



DEPARTMENT OF FISH AND GAME

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March 28, 2008

Mr. John Kessler
Project Manager
California Energy Commission
1516 Ninth Street, MS
Sacramento, CA 95814

Via mail and facsimile 916.654.3843

Subject: Department Concurrence with the California Energy Commission Staff's Final Staff Assessment for the Victorville 2 Hybrid Power Project (CEC Docket 07-AFC-1)

Dear Mr. Kessler:

The Department of Fish and Game (Department) has reviewed the California Energy Commission (CEC) Final Staff Assessment (FSA) of the biological resource impacts for the Victorville 2 (VV2) Hybrid Power Plant. The Department supports the analysis and conclusions in the FSA. The review of biological resource impacts, conducted by the CEC in consultation with the Department, includes the same type of analysis and mitigation the Department would perform if an Incidental Take Permit (ITP) were the only permitting requirement for the project. The Department, represented by both the Inland Deserts Region and Headquarters, has consulted with CEC staff and management on this project in an effort to ensure consistent and full project analysis and compliance with the California Endangered Species Act (CESA) and California Environmental Quality Act (CEQA), and is in complete support of the analytical methods, analysis, conclusions and mitigation ratios and requirements presented in the FSA.

The Department is providing these comments as the State agency, which has statutory and common law responsibilities with regard to fish and wildlife resources and habitats. California's fish and wildlife resources, including their habitats, are held in trust for the people of the State by the Department (Fish and Game Code §711.7). The Department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitats necessary for biologically sustainable populations of those species (Fish and Game Code §1802). The Department's Fish and wildlife management functions are implemented through its administration and enforcement of Fish and Game

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Code (Fish and Game Code §702). The Department is a trustee agency for fish and wildlife under the California Environmental Quality Act (see CEQA Guidelines, 14 Cal. Code Regs. §15386(a)). The Department is providing these comments in furtherance of these statutory responsibilities and those of CESA, as well as its common law role as trustee for the public's fish and wildlife.

The Department concurs with the staff conclusions regarding mitigation measures that would be required for CESA compliance, including biological monitoring during construction. Pursuant to CESA, and as the Department would require in an ITP process, a habitat compensation ratio of 3:1 would be required to fully mitigate for impacts to Mohave ground squirrel and desert tortoise resulting from this project. Impacts to burrowing owl would also be included in this ratio, although take of this species would not be authorized through an ITP. The rationale for requiring this mitigation ratio is based on several factors:

- The project site is comparatively undisturbed and located adjacent to the Mojave River.
- The project site is located away from other development.
- Creosote rings indicate a unique plant assemblage on site.
- Burrowing owl, desert tortoise and Mohave ground squirrel are all found on site or in the vicinity.
- Due to perimeter fencing and the nature of the proposed project, the project site would be a complete loss of habitat for the species.

Under the ITP process, and as coordinated for this project with CEC staff, the Department must ensure that the impacts of the taking are fully mitigated. This includes the requirement that the compensation lands be demonstrated to be suitable habitat for all the covered species. Acquisition of habitat compensation lands also requires an endowment in order to ensure those lands are managed and maintained for the covered species in perpetuity.

This project will also require a desert tortoise translocation plan which will need to meet the specific requirements identified in the FSA, and other requirements determined through interagency review of the plan, to ensure harm to desert tortoise during translocation is avoided or at least minimized. This is consistent with our ITP process and CESA.

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The CEC staff also has coordinated with the Department and identified the types of requirements that would apply to the project if a Streambed Alteration Agreement was required for impacts to waters of the State.

In addition, the Department has reviewed documents and letters filed by the applicant explaining why they believe a lower habitat compensation ratio is justified. The Department agrees with CEC staff that the information presented in those documents and letters do not justify a ratio lower than 3:1. Although the applicant states the project is in an "urban interface area", our examination of the project site indicates the habitat is of high quality, and is contiguous to open, undeveloped desert supporting additional good quality habitat for both desert tortoise and Mohave ground squirrel. We agree that projects located adjacent to development or on sites that have experienced significant disturbance may result in a lower habitat compensation ratio, but this project does not fall into that category. Moreover, although no agency has designated the project site as consisting of "critical" habitat, our determination of the appropriate ratio is not dependent on such a designation. Rather, we conduct an analysis of the project site, which in this case indicated it provides a large amount of quality habitat for both the Mohave ground squirrel and the desert tortoise which will be completely and permanently lost with the construction and operation of the VV2 project.

Reference to the "California Statewide Desert Tortoise Management Policy (1992)" is misplaced. Senate Bill 879 (Stats. 1997, ch. 567, § 2), which requires the Department to ensure project impacts of authorized take are minimized and fully mitigated, supersedes this document. The Department, in compliance with current Fish and Game Code and CESA, must be able to conclude the project's impacts are fully mitigated and the measures, when taken in aggregate, must meet the full mitigation standard. This requires the Department to view projects on a "case by case" or "project by project" basis and address impacts to species for each specific project.

Reliance on the West Mojave Plan is similarly inappropriate. This plan is not applicable to this project because it was only adopted by Bureau Land Management (BLM) as a Land Use Plan on BLM lands. The existing West Mojave Plan was not adopted by the state or any local agency for use on private lands within the planning area. There are

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no BLM lands affected by this project. In addition, BLM's decision to establish habitat compensation ratios for geographic areas (as opposed to specific projects) as part of its land management activities is not applicable to the process the Department follows in implementing the California Endangered Species Act (CESA).

As indicated above in the rationale for the mitigation ratio, the Department evaluates each project based on a number of factors, such as, but not necessarily limited to, the number of species being impacted, the quality of habitat affected, the proximity to undisturbed habitat, and the degree of habitat lost. Applying this process to the VV2 project resulted in a determination that a 3:1 habitat compensation ratio was required to ensure compliance with CESA.

Finally, the other CESA permits referenced by the applicant were, with one exception, a result of the evaluation process just discussed. In each of those cases, the authorized take was for Mohave ground squirrel only; no desert tortoise were affected by those projects. The Department's review of each project led to a conclusion that the quality of habitat and its proximity to major roads and other development justified the lower ratios used. The one exception – the ITP for the Victor Valley Reclamation Authority Wastewater Treatment Plant – was issued with limited review absent any detailed on-site inspection. As the original project was evaluated at a 3.27:1 mitigation ratio, the Department has not revisited the subsequent permit issued in this case.

In contrast, the Department's review of the VV2 project demonstrates that it will cause the permanent and complete loss of more than 400 acres of habitat that is suitable for and supports both desert tortoise and Mohave ground squirrel. Although there are many other instances where, as with VV2, the facts have led the Department to conclude that higher ratios are required, those project examples would only serve to support the fact already established by the permits referenced by the applicant that projects are evaluated on a case by case basis.

In conclusion, the Department believes the CEC's FSA analysis and conclusions are consistent and complete as required for compliance with CEQA and CESA, and in concurrence with the standards and mitigation which the Department would require under an ITP for the biological resources impacted by this project. The Department further supports the conclusion that failure to require the full mitigation, avoidance, and associated measures as identified in the FSA could result in a significant environmental impact.

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Please feel free to call either Mr. Bruce Kinney, Deputy Regional Manager, at (760) 872-1129, or Ms. Tonya Moore, Senior Environmental Scientist, at (760) 955-8139 with any questions or comments.

Sincerely,



Curt Taucher
Regional Manager

cc: Ms. Caryn Homes, CEC Staff Counsel
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