

## DOCKETED

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**STATE OF CALIFORNIA**

**Energy Resources Conservation  
and Development Commission**

In the Matter of:

NEXTERRA BLYTHE SOLAR ENERGY  
CENTER, LLC'S REVISED PETITION TO  
AMEND - CONVERSION TO PV BLYTHE  
SOLAR POWER PROJECT

DOCKET NO. 09-AFC-6C

**INTERVENOR LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL UNION NO. 1184's  
PREHEARING STATEMENT AND EXHIBIT LIST**

November 13, 2013

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On behalf of Laborers' International Union of  
North America, Local Union No. 1184

## I. INTRODUCTION

Pursuant to the November 1, 2013 Notice of Evidentiary Hearing, as amended via e-mail by Raoul Renaud on November 8, 2013, Intervenor Laborers' International Union of North America, Local Union No. 1184 ("LIUNA") submits the following Prehearing Statement and Exhibit List for the upcoming Evidentiary Hearing scheduled for November 19, 2013 on the Blythe Solar Power Project.

### **a) The subject areas that you believe are complete and ready to proceed to Evidentiary Hearing.**

LIUNA has limited its technical comments to Air Quality, Worker Safety and Fire Protection (relating to the adequacy of PM10 mitigation for Valley Fever), and Biological Resources. LIUNA believes that the Staff Assessment should be substantially revised to acknowledge the Project's significant air quality impacts and reevaluate the adequacy of proposed mitigation measures in light of those significant impacts. Nevertheless, LIUNA believes that the Air Quality subject area as well as Biological Resources and Worker Safety subject areas are ready to proceed to Evidentiary Hearing but will be requesting the Committee to remand the Staff Assessment back to staff for appropriate modifications and additional review of mitigations relating to Air Quality as well as to order modifications to various Biological Resources mitigations and monitoring requirements.

### **b) The subject areas that you believe are not complete and not yet ready to proceed to Evidentiary Hearing, and the reasons therefor.**

LIUNA believes the Commission's review of the Air Quality subject area would be well-served by additional review prior to an Evidentiary Hearing by staff accompanied by amendments to the Staff Assessment acknowledging clear significant air quality impacts from the Project's emissions of PM10 and ozone precursors, and the availability of additional feasible measures that will reduce or perhaps eliminate those remaining impacts. Nevertheless, LIUNA believes these issues are adequately joined such that proceeding to the evidentiary hearing is appropriate.

### **c) The subject areas that you believe remain disputed and require adjudication, and the precise nature of the dispute for each subject area.**

The Air Quality, Biological Resources, and Worker Safety and Fire Protection (relating to the adequacy of PM10 mitigation for Valley Fever) subject areas remain in dispute and require adjudication.

For the Air Quality subject area, the precise nature of the remaining disputes are set forth in LIUNA's comments dated October 23, 2013 (Exhibit 5006), and the comments of Dr. Petra Pless, dated October 23, 2013. Dr. Pless's comments and

attachments are resubmitted with this prehearing statement as LIUNA Exhibits 5000 through 5004. The Air Quality disputes include, but are not limited to, the following:

1. The Staff Assessment fails to apply the relevant air quality background numbers and, as a result, understates the significance of the Project's PM10 emissions and do not accurately assess the project's compliance with the applicable 24-hour and annual PM10 standards.
2. The Staff Assessment fails to acknowledge significant air impacts and standard exceedances from the Project's emissions of PM10 and ozone precursors that will result even after the proposed mitigations are applied. Despite that fact, the Assessment does not address the findings required by 20 C.C.R. § 1755(d) and 1752(k). Nor has the Assessment explored or required all feasible mitigation measures that could further reduce those impacts.
3. Condition of Certification AQ-SC4 regarding visible dust plumes is inconsistent with Mojave Desert Air Quality Management District Rule 401. The Condition would only be applied at off-site occupied buildings which are a half-mile or more away. Rule 401 (as well as Rule 403) apply at the Project's property line. This condition induces violations of the rule rather than implementing the air quality protection rules.
4. The description of the Project's decommissioning actions and discussion of that phase's associated air quality impacts is improperly deferred.
5. Additional feasible mitigations include the following:
  - a. AQ-SC4 must be applied at the Project's property line.
  - b. Worker Safety-8(2) should specifically incorporate the additional measures and construction shutdown provisions contained in AQ-SC4.
  - c. A temporary stop work requirement should be included whenever average wind exceeds 15 mph or peak winds exceed 25 mph.
  - d. VOC emissions should be mitigated by requiring natural gas-powered employee shuttles for workers staying in or near Blythe, Indio, and Ehrenberg.
  - e. PM and NOx emissions from on-road diesel-powered vehicles associated with the Project be controlled by requiring either i) 90 percent of such vehicles be EPA Smartway partners, or ii) require all on-road diesel vehicles to be equipped with California Air Resources Board-certified Tier 3 pollution control equipment capable of 85 percent reduction of PM and 25 percent reduction of NOx.

For the Biological Resources subject area, the precise nature of the remaining disputes are set forth in Dr. Shawn Smallwood's testimony dated November 8, 2013. Dr. Smallwood's testimony is resubmitted with this prehearing statement as LIUNA

Exhibit 5005. The Biological Resources disputes include, but are not limited to, the following:

1. The burrowing owl habitat mitigation is insufficient because it is based only on acknowledgement of six burrows and actual observation of a few individual owls rather than the 92 instances of owl sign observed throughout the project site.
2. The Staff Assessment is incorrect in asserting that bird collision rates cannot be estimated, although estimates must factor in the uncertainty of any quantification. Dr. Smallwood predicts that bird collisions at the Blythe Solar Project could be from 1,046 collisions/year to as many as 5,231 collisions per year.
3. Avian behavior surveys at the site should be conducted in advance of construction.
4. As designed, the Project does not apply feasible mitigation to address impacts to at least one sensitive plant species. The proposed solar panel arrays should be repositioned where feasible to avoid destruction of sensitive plant species. In particular, the panels in Unit 4 should be rearranged to avoid the approximately 2,000 individuals of critically-imperiled Abram's spurge located in the northwest portion of the proposed Unit 4.
5. Various mitigation plans, including the Biological Resources Mitigation Implementation and Monitoring Plan and the Bird and Bat Conservation Strategy ("BBCS") are too general for the public or the Commission to review the effectiveness of any mitigation measures that may result from their application, amounting to improper deferred mitigation. Thus for habitat mitigation for the desert tortoise, there is not even any indication that any suitable habitat is available for purchase in the project area and, hence, there is no evidence that habitat destroyed by the Project will in fact be mitigated. Likewise, because the REAT program has not been subjected to any public review, it's effectiveness to mitigate habitat impacts is unknown. As for the BBCS, whether or not a technical advisory committee ("TAC") will be appointed remains unclear and the terms of the critical adaptive management strategy are left to be devised in the future. The Staff Assessment should analyse and discuss how or whether any of the general measures listed in the Staff Assessment will mitigation bird mortality encountered at the Project.
6. The TAC should be a condition the existence of which should not be subject to the discretion of the CPM. The composition of the TAC is not specified. To be effective, the TAC must include one or more experts with specific expertise regarding bird collisions and solar panel facilities. To the extent important details of the various mitigation plans will be prepared in the future, those

documents should at least be made available for public review and comment before being approved by the CPM.

7. The Staff Assessment over-emphasizes the need to include in reporting and analysis only those fatalities whose cause of death can be clearly attributed to the facility.

**d) Sponsored Witnesses.**

Given the short notice for the evidentiary hearing, LIUNA’s two experts are not available to appear either in person or telephonically at the November 19, 2013 evidentiary hearing. LIUNA requests an extension of the evidentiary hearing in order to facilitate the availability of witnesses.

**e) Subject areas upon which you desire to question other parties’ witnesses.**

With the exception of the Staff Assessment, LIUNA is unaware of the identities or qualifications of any other witnesses that may appear at the November 19, 2013 evidentiary hearing. LIUNA requires time to question each of the staff’s and applicant’s witnesses presenting testimony in the following areas: Air Quality, Biological Resources, and Worker Safety (as it relates to Valley Fever and particulate matter emissions). The scope of LIUNA’s questions will generally track the comments and written testimony submitted by LIUNA and its consultants and identified as Exhibits 5000 through 5006 below. LIUNA estimates that it would need 45 minutes of time for questions relating to Air Quality and 30-minutes of time for questions relating to Biological Resources.

**f) A list identifying exhibits and declarations that each party intends to offer into evidence and the technical subject areas to which they apply.**

Exhibit	Docket Transaction Number	Title of Document (from Docket Log)	Subject Areas
5000	201027	<a href="#"><u>Michael R. Lozeau Comments: LIUNA Comments on Staff Assessment - Part A for the Proposed Blythe Solar Power Project (09-AFC-6C) [Exhibit A]</u></a>	AIR, WS&FP
5001	201027	<a href="#"><u>Michael R. Lozeau Comments: LIUNA Comments on Staff Assessment - Part A for the Proposed Blythe Solar Power Project (09-AFC-6C) [Exhibit A]</u></a>	AIR, WS&FP
5002	201027	<a href="#"><u>Michael R. Lozeau Comments: LIUNA Comments on Staff Assessment - Part A for the Proposed Blythe Solar Power Project (09-AFC-6C) [Exhibit B]</u></a>	AIR, WS&FP
5003	201027	<a href="#"><u>Michael R. Lozeau Comments: LIUNA Comments on Staff Assessment - Part A for the</u></a>	AIR, WS&FP

		<a href="#"><u>Proposed Blythe Solar Power Project (09-AFC-6C) [Exhibit C]</u></a>	
5004	201027	<a href="#"><u>Michael R. Lozeau Comments: LIUNA Comments on Staff Assessment - Part A for the Proposed Blythe Solar Power Project (09-AFC-6C) [Exhibit C]</u></a>	AIR
5005	201152	<a href="#"><u>Testimony of K. Shawn Smallwood, Ph.D.</u></a>	BIO
5006	201027	<a href="#"><u>Michael R. Lozeau Comments: LIUNA Comments on Staff Assessment - Part A for the Proposed Blythe Solar Power Project (09-AFC-6C)</u></a>	AIR, BIO, WS&FP

Because, prior to LIUNA being granted intervenor status, a number of the documents were submitted as single transactions on the Project’s docket, the actual title of the referenced exhibits are as follows:

- Exhibit 5000: Petra Pless, D.Env., Pless Environmental, Inc., “Review of Staff Assessment for Amendment to Blythe Solar Power Project (09-AFC-6C)” (Oct. 23, 2013)
- Exhibit 5001: Curriculum Vitae of Petra Pless, D.Env.
- Exhibit 5002: Mojave Desert Air Quality Management District, “California Environmental Quality Act (CEQA) And Federal Conformity Guidelines” (Feb. 2009)
- Exhibit 5003: Matt Hagemann, P.G., Ch.G., SWAPE, “Comments on the Draft Environmental Impact Report for the Pioneer Green Energy Project, Kern County, California (Jan. 3, 2013)
- Exhibit 5004: Gregory A. House, AFM, ARA, CPAg, House Agricultural Consultants, Comments on Selected Agricultural Issues of Pioneer Green Solar Project, Kern County, California (Feb. 2013)
- Exhibit 5005: Testimony of K. Shawn Smallwood, Ph.D., on Behalf Of Laborers’ International Union Of North America, Local Union No. 1184 (Nov. 8, 2013)
- Exhibit 5006: Michael R. Lozeau, Lozeau Drury LLP, LIUNA Comments on Staff Assessment - Part A for the Proposed Blythe Solar Power Project (09-AFC-6C) (Oct. 23, 2013).

**g) Subject areas for which the Petitioner will seek to introduce evidence supporting a Commission override.**

LIUNA does not intend to introduce evidence in support of any Commission override of impacts to Air Quality or Biological Resources. LIUNA believes additional mitigations must be applied to address these subject areas where significant impacts will remain even after staff’s proposed mitigation measures are applied, as is the case for Air Quality impacts and avian bird impacts.

**h) Proposals for briefing deadlines, impact of scheduling conflicts, or other scheduling matters.**

As noted above, LIUNA's expert consultants are not available for the evidentiary hearing scheduled for November 19, 2013. LIUNA requests an extension of the evidentiary hearing in order to attempt to secure the presence of one or both of their expert consultants. LIUNA requests that the Commission panel allow the parties to submit closing briefs within three weeks of the close of the evidentiary hearing and reply briefs, if any, one week after receipt of the closing briefs.

**i) For all subject areas, a description of any proposed modifications to the proposed conditions of certification listed in the Staff Assessment (SA).**

1. Amend condition of certification AQ-SC4 (Dust Plume Response Requirement) to apply at Project's property line, rather than occupied structures a half-mile or more away from the Project boundary.

2. Amend condition of certification AQ-SC4 (Dust Plume Response Requirement), to specify that the dust abatement and temporary shutdown requirements laid out in Step 1 through 3 of this measure apply at the wind speeds specified in MDAQMD Rule 403(e), *i.e.*, when the wind speed instantaneously exceeds 25 mph or when the wind speed averaged over 15 minutes exceeds 15 mph.

3. Amend WORKER SAFETY-8(2) to specify that the dust abatement and temporary shutdown requirements laid out in Step 1 through 3 of this measure apply when PM10 concentrations per WORKER SAFETY-8(2) exceed  $50 \mu\text{g}/\text{m}^3$ .

4. In order to substantially reduce VOC emissions from construction worker commuter vehicles, Applicant must establish natural-gas powered shuttle buses with pick-up locations in the three towns where construction workers will likely lodge or reside, *i.e.*, Blythe and Indio in California and Ehrenberg in Arizona, and provide incentives for use of shuttle by workers.

5. In order to reduce combustion exhaust emissions from other on-road vehicles during construction of the Modified BSPP such as concrete trucks, delivery trucks, cabling trucks, electrical trucks, structural steel trucks, etc., require a) that ninety percent of the truck carriers contracted by the Applicant be EPA SmartWay partners or b) that the Applicant contract with truck carriers whose on-road diesel powered vehicles are equipped with CARB-certified Tier 3 pollution control equipment, capable of achieving at least 85 percent reduction in particulate matter and 25 percent reduction in nitrogen oxide emissions.

6. Add in a condition applying the above Air Quality mitigations to the Project's decommissioning phase.

7. Add in findings pursuant to 20 C.C.R. § 1755(d) and 1752(k) to address remaining impacts to Air Quality from the Project's PM10 and ozone precursor emissions after application of the above additional conditions.
8. Amend BIO-15 to require the formation of a technical advisory committee (TAC), rather than wait CPM's request.
9. Amend BIO-15 to identify minimum qualifications of TAC members. The biological monitor needs the oversight of a qualified TAC. Condition should require that TAC be composed of three PhD-level scientists with demonstrated expertise in impact monitoring. The Condition should make clear that the TAC is able to set its own meeting schedule and agenda, and acts as an independent body. The provision that the CPM has the authority to dissolve the TAC should be deleted.
10. Amend BIO-7, to require that the BRMIMP be prepared well in advance of construction and that the BRMIMP be released for public review and comment prior to approval. LIUNA believes that a draft BRMIMP should be available for comment already, prior to Commission approval of the Project modification. The suggested change to BIO-7 is in the alternative and assumes that the BRMIMP was not subjected to public review prior to Project approval.
11. The Conditions should be amended to require that the location of panels in Unit 4 be relocated to avoid the approximately 2,000 individuals of critically-imperiled Abram's spurge located in the northwest portion of the proposed Unit 4.
12. Add in a mitigation requiring compensatory mitigation in the form of donations to local wildlife rehabilitators.
13. Amend BIO-15 to require that links the biological monitoring and adaptive management to the Project's development phases, with the timing, planning, and mitigation of each phase linked to fatality thresholds of earlier phase(s). Building the project without regard to the fatality and behavior monitoring will mean that the phases subsequent to Phase 1 will derive no benefit from what was learned from the monitoring. The environmental impacts will therefore remain unchanged, when they could have been reduced in later phases.
14. BIO-15 should be amended to require qualified biologists to search the ground on foot between solar panel arrays twice monthly for at least three years to determine whether collision fatalities are an issue. The searches should be conducted randomly or for systematically selected arrays of solar panels, covering at least 33% of the project area. Frozen fresh carcasses of birds and bats should be placed at random locations within the fatality search intervals on a periodic basis, such as weekly.

15. BIO-15 should be amended to require that, if collision fatalities are deemed to be an issue by the TAC or CPM, then fatality monitoring should continue for another two years beyond the three-year period identified by staff.

16. The BBCS should include a requirement that the Project perform an analysis of the pattern of fatalities to identify spatial or other trends that can inform mitigation measures to reduce fatality rates. The BBCS also should require flight behavior surveys to be performed during one-hour sessions prior to construction to reveal flight paths and trends in behaviors. Most of the behavior surveys should be performed during the early morning and late evening hours, but nocturnal surveys should also be done using a high-end thermal imaging camera. The nocturnal surveys should last two to three hours per session, due to set-up time and the risks of damaging the imaging equipment. The objectives of flight behavior surveys would be to: (1) establish whether specific portions of the project area should be avoided, and (2) explain fatality patterns so that mitigation measures can be formulated, if possible.

## **Conclusion**

LIUNA appreciates this opportunity to participate in the Commission's proceeding on the Blythe Solar Power Project. We look forward to the evidentiary hearing.

Dated: November 13, 2013

Respectfully Submitted,

LOZEAU|DRURY LLP

Original signed by \_\_\_\_\_  
Michael R. Lozeau  
Attorneys for Laborers International Union of  
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