

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:)

Application for Certification for the Ivanpah Solar)
Electric Generating System)
_____)

Docket No. 07-AFC-5

DOCKET 07-AFC-5

DATE	<u>April 22 2009</u>
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RECD.	<u>April 22 2009</u>
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APPLICANT'S REPLY COMMENTS
REGARDING SCHEDULING ISSUES
THE IVANPAH SOLAR PROJECT

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INTRODUCTION AND SUMMARY

By “Order Directing Comment on a Revised Committee Schedule,” dated March 20, 2009, as revised on April 16, 2009, the Committee, in pertinent part, asked the parties for reply comments on the Status Reports filed by the Parties.

I. STAFF’S STATUS REPORT

Applicant and Staff have a serious yet good-faith disagreement. The Applicant maintains that the Staff is requesting detailed design information that is not legally required at this stage in the proceeding. Staff disagrees.

Notwithstanding the good faith disagreement on the necessity of the requested information, it is important to note that Applicant continues to file documents this week and expects to have all of the information filed next week, the week of April 27th. Against this backdrop, it is clearly time to move this proceeding forward.

As discussed in Section I of the Applicant’s Status Report #8, CEQA and NEPA are informational processes. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure. With the Applicant’s final filings, all information requests are satisfied.

The FSA/DEIS is not a decisional document; it is an informational document. The FSA/DEIS is not the end of the review process; it is the next step in the CEC’s detailed Certified Regulatory Program and the first informational document in the BLM’S NEPA process. Perfection not being required, it is time for the Committee to move this process to the next step in a long, open remaining public process.

Applicant maintains that it has provided sufficient information to meet the requirements of both CEQA and NEPA. Staff disagrees. We look to the Committee to decide on this important matter.

II. BIOLOGICAL OPINION AND TIMING ISSUES

The Parties suggest that the federal Endangered Species Act Section 7 consultation process must be complete before the Commission can take any action on the Ivanpah Solar Project. The Applicant believes that the question of timing for the Biological Opinion should be clarified.

From the federal perspective, BLM staff has stated that the Biological Opinion should be available to the decision makers before the federal Record of Decision (“ROD”) is issued. Applicant agrees with BLM’s views on this NEPA-related matter.

As a matter of state law, the Commission does not need the Section 7 process to be completed before Evidentiary Hearings can be held. Indeed, in its normal course of business, the Commission regularly issues its Final Decision to projects with a condition in Biological Resources that requires, among other things, that the results of the Section 7

consultation be incorporated into the Biological Resources mitigation plan.¹ Thus, as a matter of State law and as a matter of Commission precedent, given that the Commission can give Final Approval before the Biological Opinion is complete, a Biological Opinion is not required for Evidentiary Hearings to begin.

BLM Staff has stated that the Biological Opinion should be available to the decision makers before the ROD is issued. If the CEC's Final Decision and the BLM's ROD occur on the same time line as the Applicant proposed on April 9th, the CEC would likely have the Biological Opinion before its Final Decision or have sufficient information to approve the project with the standard condition requiring incorporation of the Biological Opinion.

III. IS MORE TIME REQUIRED?

No.

Today, April 22, 2009, is Day 539 of this proceeding.

On May 9, 2009 (Day 556), it will be one year from the date when the Applicant filed the Optimization package (Data Response, Set 1D), the project improvements that are often blamed for the delay in this proceeding.

Under the Applicant's proposed Schedule of April 9, 2009 (Status Report #8), there is more than enough time between publication of the FSA/DEIS and the close of Evidentiary Hearings. The Commission's Evidentiary Hearings and the DEIS public comment period are not one in the same, and treating them as a single process that must be perfectly aligned is not required.²

While the Applicant's Proposed Schedule will require diligence on the part of all parties, it is reasonable, especially for a project filed in 2007 that has been extensively studied.

¹ This condition from the Commission's Final Decision in the case of the Colusa Generating Station (06-AFC-09) is typical and recognizes that the Biological Opinion will be obtained post-Commission certification:

BIO-11 The project owner shall provide a copy of the final Biological Opinion per Section 7 of the federal Endangered Species Act obtained from the U.S. Fish and Wildlife Service. The terms and conditions contained in the Biological Opinion shall be incorporated into the project's BRMIMP.

Verification: At least 30 days prior to the start of any site or related facilities mobilization activities, the project owner shall submit to the CPM a copy of the U.S. Fish and Wildlife Service's Biological Opinion. (Colusa Final Decision, p. 198.)

² As one example, the Staff states that "Staff anticipates the need to prepare revisions to the FSA/DEIS that will be reflected in the Final EIS." To be clear, there is no need to revise the Staff's testimony. The FSA/DEIS is the Staff's testimony. It is also the last Staff document in the Commission's process. At the end of Evidentiary Hearings, the Staff's role at the Commission ends and the proceeding is in the hands of the decision makers. Now, if the Staff can assist the BLM Staff in preparing responses to comments in the BLM's NEPA-compliant process, this Staff assistance would be appreciated, given the BLM's staffing constraints, but there is no need to build time into the schedule for a revised FSA/DEIS. Responses to comments are all that is required.

The Ivanpah Solar Project has a power purchase agreement. This is the first large scale solar project in the State, and it sits poised to make the first major contribution to California's Renewable Portfolio Standard and Greenhouse Gas objectives. Significantly, in order to qualify for incentives to spur renewable energy development found in the American Recovery and Reinvestment Act of 2009 (the "ARRA" or the Stimulus package), the Ivanpah Solar Project must begin construction in 2010. To begin construction in calendar year 2010, a Final Decision in this proceeding is required in late 2009 or very early in 2010.

California proudly leads the nation in renewable energy and Greenhouse Gas policies. The early successes are modest, but the goals remain desirable and admirable. The substantial efforts underway will bear fruit over the next decade. As California strives to make these long-term goals a reality, the challenge remains advancing the projects in the pipeline so that the renewable future is only years, not decades away.

Policy makers are quick to tout California's renewable policies, and Sacramento is awash in a green rhetorical wave. It is time for the Committee to promulgate a schedule for the Ivanpah Solar Project wherein the pace of review matches the State's renewable rhetoric.

April 22, 2009

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By  _____

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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on April 22, 2009, I served the attached *Applicant's Reply Comments Regarding Scheduling Issues* via electronic mail and United States Mail to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.



Karen A. Mitchell



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APPLICATION FOR CERTIFICATION
FOR THE *IVANPAH SOLAR ELECTRIC
GENERATING SYSTEM*

DOCKET No. 07-AFC-5

PROOF OF SERVICE
(Revised 4/16/09)

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