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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:

BLYTHE SOLAR POWER PROJECT
AMENDMENT

Docket No. 09-AFC-06C

ENERGY COMMISSION STAFF REPLY BRIEF

INTRODUCTION

In almost every energy project before the Commission, comment is received requesting a reduced acreage project or a project using photo voltaic technology. The Blythe Amendment does both and in the process reduces all of the impacts identified in the original project. While there are many inferences, myths and assumptions cluttering the factual landscape, this amendment provides all the benefits of renewable energy while reducing project impacts. With this reply Staff will attempt to correct some misperceptions.

RESPONSES TO COMMENTS RAISED BY CRIT

COMMENT: *The amended project is sufficiently different from the licensed thermal project that the Commission needs to consider the amended project as a new project and start the environmental review over.*

RESPONSE: The idea of needing to start over is simply incorrect. First, Public Resources Code section 25500.1 requires the Commission to utilize its amendment process under section 1769 of title 20 of the California Code of Regulations. Under the law, the Commission cannot require the filing of a new Application for Certification and

start the process over. Second, it makes no practical sense to start over for a license amendment that reduces all of the impacts. This would certainly discourage project owners from proposing project amendments that reduce impacts. The California Environmental Quality Act (CEQA) only requires a subsequent or supplemental Environmental Impact Report if the project change results in more severe impacts than originally identified or if there are new types of significant impacts. (CEQA Guidelines section 15162 and 15163) It is arguable that under CEQA, as opposed to the Commission's process, no additional environmental assessment would have been needed prior to approving the amendment. But the Commission's process requires a Staff assessment of the proposed modifications and Staff has analyzed the changes for any potential significant environment impacts.

COMMENT: *Native American groups, including CRIT were not provided adequate notice or opportunity to participate in the original or current proceeding.*

RESPONSE: Commission Staff has made concerted and dedicated efforts to ensure adequate engagement by tribal groups, the public, other agencies and environmental groups. In the Staff Assessment, part B, eight pages of testimony detail the outreach efforts made during the original solar thermal case and the current amendment. (Exhibit 2001 pp 4.3-32 to 4.3-40)

Despite the Native American Heritage Commission's finding that there were no sacred or otherwise important objects or places around the project site, Staff and the project owner made efforts to contact 15 area tribes including CRIT member tribes, Mohave and Chemehuevi, to engage them regarding the project. (Exhibit 2001 p. 4.3-33) The results of this effort included requests by the Cahuilla tribe for the project to use Native American monitors and qualified archaeologists. (Exhibit 2001 p. 4.3-34) These suggestions were incorporated into the Cultural Conditions.

The outreach efforts by the Commission and project owner are only half the story. In parallel with the state's efforts, the BLM also initiated its consultation process targeting the same area tribes. In its 2009 introductory letter, the BLM noted that it along with the Energy Commission would be performing the environmental review of the project.

Again CRIT, Chemehuevi and others were invited to participate. (Staff Exhibit 2001 p. 4.3-35) Beyond letter writing and phone calls, meetings and site visits were scheduled throughout 2010. The 2013 amendment triggered another round of tribal consultation.

Commission Staff even took the time to meet with Alfred Figueroa, an active Native American participant, out at the Blythe site. Staff took seriously Mr. Figueroa's concerns and investigated his claims. (Exhibit 2001 p. 4.3-39 to 4.3-40)

COMMENT: *The project is not making any effort to avoid archaeological sites as all proposed mitigation consists of data recovery.*

RESPONSE: Superior to mitigation of impacts is project design changes that avoid the impacts altogether and eliminate the need for mitigation. That is exactly what this amendment is doing, i.e. offering a redesigned project that eliminates a number of impacts by avoiding sensitive biological and cultural areas. This amendment actually represents the second version of the PV project. The original PV project was to be up to 1000 MW and be the same size as the licensed solar thermal project, therefore impacting all of the same cultural sites. (Petitioner's Exhibit 1002) In an effort to avoid impacts and reduce the need for mitigation, the PV project was redesigned a second time to move away from the big horn sheep range, avoid some large washes and avoid a number of identified cultural sites. (Staff Exhibit 2001 pp. 4.2-201 to 4.2-202, 4.3-104 to 4.3-111)

In addition to the project redesign to avoid cultural sites, the PV project will reduce the total grading, reduce the depth of earth removal and eliminate drainage, power block excavation and natural gas line trenching. All of these project redesign elements will result in artifacts being undisturbed. (Petitioner's Exhibit 1006) The entire amendment represents cultural resource avoidance.

Beyond the post-licensed project redesign to eliminate impacts to cultural resources, the proposed mitigation incorporates avoidance measures in the Cultural Resources Monitoring and Mitigation plan.

All impact-avoidance measures (such as flagging or fencing) to prohibit or otherwise restrict access to sensitive resource areas that are to be avoided during ground disturbance, construction, and/or operation shall be described. Any areas where these measures are to be implemented shall be identified. The description shall address how these measures would be implemented prior to the start of ground disturbance and how long they would be needed to protect the resources from project-related impacts. (Staff Exhibit 2001 p. 4.3-142)

The project redesign coupled with the recommended mitigation measures provides a comprehensive avoidance and mitigation package that exceeds what is required for projects in other jurisdictions.

COMMENT: *Artifact discoveries at the Genesis project prove that the Commission's conditions of certification failed and the Blythe project will have the same problems.*

RESPONSE: As an initial matter, the Genesis project cannot be used as a metric for the Blythe project because the Genesis project's location and technology are distinct. Genesis, being located near Ford Dry Lake, was expected to generate a number of cultural artifacts. (Staff Exhibit 2002 response to CRIT's comments, See also Petitioners testimony at the November 19, Evidentiary Hearing) Mitigation was devised to address these finds. For example, the reason monitoring can be required is to address the expectation of finding artifacts. If there was no expectation, monitoring could not be required as part of the mitigation. Genesis, being solar thermal, also has far more soil disturbance than Blythe which results in a greater potential to disturb artifacts.

More importantly, the Genesis mitigation worked as it was supposed to and provides evidence that the Conditions of Certification for Blythe are more than adequate given Blythe's lower propensity to disturb artifacts. (Staff Exhibit 2001 pp. 4.3-1 to 4.3-2) Cultural Resource mitigation is divided into three broad categories. 1) Handling of known sites, 2) Monitoring and 3) Handling of discovered sites. Like all projects licensed by the Commission, the Blythe cultural resource protocols cover all three of these areas.

- 1) Known sites and cultural landscapes: CUL-1, CUL-2, CUL-4 through CUL-14
- 2) Monitoring: CUL-3, CUL-4, CUL-5, CUL-7, CUL-17
- 3) Discovered sites: CUL-3, CUL-4, CUL-5, CUL-7, CUL-17

Given the track record at Genesis, Ivanpah and other solar projects, all evidence indicates that appropriately qualified monitors and cultural resource specialists will be engaged in the Blythe project during construction, will identify unearthed artifacts which will trigger the discovered sites Conditions of Certification and the technical experts will work to implement mitigation measures based on the nature of the artifacts found. (Staff Exhibit 2002 Response to CRIT's comments)

COMMENT: *The original Solar Thermal project's ARRA driven schedule resulted in short cuts that compromised the sufficiency of the cultural environmental analysis.*

RESPONSE: Public Resources Code section 25540.6 gives the Commission 12 months to make a decision on a solar thermal Application for Certification. The original Blythe Application was filed August 24, 2009, and a decision was issued September 15, 2010. (Staff Exhibit 2004) Clearly this time period does not evidence some accelerated corner cutting process and is on par with the time frame directed by section 25540.6. Those who participated in the project review process had adequate time during the 13 months to offer comments, discuss issues and engage Staff.

COMMENT: *The process used to assess impacts to archaeological resources violates CEQA.*

RESPONSE: When a project will impact an archaeological site, a lead agency shall first determine whether the site is an historical resource, as defined in subdivision (a). (CEQA Guidelines 15064.5(c)(1)) For the known sites, staff assumed all were eligible for the NRHP and the CRHR, with the exception of any resources for which staff had sufficient information in hand to determine the resource's ineligibility for either register. (Staff Exhibit 2001 p. 4.3-80) This practice is consistent with CEQA Guidelines 15064.5 because a determination was made prior to issuance of a Commission decision. What

would not be permissible is an assessment that made no determination until after a final decision. The BLM and the State Historic Preservation Officer concurred in Staff's approach. (Staff Exhibit 2001 p. 4.3-79)

After site determination is made, a lead agency shall identify potentially feasible measures to mitigate significant adverse changes in the significance of an historical resource. The lead agency shall ensure that any adopted measures to mitigate or avoid significant adverse changes are fully enforceable through permit conditions, agreements, or other measures. (CEQA Guidelines 15064.5(b)(a)) These requirements are met through the Conditions of Certification imposed on the project as well as requirements issued by the BLM through its Programmatic Agreement. (Staff Exhibit 2003 Blythe Solar Thermal Programmatic Agreement)

CRIT takes issue with the assumption of eligibility. Characterizing all known sites as eligible for listing has the disadvantage of potentially imposing excessive mitigation on the project, beyond actual impacts, because chances are some of the sites do not warrant listing and thus mitigation. But the process is consistent with CEQA .

CRIT cites *Madera Oversight Coalition Inc vs. County of Madera* (2011) 199 Cal.APP.4th 48 to argue that staff's cultural assessment and proposed mitigation violates CEQA. In *Madera*, the county found that four sites qualified as historical resources. As part of the mitigation a post certification verification of eligibility was required. The Court found that neither CEQA nor the Guidelines authorize any mechanism or procedure for undoing an EIR's conclusion that an archaeological site is an historical resource. The Court held:

. . . we conclude that the mitigation measure for the four prehistoric-period sites contained in MM4.5-2(a) sets forth a course of action that is contrary to law. The postcertification verification procedure allows for an environmental decision to be made outside an arena where public officials are accountable.

In this case, as opposed to *Madera*, there is no verification component of the mitigation that would undo the findings of the Final Decision. In addition, the project site in

Madera was not on federal land with the project subject to a Programmatic Agreement. In the Blythe case, both the Conditions of Certification and the Programmatic Agreement require additional field work to refine the application of mitigation and to submit to the State Historical Resources Commission site nominations. (Staff Exhibit 2001 CUL-6) It is possible that based on the data, the State Historical Resources Commission or BLM may not agree that a particular site is eligible but that would not change the Commission's Final Decision regarding eligibility.

Post certification study and mitigation refinement is a necessary and accepted practice under CEQA. Case law and CEQA Guidelines, (15126.4(a)(1)(B)) allow deferral of mitigation where the adopted mitigation measure 1) commits the agency to a realistic performance standard or criterion that will ensure the mitigation of the significant effect and 2) disallows the occurrence of physical changes to the environment unless the performance standard is or will be satisfied.

In *Riverwatch v County of San Diego*, (1999) 76 Cal.App.4th 1428, an EIR was challenged on the grounds that the document deferred preparation of some environmental analysis until California Department of Transportation (CalTrans) had conducted a study. The EIR concluded that the widening of SR 76 would impact the San Luis Rey River floodplain, but that impacts could be mitigated by measures and design elements incorporated into the project. The specific mitigation required was largely dependent on a study to be conducted by CalTrans as part of an encroachment permit.

The court held, "the fact the entire extent and precise detail of the mitigation that may be required is not known does not undermine the EIR's conclusion that the impact can in fact be successfully mitigated."

In *Sacramento Old City Association v City Council of Sacramento* (1991) 229 Cal.App.3d 1011, the court allowed the City of Sacramento to expand its convention center without first deciding upon which of several mitigation options it would eventually carry out.

In *North Coast Rivers Alliance s v Marin Municipal Water District* (2013) 216 Cal.App.4th 614, the court stated when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, and has committed to mitigating those impacts, the agency may defer precisely how mitigation will be achieved under the identified measures pending' further study.

Unlike *Madera*, the Blythe project is on BLM land and subject to a Programmatic Agreement developed under 36 CFR 800.14(b). In the agreement BLM notes that eligibility determinations may be made after a record of decision which may also be after the Commission decision. (Staff Exhibit 2003 p12 of the Programmatic Agreement)

COMMENT: *Staff incorrectly classified the project site as Class M when it actually is Class L therefore the project is not compliant with federal law.*

RESPONSE: The original correct classification of the project site was Multiple-Use Class L. The classification as Class M or Class L does not impact conformance with applicable laws because renewable projects are allowed for both classifications and more importantly, the BLM issued a joint Plan Amendment\Final Environmental Impact Statement and Record of Decision that specifically amended the California Desert Conservation Act Plan to allow solar energy development on the Blythe project site. (See the Blythe PA/FEIS p ES-4, 1-6 to 1-8 and the Blythe Record of Decision page 1 and 13) While the PV project amendment will require a revised Record of Decision, there is no evidence in the record and no comments put forth by BLM that the current classification allowing a solar facility on the project site will change. Therefore Staff's underlying conclusion that the site designation is compatible with a solar power plant is correct.

COMMENT: *BLM uses Visual Resources Management classification methodology that was not discussed by Staff. Therefore, the Staff Assessment is not in conformity with federal requirements.*

RESPONSE: The approved BSPP site is located entirely on land managed by the BLM. BLM has the responsibility to identify and protect visual values on all BLM lands.

BLM is responsible for ensuring that the scenic values of these public lands are considered before allowing uses that may have negative visual impacts. BLM accomplishes this through its Visual Resource Management (VRM) system, a system which involves inventorying scenic values and establishing management objectives for those values through the resource management planning process, and then evaluating proposed activities to determine whether they conform to the management objectives.

California state agencies are not required to use the BLM's VRM system as their aesthetic/visual evaluation method in addressing visual impacts under CEQA and agency permitting authority. Many state agencies have created a design-base classification assessment that has aspects of the BLM's VRM system; such as Caltrans. The BLM is required to use their VRM system on all lands administered by the BLM. The U.S. Department of Defense, U.S. Forest Service, the National Park Service, the Federal Highway Administration, as well as the Energy Commission have their own methods of assessing aesthetic/visual impacts.

The Energy Commission and BLM issued separate final documents for compliance with CEQA and NEPA during the original proceeding and for the pending amendment.

In the Commission Decision for the Blythe Solar Power Project, (Staff Exhibit 2004 pp. 457- 458) it states the "BSPP would result in substantial adverse and unavoidable impacts to visual resources under CEQA, and therefore would be incompatible with surrounding land uses." A Statement of Overriding Considerations was therefore required and was adopted by the Energy Commission for CEQA impacts and LORS noncompliance associated with the project that would not be mitigated to less than significant levels (Staff Exhibit 2004 pp. 539-541) This finding is consistent with BLM's assessment as noted in the Plan Amendment\Final Environmental Impact Statement.

The Right of Way and proposed California Desert Conservation Act land use plan amendment was approved by BLM, therefore, the original solar thermal facility was authorized in accordance with Title V of the Federal Land Policy and Management Act of 1976 and Federal Regulations at 43 CFR part 2800.

Date: December 3, 2013

Respectfully Submitted,

s/ Jared Babula
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