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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:

APPLICATION FOR CERTIFICATION
FOR THE GENESIS SOLAR ENERGY
PROJECT

DOCKET NO. 09-AFC-8

**REPLY BRIEF OF
INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY**

August 11, 2010

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INTRODUCTION

The Center for Biological Diversity's Opening Brief addressed many issues regarding this proposed project that need not be repeated on reply. To summarize briefly, 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, and there are feasible alternatives to the proposed project that were not adequately addressed (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. Therefore, the Center asserts that the Commission has failed to comply with CEQA and the proposed project cannot lawfully be approved. In addition, the proposed project fails to comply with other LORS and therefore should not be approved.

The Center has also raised concerns that the rush to decision in this case (and others), is being fueled by funding deadlines that have created bureaucratic momentum for project approval. As a result, the accelerated approval process for multiple projects in the California desert has undermined adequate environmental review¹ and full and fair public participation. Further, the scale of this and other large-scale industrial solar power projects now proposed for the California desert is unprecedented; both individually and collectively these projects will have significant impacts on biological resources, soils, water, and other resources across a broad landscape. Unfortunately, these landscape-scale impacts have not been adequately addressed here or in any previous land use planning process by the BLM or any other Federal or State agency.

Against this backdrop, the Center offers the following reply to respond to specific issues raised by other parties in the briefing to date.

ARGUMENT

I. Cumulative Impacts of the Proposed Project are Significant

The Center agrees with Staff to the extent Staff has addressed the standard for cumulative impacts and correctly shows that under CEQA cumulatively considerable impacts can be found even where the contribution of an individual project to the problem is not alone significant. *See* Staff Opening Brief at 1-2. The Applicant's assertions that the proposed project does not contribute to cumulative impacts to land use are not persuasive particularly given that the applicant focuses solely on recreational "use" that may be lost and ignores other multiple uses that will be lost, most importantly, as wildlife habitat.

As the Center explained in our Opening Brief, land use and visual resources are not the only cumulative impacts that are significant. The project will also have significant cumulative impacts to water resources (even under the dry cooling alternative), cultural resources, wildlife, and potentially other resources. For example, the impacts to rare plants have not yet been fully

¹ Nonetheless, the Center recognizes the hard work that Staff has done and that Staff has been burdened by the short timelines and multiple project approvals.

identified or analyzed and, therefore, no conclusion can be drawn on the potential cumulative impacts to those species at this time. Moreover, growth inducing impacts are significant.

II. Impacts of the Use of All-Terrain Fire Engines Has Not Been Adequately Evaluated

Staff asserts that the use of the all-terrain fire engines should be exempt from review under the CEQA exemptions for emergencies. Staff Opening at 8; *see also* Genesis Reply Day 1 and 2 at 10. While Staff is no doubt correct that *in an emergency situation* there is no need to stop and comply with CEQA, that exemption *does not apply* now when the Commission is considering approval of a proposed project and at a time that planning can be done to minimize impacts that may occur in an emergency. Certainly Staff recognizes that fire plans are necessary as it requires them for the project. Planning for how the proposed all-terrain fire engines may be used is also both necessary and prudent.

Genesis claims that the potential for any need for emergency response is “extremely low.” Genesis Reply Day 1 and 2 at 10. However, it is untrue that no emergency response has occurred at SEGS plants in the past. In fact, in 1999 there was a large fire at the SEGS I plant in California.²

If it were true that the likelihood of any emergency occurring at a time when the access road was unavailable were are remote as Staff and the Applicant now assert, then there would be no need for the all-terrain fire engines which were proposed in lieu of a secondary access road. This is not the case here. While we all hope that no emergencies of any kind will occur at this facility if it is built, the use of the all-terrain fire engines is not a remote possibility, but rather a real possibility with potential impacts that must be addressed. Below the Center suggests that a specific condition could be adopted to address this issue.

III. Changes and Additions to the Proposed Project Conditions of Certification

The Center does not believe that the inadequacies in the environmental review and the poor choice of a project site can be remedied through Conditions of Certification. Nonetheless, the Center has participated in several workshops regarding specific conditions of certification and discussed conditions at hearing and in our Opening Brief that would improve the proposed project. These include, but are not limited to, issues regarding dry cooling, mitigation for groundwater impacts, and conditions proposed by Staff in the visual resources component that would have conflicted with best practices for raven control. *See, e.g.*, 7/12 Tr. at 455-57 (discussing importance of including single pole which minimizes raven predation in conditions.) Thus, the Applicant is simply wrong in stating that intervenors, including the Center, have not “objected to or specifically recommended different conditions of certification.” Genesis Opening Br. for Day 1 and 2 at 8.

² *See, e.g.*, http://www.nrel.gov/csp/troughnet/power_plant_data.html.

In order to assist the Committee, assuming for the sake of argument alone that the proposed project may be permitted, the Center provides the following **summary of recommendations for additions or changes to the conditions of certification**:

Bio- ___: Limited Road Access (New Condition)

With the approval of the BLM, the facility owner will construct a security gate and provide a guard 24 hours per day at the south end of the access road to prevent unauthorized access. Use of the access road will be restricted to activities associated with construction and operation of the proposed project, and the gate shall be kept locked after hours of operation, for the protection of wildlife, cultural sites, the public, and facilities within the ROW. Workers will be prohibited from bringing personal off-road vehicles (i.e., green sticker vehicles) to the site or onto the access road and workers will be prohibited from leaving the paved access road or the facility area in work vehicles or any personal vehicles brought to the site.

The facility owner will provide an educational unit to both construction workers and operations workers at the facility regarding legal limitations on off-road vehicle use, damage to habitats and species that may occur from route proliferation and from any off-road vehicle use off of designated routes and roads.

Rationale: As the Center explained in our Opening Brief the potential impacts of the use of the road as a new access to public lands in this area have not been adequately evaluated and are likely significant. Only by requiring that the new access road be closed to the general public can the Commission provide needed protections to ensure public safety and avoid many of the potential environmental harms from the road (that have unfortunately not yet been adequately evaluated). BLM has required limiting access to roads for wind energy projects in California in the past, (7/12 Tr. at 249; Mark Massar, BLM) and BLM routinely provides for limited access roads for oil and gas exploration and development (*see* BLM 9113 Manual (BLM 1985) and the Surface Operating Standards for Oil and Gas Exploration and Development (RMRCC 1989) aka the Gold Book).

As BLM has explained:

Oil and gas roads that are not closed to public use (through the use of gates or other traffic control devices) have the potential to serve secondary uses, such as providing access for hunters and other recreational users who may not be familiar with the road and area. Therefore, safety is a primary design consideration. Roads also have the potential to cause environmental harm through erosion, air pollution, stream degradation, habitat alteration, and increased public use of an area. . . . In areas of high environmental sensitivity, special road location, design, and construction and maintenance techniques may be required, as well as seasonal vehicular closures to the general public.

“Gold Book” at 21 (formally titled Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development) available at:
http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/best_management_practices/gold_book.html

One study of an industrial scale wind site in the California desert concluded that limiting access to roads can protect species and habitats under such circumstances.

Most of the wind energy operations in the area prohibit or greatly restrict access by the public with locked gates, no trespassing signs, and barbed wire fences. This eliminates or greatly minimizes negative impacts associated with vandalism, illegal collection of plants and animals, off-highway vehicle use, and other human impacts (Fish and Wildlife Service, 1994; Brooks, 1999; Lovich and Bainbridge, 1999). In effect, the areas become preserves if they are large enough to meet the needs of the species living therein.

Lovich and Daniels at 720.³ The Center urges the Commission to adopt this or a similar condition of certification so that any Commission approval for the project will match the conditions that BLM has also been urged to adopt.

• **Bio-__ : Monitoring and Reporting Requirements for Both Construction and Operations:**

The facility owner will be required to provide access to the site for monitoring on site and in the surrounding area for impacts to biological and cultural resources during construction and operations as part of a long-term coordinated effort to acquire information about the impacts of large-scale solar projects on the resources of the California Desert for planning and other purposes.

Rationale: Coordinated monitoring and reporting for all large-scale solar developments in the desert is critical to long-term planning and conservation in the California deserts. As the DRECP science advisors recently stated in their draft report:

Given uncertainties about the impacts of diverse renewable energy developments and associated infrastructure on covered species and communities, DRECP should reverse this typical approach by *immediately developing and implementing monitoring protocols and securing access to lands proposed for renewable energy development.* Researchers from governmental and nongovernmental research

³ Lovich, J. E. and R. Daniels. 2000. Environmental characteristics of desert tortoise (*Gopherus agassizii*) burrow locations in an altered industrial landscape. *Chelon. Conserv. Biol.* 3:714-721. Recognizing that the evidentiary record is closed, the Center is not providing a copy of this reference at this time but has copies available should any of the parties wish to review this study.

institutions must have access to lands proposed for development before, during, and after construction and operation of energy developments and appurtenance structures. Access prior to construction is necessary to characterize ecological baseline conditions in and near proposed developments and thus allow Before/After—Control/Impact (BACI) sampling designs (Green 1979). BACI designs allow for much stronger inference about impacts of developments on biological resources than the “after-the-fact” monitoring typically implemented by conservation plans. Results of these studies should be used to evaluate impacts during and after construction, and use the results to inform future developments. Moreover, the plan should initiate some systematic, landscape-scale sampling across the study area to better characterize baseline environmental conditions prior to implementation of large-scale energy developments and further climate change. These recommendations are expanded on in Section 6.4.

The advisors recommend obtaining additional scientific input as soon as possible to assess monitoring priorities, metrics, sampling designs, and related matters to implement at renewable energy projects permitted during within the coming months or year. Solid baseline sampling should occur as soon as possible, prior to any construction. Monitoring designs and protocols can be modified over time, but it is essential that initial sampling is robust to any likely changes to ensure comparable data over time.

Public Review Draft Recommendations of Independent Science Advisors (August 2010) for The California Desert Renewable Energy Conservation Plan (DRECP) Prepared For Renewable Energy Action Team: California Department of Fish & Game, U.S. Fish & Wildlife Service, U.S. Bureau of Land Management, California Energy Commission at 79 (emphasis in original).⁴ As the Independent Science Advisors further explain:

“A critical issue is that access to researchers must be established in potential renewable energy development areas before, during, and after development.”

Id. at 85 (emphasis in original). Moreover, it is critically important to gather comprehensive baseline information for the DRECP. *Id.* Therefore, all projects covered under the DRECP planning agreement (which includes the proposed project and other fast-track solar projects in the DRECP planning area as “Existing Projects” *see* DRECP

⁴ Available at <http://www.drecp.org/documents/index.html#science>. The Center asserts that this document issued in August 2010 should be officially noticeable. Moreover, even if it were not, it should be considered in this context. Given the expedited timeline and the ongoing, relevant planning efforts by the Commission and other agencies, the Center believes that it is of critical importance to ensure that the Committee and the Commission are aware of the most up-to-date relevant information in the context of this proposed project approval.

Planning Agreement⁵ at 2 (citing Fish and Game Code § 2069(b)) should participate in the efforts to gather information needed for the DRECP planning process as well as ongoing monitoring and should be required to allow access to the sites for gathering such data.

- **Bio-16/Bio-21: Avian Protection Plan:**

In addition, biological monitoring at the site will include monitoring and reporting of impacts to all bird species, including frequent monitoring for migratory birds during migration seasons and monitoring of the evaporation ponds. Any dead or injured birds will be reported immediately to the California Department of Fish and Game and all carcasses of dead birds will be preserved for evaluation. Reports on all monitoring efforts will be provided to the Commission and the California Department of Fish and Game **on a quarterly basis at minimum**. If impacts to any birds are found to be greater than were anticipated in the Staff Assessment, the Commission reserves the right to impose additional mitigation requirements and conditions at any time.

- **Bio-12:** Compensatory mitigation shall be **2:1** for desert tortoise habitat outside critical habitat and **5:1** for desert tortoise habitat within critical habitat.

- **Bio-13:** Raven Control: The facility owner will not construct lattice poles for any power line (or gen-tie), only mono-poles will be used to limit raven perching and nesting in the area.

- **Bio- 20:** In addition, require full mitigation for the **151 acres** of sand shadow area as part of the mitigation for impacts to Mojave fringe-toed lizard habitat at a ratio of at least **2:1**.

- **Bio-24: Revegetation and Restoration for Both Temporary and Long-term Disturbances:**

The facility owner will in addition prepare a restoration and revegetation plan for restoration of the entire site and the access road at the end of the project term. The facility owner shall also prepare a plan for revegetation and restoration of natural areas after fire.

- **Bio-28: Golden Eagles:** Monitoring should be expanded beyond monitoring of nests to include monitoring of forage areas. The distance from nests for monitoring should be 10 miles as stated in the RSA not the shorter distance as later agreed by Staff and the Applicant.

⁵ Available at <http://www.energy.ca.gov/2009publications/REAT-1000-2009-034/REAT-1000-2009-034-F.PDF> This document was adopted by the Commission and therefore is officially noticeable.

- **Bio- __/Worker Safety: (New Condition) Emergency Access Plan for All-Terrain Fire Engines:**

The facility owner will develop (by a date certain) in conjunction with the Riverside County Fire Department a plan for emergency access to the facility under various emergency scenarios that will minimize impacts to species and habitats. Scenarios should include circumstances where the main access road is blocked due to traffic or accidents on Interstate 10. At minimum, impacts to soils, desert tortoise, Mojave fringe-toed lizard, and rare plants must be evaluated and restoration and revegetation plans must be developed for implementation if any emergency off-road access does occur that damages these resources.

IV. Modifying Conditions to Allow for Project Phasing

The Applicant requests language in the conditions that would allow for commencement of limited construction and Staff rejects this proposal. The Center agrees with Staff that the Applicant's proposal as stated should be rejected. The proposal is too general and vague and could undermine adequate review and approvals of plans for construction or limited construction. However, assuming for the sake of argument alone that the proposed project is approved, the Center believes that there may be a basis for compromise if the Applicant identifies a specific area for initial, limited construction activities and provides completed plans that would support construction in that limited area.

CONCLUSION

In light of the above, the Center's Opening Brief, 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 proposed project is shown to comply with all Federal, State, and local LORS.

Dated: August 11, 2010

Respectfully submitted,



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

Docket No. 09-AFC-8

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(Revised 8/5/10)**

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DECLARATION OF SERVICE

Aug 11 Lisa Belenky declare that on Aug. 11, 2010, I served and filed copies of the attached Reply Brief, dated Aug 11, 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://www.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:

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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.

