose* (2006) 141 Cal. App. 4th 1336, 1356-57.) Moreover, the reasons for the staff's rejection of the alternatives during the environmental review varied making any coherent comparison difficult. For example, the Gabrych Alternative which Staff found was feasible and preferred because it could avoid many significant impacts in part due to siting on previously disturbed lands was rejected variously because the CEC could not "approve" it, because "obtaining site control may be more challenging at this site" and because a decision could not be made before the end of 2010 and therefore it would not meet the applicant's objectives. (RSA at B.2-21 to B.2-53).

The only economic issues that are discussed are the applicant's desire to obtain DOE loan-guarantees and ARRA grants—nothing has been disclosed as to the cost to the consumer of the energy that may ultimately be generated from the proposed project nor the cost to the consumer from the new Colorado to Valley transmission line (formerly Devers to Palo Verde two) which will be passed through to the consumer. As a result no meaningful economic comparison could be or was made between the proposed project and other alternatives such as conservation measures, distributed energy projects or moving the proposed project to alternative sites. To the extent that the proposed project is *dependent* on federal loan guarantees and federal grant funding, that is if project itself is economically infeasible without public funding support, then that should be disclosed to the public. Clearly, public funding should not drive decisionmaking regarding environmental impacts. In order to fairly compare economic feasibility of alternatives, the Staff should have provided some economic metric that would put the proposed project on a level playing field with other alternatives rather than only discussing funding in the context of the applicant's proposal.

An applicant's mere assertion of a conflict with project objectives does not render an alternative economically infeasible. On the contrary, recent decisions have clarified that a finding of economic infeasibility must be based upon quantitative, comparative evidence showing that the alternative would render the project economically impractical. (See, e.g., *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1461-62 [holding that applicant's inability to achieve "the same economic objectives" under a proposed alternative does not render the alternative economically infeasible]; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600 [requiring evidence that comparative marginal costs would be so great that a "reasonably prudent property owner" would not proceed with the project]; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356-57 [holding that evidence of economic infeasibility must consist of facts, independent analysis, and meaningful detail, not just the assertions of an interested party].) Thus, the agency's rejection of alternatives based on the applicant's statements without providing any actual comparative cost figures fails to adequately address feasibility of the alternatives.

The RSA also summarily rejected a distributed renewable altervative because "would depend on additional policy support, manufacturing capacity, and lower cost than currently exists to provide the renewable energy required to meet the California Renewable Portfolio Standard requirements. Additional technologies, like utility-scale solar thermal generation, are also necessary." (RSA at B.2-58.) Because costs are not disclosed for this project the Commission

cannot properly reject this environmentally superior alternative on that basis. The Center sponsored testimony from Bill Powers on the treatment of the distributed energy alternative in the RSA showing that the discussion of this alternative was inaccurate and inadequate and that these alternative energy sources are moving forward and provide a feasible alternative to the proposed project. (Exh. 831 at 4-21 [B. Powers]; Exhs. 821-828.) To allow the Staff's logic to control here would undermine *any* feasible alternative and thereby defeat any alternatives analysis in violation of CEQA. The question for the Commission in this matter is whether the impacts of *this* proposed project could be avoided by a feasible alternative. Unfortunately the environmental review failed to address this critical question.

Although the project size is very large, it is relatively modest compared to several of the other fast-track proposals, but none of the other projects is as remote and has as great a potential to expand other uses of adjacent public lands. Because these issues were not addressed in the RSA, the alternatives analysis also did not provide a reasonable range of alternatives that would avoid habitat fragmentation and edge effects, growth inducing impacts for both off road vehicle use and additional industrial uses in this area, and other land use incompatibility.

### D. The Project Will Cause Significant Adverse Impacts that Have Not Been Avoided or Minimized or Mitigated to a Less that Significant Level.

The Project will have significant impacts that have not been avoided or mitigated including impacts to biological resources and significant cumulative and growth inducing impacts. Because identification and analysis of many impacts of the proposed project is inadequate any proffered mitigation measures cannot rationally be found to address the impacts and mitigate for them. For example, the staff did not provide any meaningful assessment of potential impacts to migratory birds or alternatives to avoid or any mitigation measures to lessen such impacts. Similarly, the staff did not provide adequate information or analysis for impacts of the vastly expanded access to the area by motorized vehicles in this part of the Chuckwalla valley and the potential impacts to summer/fall blooming plants are merely assumed. As a result the RSA does not address these issues when reviewing alternatives and proposed no mitigation measures in the RSA that address these impacts to biological resources. F Therefore, the Commission cannot conclude that the impacts are not significant or show that the impacts have been mitigated below the level of significance. Conclusions regarding the effectiveness of mitigation measures must be supported by substantial evidence. (*See, e.g., Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099 at p. 1116-119.)

For the mitigation measures that are proposed, the Center is also concerned that the Staff is relying on estimates for the cost of acquisition of mitigation lands that may be far too low. On the final day of hearings staff sponsored Exhibit 439 (Biological Resource Compensation/Mitigation Cost Estimate Breakdown for use with the REAT-NFWF Mitigation Account - Table of Estimated Costs July 9, 2010) which provides some estimates for acquisition costs that were apparently prepared by the REAT. 7/21 Tr. at 86-87. The Center objected to this exhibit because there was no notice provided and the Center was unable to provide rebuttal testimony without notice at the final day of hearing. 7/21 Tr. at 135, 205-206 (noting objection is preserved).

The Center supports estimating a reasonable cost for mitigation per acre so that the Commission can obtain securities from the applicants. However, the Commission should ensure

that such securities can truly provide the needed mitigation if necessary. The costs should to the extent possible be based on actual comparable acquisitions. While we understand that "comps" may be difficult to find in recent years, there are some. For example, there was information provided by local realtors in the Palen matter before the CEC (09-AFC-7) showing that per acre costs could range up to more than $4,000 per acre.[4] The acquisition of the former Rice airport site in 2009 could also be a useful comparable acquisition for some purposes and the Center has been informed that the price for that purchase was over $5,000 per acre.

The costs included in Exhibit 439 are confusing at best and generally too low to achieve the goals of compensatory mitigation. The $1000 per acre estimate in particular appears to be unreasonably low for good quality desert tortoise habitat or the rare sand habitats that will need to be acquired for mitigation here. The Draft Interim Mitigation Strategy[5] provided actual costs for acquisition for the Coachella Valley MSHCP were estimated to be $5,852 which is likely a far better estimate (at page 14). While $250/acre cost referenced in Exhibit 439 is an improvement over the CVMSHCP which only required $100/acre for enhancement and restoration, it may still be insufficient to meet the short-term goals of initial site work – clean-up, enhancement, restoration. As staff and the applicant are well aware, tortoise fencing, which is an important component of enhancement/restoration for desert tortoise habitat can be quite expensive to install and maintain because of its structural requirements (buried well below the soil surface), installation of culverts to maintain connectivity etc. Additionally, the estimate of $1,450/acre Long-term Management and Maintenance Fund appears to low to cover all of the conservation needs on acquired sites *in perpetuity*.

### E. The Commission Cannot Make the Findings Necessary to "Override" the Project's Significant Impacts Under CEQA.

In order to approve the Project despite its significant environmental impacts, the Commission must find (1) that mitigation measures or alternatives to lessen these impacts are infeasible, and (2) specific overriding benefits of the Project outweigh its significant environmental effects. (§ 21081; Siting Regs. § 1755.) Here the Commission's objectives can be met without the proposed project—that is, under the No Action/No Project alternative. Even assuming for the sake of argument alone, that the identification and analysis of environmental impacts were adequate, which it is not, as explained above, the alternatives analysis fails to provide sufficient meaningful analysis of alternatives that could avoid the significant impacts of the project. As a result, the record does not contain substantial evidence to support either of the findings necessary to "override" a significant impact under CEQA.

Neither the Applicant nor Staff has demonstrated that all of the considered or rejected off-site alternatives or the distributed alternatives are infeasible. An off-site alternative and the

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[4] Comments by Kenneth B Waxlax of Peter Murray and Associates Real Estate: 2010-05-07_Peter_Murray+Associates_Comment_Letter_Re_Real_Estate_TN-56601. This document was submitted to the CEC and is available at http://www.energy.ca.gov/sitingcases/solar_millennium_palen/documents/index.html

[5] This document was prepared by DFG for the CEC et al., is officially noticeable, and relevant. Available at http://www.energy.ca.gov/33by2020/documents/index.html Staff stated they were aware of this document and that the proffered Exh. 439 "replaced" the table regarding costs from existing plans including the CVMSHCP. 7/21 Tr. at 89.

distributed alternative are feasible, the Commission cannot make the findings required to "override" the Project's significant impacts.

Nothing in CEQA states that an alternative may be found infeasible solely due to a conflict with the *applicant's* objectives. The statutory definition of "feasible" does not even mention the applicant's objectives. (Pub. Res. Code § 21061.1.) In fact, the CEQA Guidelines expressly provide that a feasible alternative may impede achievement of those objectives to some degree. (*See* CEQA Guidelines § 15126.6(a), (b).)

In any event, because the RSA failed to adequately identify and analyze a number of the proposed project's impacts that may be significant, as detailed above (particularly regarding birds, summer/fall blooming plants, edge effects, habitat fragmentation, and impacts to cultural resources). Because significant impacts have not been accurately identified and analyzed, no mitigation has been proposed. Therefore, the Commission has no basis to conclude that mitigation of these impacts is infeasible. Finally, there is inadequate evidence to support a finding that the proposed project's benefits outweigh its significant effects. On this record, therefore, the Commission cannot make the findings necessary to "override" the Project's significant environmental impacts under CEQA.

## II. THE PROJECT IS INCONSISTENT ENVIRONMENTAL LAWS

### A. Approval of the Proposed Project Would Violate CEQA and May Violate Other State Laws

As detailed above, the CEQA review for the proposed project to date is inadequate and therefore the Commission's approval of this project would violate CEQA. Because the environmental review is incomplete it is impossible to determine the full impacts of the project. Nonetheless, it appears that the proposed project may also violate the following State laws. California Native Species Conservation and Enhancement Act, (Fish & Game Code, §1755), provides that it is the policy of the state to maintain sufficient populations of all species of wildlife and native plants and the habitat necessary to ensure their continued existence at optimum levels. Given the lack of summer/fall surveys for other rare plants the Commission cannot find that approval of the proposed project would comply with this policy. Similarly, the Commission cannot find that the project complies with the Native Plant Protection Act (Fish & Game Code, § 1900 *et seq*.), which regulates the taking endangered or rare native plants. Because impacts to birds were not adequately assessed, the Commission also cannot find that the proposed project would be consistent with the Fish and Game Code, section 3513, which prohibits take of any migratory nongame bird as designated in the Migratory Bird Treaty Act.

### B. Federal LORS

The proposed project may also violate the National Environmental Policy Act (NEPA), the Federal Land Policy Management Act ("FLPMA") (43 U.S.C. §1701 *et seq*.), the Migratory Bird Treaty Act (16 U.S.C. § 701 *et seq*.), the Bald and Golden Eagle Protection Act (16 U.S.C. § 668 et seq.), and other federal laws, ordinances, regulations and standards. As part of FLPMA, Congress designated 25 million acres of southern California as the California Desert Conservation Area ("CDCA"). (43 U.S.C. § 1781(c).) Congress declared in FLPMA that the CDCA is a rich and unique environment teeming with "historical, scenic, archaeological, environmental, biological, cultural, scientific, educational, recreational, and economic

resources." (43 U.S.C. § 1781(a)(2).) Congress found that this desert and its resources are "extremely fragile, easily scarred, and slowly healed." (*Id*.) For the CDCA and other public lands, Congress mandated that the BLM "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." (43 U.S.C § 1732(b).) The proposed project will unnecessarily cause undue degradation of excellent desert tortoise habitat and, after 30 years of exclusive use, leave an enormous scar on the desert that not heal for centuries. As the staff correctly noted, the siting of the proposed project's single use is inconsistent with federal land use planning and FLPMA's multiple-use mandate.

As detailed in the Center's comments on the DEIS provided to the BLM, the site-specific environmental review for the proposed project also fails to meet the standards of NEPA and therefore BLM has also failed to comply with the NEPA. Moreover, the BLM has begun, but not completed, a planning process that will consider many of the impacts of large-scale industrial solar power plants and look at the issue of appropriate siting across the southwestern states. Accordingly, piecemeal approvals of large-scale industrial solar power plant projects may undermine the ability of BLM to make rational planning decisions.

As discussed above, the environmental review does not adequately identify or analyze impacts to birds from the proposed project although the proposed project may have significant impacts to migratory birds and golden eagles habitat and foraging. Therefore, it is impossible for the Commission to find that the project is consistent with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act both of which prohibit take.

### C. The Commission Cannot "Override" the Project's Noncompliance with State and Federal LORS.

"[T]he Commission has consistently regarded a LORS override [as] an extraordinary measure which . . . must be done in as limited a manner as possible." (*Eastshore Energy Center, Final Commission Decision, October 2008 (06-AFC-6) CEC-800-2008-004-CMF*, at p. 453 [quotation omitted].) In order to approve a project that conflicts with LORS, the Commission must make two independent findings: (1) that public convenience and necessity require the project, and (2) that there are not more prudent and feasible means of achieving public convenience and necessity. (§ 25525; Siting Regs. §§ 1752(k), 1755(b).) Neither finding can be made on the record here. As discussed above, the Center disagrees with the Staff's assessment that the only significant and unmitigated impacts of the project are cumulative impacts to visual resources and land use. Indeed, it is impossible to see how Staff could have reached this conclusion given the incomplete information regarding many resources including birds and other wildlife, summer/fall blooming plants, and cultural resources.

#### *1. Public Convenience and Necessity Do Not Require the Project.*

The Applicant has not met its burden of presenting substantial evidence to support a finding that public convenience and necessity require this project. (*See* Siting Regs. § 1748(d).) The phrase "public convenience and necessity," depending on the facts presented, can mean anything from "indispensable" to "highly important" to "needful, requisite, or conducive." (*San Diego & Coronado Ferry Co. v. Railroad Com. of California* (1930) 210 Cal. 504, 511-12.) A more recent decision defines the phrase as meaning "a public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are denied, to their detriment,

that which is enjoyed by others similarly situated." (*Luxor Cab Co. v. Cahill* (1971) 21 Cal.App.3d 551, 557-58.) In *Eastshore*, the Commission stated that its practice is to balance the benefits of each project against the public purposes of the LORS with which it conflicts. (See *Eastshore* at p. 455.) Under any of these tests, public convenience and necessity do not require this Project, and as a result it cannot be certified.

***2. There are more prudent and feasible means of achieving the Commission's goals***

While it is undoubtedly true that California must move forward with the development of new sources of clean, renewable energy, there is no reason, and now showing on this record, that such energy projects must be built in such a remote location in habitat for rare and imperiled species. Although the Commission has been pressing to rush this process forward, there is no showing that the public will be inconvenienced or handicapped in any way if the Commission takes the time to ensure that feasible alternatives are fully explored and renewable power plants are properly sited. To that end as well, the Commission could choose to supplement the existing environmental review to obtain additional needed information (for example on summer/fall blooming plants, birds, and cultural resources) and provide adequate CEQA review of this application including feasible alternatives.

As the Commission is aware, there are many opportunities for development of renewable energy in closer proximity to urban load center where there are areas appropriately zoned for industrial development. (*See* Exh. 831[B. Powers].) Moreover, additional opportunities are emerging every day for siting large-scale industrial renewable energy projects on previously damaged or disturbed lands. Indeed, approximately 30,000 acres of former agricultural lands in the Westlands Water District may soon be available to provide 5,000 MW of utility-scale solar development. (Exh. 831 at 21-23.)

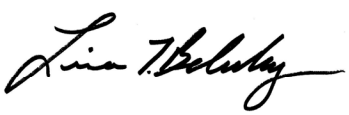
Alternative renewable energy projects are being proposed, built, and brought on line in many areas beyond of the California desert as well. While clearly some solar development will go forward in the California desert, there is no showing that siting an industrial-scale solar facility in this remote area is necessary, particularly when other feasible alternatives exist and have not been adequately explored.

**CONCLUSION**

In light of the above, the testimony, exhibits and public comment submitted in this matter, the Center urges the Commission to deny the application until and unless adequate CEQA review is provided including a meaningful range of alternatives, adequate minimization and mitigation measures are provided, and the project is shown to comply with all Federal, State, and local LORS.

Dated: August 3, 2010

Respectfully submitted,



Lisa T. Belenky, Senior Attorney
Center for Biological Diversity

351 California St., Suite 600
San Francisco, CA 94104
Direct: 415-632-5307
Fax: 415-436-9683
lbelenky@biologicaldiversity.org

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA**
**1516 NINTH STREET, SACRAMENTO, CA 95814**
**1-800-822-6228 – WWW.ENERGY.CA.GOV**

**APPLICATION FOR CERTIFICATION FOR THE *GENESIS SOLAR ENERGY PROJECT***

**Docket No. 09-AFC-8**

***PROOF OF SERVICE***
**(Revised 7/23/10)**

APPLICANT
Ryan O'Keefe, Vice President
Genesis Solar LLC
700 Universe Boulevard
Juno Beach, Florida 33408
*e-mail service preferred*
Ryan.okeefe@nexteraenergy.com

Scott Busa/Project Director
Meg Russel/Project Manager
Duane McCloud/Lead Engineer
NextEra Energy
700 Universe Boulvard
Juno Beach, FL 33408
Scott.Busa@nexteraenergy.com
Meg.Russell@nexteraenergy.com
Duane.mccloud@nexteraenergy.com
*e-mail service preferred*
Matt Handel/Vice President
Matt.Handel@nexteraenergy.com
*e-mail service preferred*
Kenny Stein,
Environmental Services Manager
Kenneth.Stein@nexteraenergy.com

Mike Pappalardo
Permitting Manager
3368 Videra Drive
Eugene, OR 97405
mike.pappalardo@nexteraenergy.com

Kerry Hattevik/Director
West Region Regulatory Affairs
829 Arlington Boulevard
El Cerrito, CA 94530
Kerry.Hattevik@nexteraenergy.com

APPLICANT'S CONSULTANTS
Tricia Bernhardt/Project Manager
Tetra Tech, EC
143 Union Boulevard, Ste 1010
Lakewood, CO 80228
Tricia.bernhardt@tteci.com

James Kimura, Project Engineer
Worley Parsons
2330 East Bidwell Street, Ste.150
Folsom, CA 95630
James.Kimura@WorleyParsons.com

COUNSEL FOR APPLICANT
Scott Galati
Galati & Blek, LLP
455 Capitol Mall, Ste. 350
Sacramento, CA 95814
sgalati@gb-llp.com

INTERESTED AGENCIES
California-ISO
e-recipient@caiso.com

Allison Shaffer, Project Manager
Bureau of Land Management
Palm Springs South Coast
Field Office
1201 Bird Center Drive
Palm Springs, CA 92262
Allison_Shaffer@blm.gov

INTERVENORS
California Unions for Reliable
Energy (CURE)
c/o: Tanya A. Gulesserian,
Rachael E. Koss,
Marc D. Joseph
Adams Broadwell Joesph
& Cardoza
601 Gateway Boulevard,
Ste 1000
South San Francisco, CA 94080
tgulesserian@adamsbroadwell.com
rkoss@adamsbroadwell.com

Tom Budlong
3216 Mandeville Cyn Rd.
Los Angeles, CA 90049-1016
tombudlong@roadrunner.com

Mr. Larry Silver
California Environmental
Law Project
Counsel to Mr. Budlong
*e-mail preferred*
larrysilver@celproject.net

Californians for Renewable
Energy, Inc. (CARE)
Michael E. Boyd, President
5439 Soquel Drive
Soquel, CA 95073-2659
michaelboyd@sbcglobal.net

Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104
lbelenky@biologicaldiversity.org

Ileene Anderson
Public Lands Desert Director
Center for Biological Diversity
PMB 447, 8033 Sunset Boulevard
Los Angeles, CA 90046
ianderson@biologicaldiversity.org

OTHER
Alfredo Figueroa
424 North Carlton
Blythe, CA 92225
lacunadeaztlan@aol.com

ENERGY COMMISSION

JAMES D. BOYD
Commissioner and Presiding Member
jboyd@energy.state.ca.us

ROBERT WEISENMILLER
Commissioner and Associate Member
rweisenm@energy.state.ca.us

Kenneth Celli
Hearing Officer
kcelli@energy.state.ca.us

Mike Monasmith
Siting Project Manager
mmonasmi@energy.state.ca.us

Caryn Holmes
Staff Counsel
cholmes@energy.state.ca.us

Robin Mayer
Co-Staff Counsel
rmayer@energy.state.ca.us

*Jared Babula
Co-Staff Counsel
jbabula@energy.state.ca.us

Jennifer Jennings
Public Adviser's Office
publicadviser@energy.state.ca.us

## DECLARATION OF SERVICE

I, Lisa Belenky, declare that on August 13, 2010, I served and filed copies of the attached Opening Brief of CBD, dated _____, 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:
**[http://ww.energy.ca.gov/sitingcases/genesis_solar].**

The documents have 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**
Attn: Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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.

L Belenky