

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

DOCKET	
07-AFC-5	
DATE	<u>NOV 16 2009</u>
RECD.	<u>NOV 16 2009</u>

In the Matter of:)
)
The Application for Certification for the)
Ivanpah Solar Energy Generating Station)
)
_____)

Docket No. 07-AFC-5

DEFENDERS OF WILDLIFE
PRELIMINARY PREHEARING CONFERENCE STATEMENT

November 16, 2009

Joshua Basofin
Defenders of Wildlife
1303 J Street, Suite 270
Sacramento, CA 95814
(916) 313-5800 x108 Voice
(916) 313-5812 Facsimile
jbasofin@defenders.org

Introduction

Defenders of Wildlife (“Defenders”) submits this statement pursuant to the Notice of Prehearing Conferences and Evidentiary Hearing. Defenders has strong concerns, as indicated in this statement, regarding the ambitious timeline for these proceedings and the ability of the public to be fully involved in the California Environmental Quality Act (“CEQA”) process for this certified regulatory program.

1. The topic areas that are complete and ready to proceed to evidentiary hearing

Defenders has not been afforded sufficient opportunity to fully analyze all of the topic areas in the FSA/DEIS. The FSA/DEIS was publicly released on November 4, 2009 and Defenders has not yet receive the hard copy. The prehearing conference has been scheduled for November 18, just two weeks after release of the FSA/DEIS. This new schedule is a departure from the previously published committee schedule, which states that the perhearing conference will be held five weeks after the FSA/DEIS is filed. The parties have not been afforded an opportunity to comment on this new schedule. Because the FSA/DEIS review period has been remarkably short, Defenders reserves the right to call witnesses and submit exhibits for each topic area.

In addition, Defenders respectfully requests that the hearing be postponed until January 11, 2010, which is stipulated as an option “if necessary” on the new prehearing schedule. It is in the interest of the CEC and all parties to be afforded adequate time to review the FSA/DEIS and be fully prepare for hearing.

2. The topic areas that are not complete and not yet ready to proceed to evidentiary hearing, and the reasons therefore

As stated above, Defenders reserves the right to address each topic area at the evidentiary hearing. Defenders considers the disputed topic areas listed below to also be incomplete in terms of the information and analysis contained in the FSA/DEIS.

3. The topic areas that remain disputed and require adjudication, and the precise nature of the dispute for each topic

- Purpose and Need:

The FSA/DEIS fails to address risks associated with global climate change in the Purpose and Need section, including both the need for climate change mitigation strategies (e.g., reducing greenhouse gas emissions) and the need for climate change adaptation strategies (e.g., conserving intact wild lands and the corridors that connect them). Renewable energy projects, including the proposed ISEGS project, are elements of a national climate change mitigation strategy to reduce greenhouse gas emissions. California recently released a draft Climate Change Adaptation Strategy that stressed the need to protect intact wild lands and associated wildlife corridors, including those occurring in the desert, as a priority adaptation strategy measure.

The habitat fragmentation, loss of connectivity for terrestrial wildlife, and introduction of predator and invasive weed species associated with the ISEGS project in the proposed location are anathema to an effective climate change adaptation strategy. Siting the ISEGS project in the proposed location in Ivanpah Valley confounds our climate change adaptation strategy with a poorly executed climate change mitigation strategy. Defenders believes that the solution to this problem is to build and operate the proposed ISEGS project (to implement the mitigation strategy) in an alternative site away from intact wild lands, which is consistent with the draft California Adaptation Strategy's goal of maintaining wildlife habitat and movement corridors.

- **Biological Resources**

- **Desert tortoise:** The FSA/DEIS discussion of desert tortoise impacts and the proposed mitigation measures are wholly inadequate and Defenders will provide detailed information on the disputed factual issues going forward. As an initial matter, the FSA/DEIS fails to adequately address the following issues and the proposed mitigation is inadequate in the following ways:
 - The tortoises present in the North Ivanpah Valley are part of the Northeastern Mojave desert tortoise population.
 - Northeastern Mojave desert tortoises are an Evolutionary Significant Unit.
 - Northeastern Mojave desert tortoises are the most genetically distinct population of California's desert tortoises.

- The Northeastern Mojave tortoise population is declining. Current tortoise densities within the Northeastern Mojave Recovery Unit are the lowest of the six Recovery Units recognized in the Recovery Plan.
- Northeastern Mojave desert tortoises have a limited range in California. The North Ivanpah Valley contains a significant portion of this range in California.
- The proposed project will directly, indirectly and cumulatively impact the Northeastern Mojave population. The impacts include destruction and loss of habitat, take of Northeastern desert tortoises, population fragmentation, and compromised viability.
- The FSA/DEIS proposes mitigating impacts by acquiring habitat and implementing recovery actions in the Eastern Mojave Desert Tortoise Recovery Unit, an area occupied by a different Evolutionary Significant Unit of desert tortoise.
- The mitigations proposed for the project do not meet CESA's fully mitigated standard.
- The mitigation measures are not adequate to protect any translocated tortoises. For example, the FSA/DEIS notes that FWS stated that fencing along I-15 is critical before any tortoise translocations are under taken (FSA/DEIS at 6.2-50) however Bio-9 for desert tortoise does not require that the fencing be in place.
- **Bighorn Sheep:** The FSA/DEIS fails to fully analyze impacts to bighorn, provide alternatives to avoid impacts, or provide measures to minimize impacts. For example, the suggested mitigation measure of adding additional an artificial water source in the Clark Mountain area will not mitigate for the loss of bajada foraging habitat. The FSA/DEIS also fails to identify and analyze the impacts associated with construction and maintenance of the artificial water source suggested as a mitigation measure.
- **Special Status Wildlife:** The FSA/DEIS fails to fully analyze impacts to special status species, including gila monsters, burrowing owl, raptors, bats and other wildlife or to provide alternatives to avoid impacts, or provide measures to minimize impacts.
- **Rare Plants:** For rare plants and special status plant communities the FSA/DEIS provides too little analysis of impacts, inadequate discussion of alternatives that could avoid impacts, and inadequate information about the proposed mitigation strategy. The FSA/DEIS concludes that the ISEGS project will result in "impacts to Mojave milkweed and Rusby's desert-mallow" that "would remain significant in a CEQA context even after implementation of the special-status plant impact avoidance and minimization measures described in Energy Commission staff's proposed conditions of certification." (FSA/DEIS p. 1-18) The CEC staff was unable to identify private lands with existing occurrences of impacted rare plants that would serve as suitable rare plant mitigation lands. Furthermore, for implementing of many of the suggested protection measures on

public lands there would need additional NEPA analysis, which is deemed too lengthy a process to perform for this project. The best way to avoid CEQA-significant impacts to rare plants occurring at this site is to relocate the project to another, lower resource value site which was not adequately considered in the FSA/DEIS. From an initial review it also appears that the FSA/DEIS fails to adequately consider CNPS List 2 plants (rare in California but more common elsewhere) meet the definition of "rare" under CEQA (CEQA Guidelines Section 15380). CNPS List 2 plants represent important peripheral populations of rare plant taxa (Leppig and White, 2006) restricted to narrow growth conditions.

In addition, the FSA/DEIS fails to identify and analyze the loss of carbon sequestration that will occur under the proposed project. Desert vegetation types are able to sequester atmospheric carbon dioxide (greenhouse gas) 24 hours/day, unlike other vegetation communities which are able to sequester CO₂ only during daylight hours. ISEGS and all desert utility-scale projects to follow will decrease the carbon sequestration benefits from desert vegetation. (Wohlfahrt et al. 2008) This impact should have been identified and analyzed in the FSA/DEIS.

- **Special-Status Plant Impact Avoidance and Minimization:** The measures provided in the FSA/DEIS are also inadequate for the following reasons:
 - The mitigation measures that address rare plant impacts are not adequate where full implementation of all measures still result in significant impacts under CEQA.
 - Transplantation is not a successful mitigation practice for rare plants since current knowledge of conditions favorable to plant survival are incomplete.
 - The lack of Fall surveys misrepresents the full suite of rare plant taxa occurring on site – new surveys should be completed.
 - No detail is provided on how the applicant will reconfigure the project features within the northern portions of ISEGS 1 and 3 to avoid areas that support the highest density and diversity of rare plant species.
 - The FSA/DEIS fails to explain how the acquisition of lands for desert tortoise habitat represent appropriate lands for desert rare plants. As presented in the FSA/DEIS, the proposed "nesting" approach to mitigation land acquisition could completely fail to provide any actual mitigation for the rare plants affected by the proposed project.
 - No mitigation measures are provided for the loss of carbon sequestration from desert vegetation types which are able to constantly sequester atmospheric carbon dioxide, unlike other vegetation communities which are able to sequester CO₂ only during daylight hours.

- **Water Resources:** The FSA/DEIS does not adequately address the potential for stormwater scouring of the solar thermal units nor the need to appropriate large amounts of water for use on-site.
- **Overall Adequacy of Mitigation Measures:** Defenders has serious concerns regarding the propensity for mitigation “nesting” to mitigate impacts to biological resources under the California Environmental Quality Act (“CEQA”) and fully mitigate for take of species under the California Endangered Species Act (“CESA”). For example, BIO-17 of the FSA/DEIS states that “compensatory mitigation for desert tortoise may also offset impacts to Gila monsters.” This statement does not contain any technical data as evidence that Gila monsters would be present on compensatory mitigation sites for desert tortoise, nor does it explain how this “nesting” methodology will ensure adequate mitigation for the species.
- **Alternatives:** The FSA/DEIS does not contain an adequate range of alternatives, as required by CEQA. The Alternatives which are provided, including the Private Land site alternative and the Sierra Club reconfiguration alternative, were not properly analyzed. Under CEQA, alternatives need only accomplish most of the goals of the project and may be more costly than the proposed project.
- **Cumulative Impacts Analysis:** The cumulative impacts analysis omits several key projects and fails to adequately analyze the scope of the cumulative impacts in this area. The FSA/DEIS fails to adequately consider that the California population of the Northeastern Mojave Desert Tortoise Recovery Unit in the northern Ivanpah Valley is unique in California and is at risk from the cumulative effects of this project, the proposed Optisolar (now First Solar) power project adjacent to ISEGS, the proposed DesertXpress High Speed Passenger Train, and the upgrade of the Eldorado-Ivanpah transmission line in California alone.

4. The identity of each witness sponsored by each party

Defenders does not currently possess a list of sponsored witnesses to submit. Defenders will disclose a witness list in its next statement.

5. Topic areas upon which a party desires to cross-examine witnesses, a summary of the scope of such cross-examination, and the time desired for such cross-examination

Defenders reserves the right to cross-examine all witnesses called by Staff, Applicant and Intervenor for each of the topic areas in the FSA/DEIS. Defenders currently does not possess a list of Staff, Applicant and Intervenor witnesses or their written testimony and therefore can stipulate neither the topics nor the amount of time that may be necessary for cross-examination.

With the current information available, Defenders anticipates cross-examining witnesses on at least the following topic areas, although additional topic areas will undoubtedly emerge for which cross-examination may be necessary.

- **Biological Resources:** CEC Staff, CDFG staff, FWS staff, BLM staff, and Applicant witnesses regarding assessment of impacts to biological resources and appropriate avoidance, minimization, and mitigation strategies.
- **Water Resources:** CEC Staff, BLM Staff, and Applicant witnesses regarding the basis for Staff's conclusions on the impacts to water resources and soils and air quality; the appropriate avoidance, minimization, and mitigation strategies; and the efficacy and enforceability of mitigation measures suggested.
- **Alternatives:** CEC Staff, BLM Staff, and Applicant witnesses regarding identification and selection of alternatives for review; the analysis of those alternatives; and the analysis of the feasibility of alternative sites.
- **Cumulative Impacts:** CEC Staff, BLM Staff, and Applicant witnesses regarding the adequacy of the cumulative impact analysis.
- **Mitigation Methodology:** CEC Staff, CDFG Staff and BLM Staff regarding the ability of "nesting" to meet full mitigation requirements.

6. **A list of identifying exhibits and declarations that each party intends to offer into evidence and the technical topics to which they apply**

At this time Defenders does not possess a list of identifying exhibits. Defenders will disclose a witness list in its next statement.

7. **Proposals for briefing deadlines, vacation schedules, and other scheduling matters**

Defenders respectfully requests that the Committee continue the hearing until January 11, 2010, a date which is stipulated in the Notice of Prehearing Conferences and Evidentiary Hearing. To that end, Defenders proposes an amended schedule. This schedule is more in keeping with the current Committee Schedule, which provides *7 weeks* between release of the FSA/DEIS and the evidentiary hearing:

<i>ITEM</i>	<i>DATE</i>
Staff publishes Final Staff Statement Assessment/Draft Environmental Impact(FSA/DEIS)	Wednesday, November 4, 2009
Applicant's opening testimony filed and served	Monday, November 16, 2009
Parties file preliminary Prehearing Conference Statements	Monday, November 16, 2009
Last day to file Petitions to Intervene	Wednesday, November 18, 2009
Initial Prehearing Conference	Wednesday, November 18, 2009
Staff and Intervenors file and serve opening testimony (other than FSA/DEIS)	Wednesday, December 9, 2009
Parties file final Prehearing Conference Statements	Tuesday, December 15, 2009
All parties file rebuttal testimony	Wednesday, December 16, 2009
Second Prehearing Conference	Wednesday, December 23, 2009
Evidentiary Hearings	January 11 and 12, 2010

8. For all other topics, the parties shall review the Proposed Conditions of Certification listed in the Final Staff Assessment (FSA) for enforceability, comprehension, and consistency with the evidence, and submit any proposed modifications.

Defenders has not had sufficient time to review all of the proposed Conditions of Certification and reserves the right to address these items through briefs, testimony and exhibits.

9. For the preliminary statement only, for discussion at the November 18 Prehearing Conference

Defenders has nothing to add at this time.

DECLARATION OF SERVICE

I, Joshua Basofin, declare that on November 16, 2009, I served and filed copies of the Attached Prehearing Conference Preliminary Statement. 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:

[www.energy.ca.gov/sitingcases/ivanpah]. The document has 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:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

X sent electronically to all email addresses on the Proof of Service list;

X by personal delivery or by depositing in the United States mail at Sacramento, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

X sending and original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

 depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

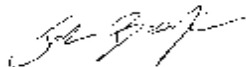
Attn: Docket No. 07-AFC-5

1516 Ninth Street, MS-4

Sacramento, CA 95814-5512

docket@energy.state.ca.us

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





**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV**

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

DOCKET NO. 07-AFC-5
PROOF OF SERVICE
(Revised 7/20/09)

APPLICANT

Solar Partners, LLC
John Woolard,
Chief Executive Officer
1999 Harrison Street, Suite #500
Oakland, CA 94612

Todd A. Stewart, Project Manager
Ivanpah SEGS
sdeyoung@brightsourceenergy.com

E-mail Preferred

Steve De Young, Project Manager
Ivanpah SEGS.
1999 Harrison Street, Ste. 2150
Oakland, CA 94612
tstewart@brightsourceenergy.com

APPLICANT'S CONSULTANTS

John L. Carrier, J. D.
2485 Natomas Park Dr. #600
Sacramento, CA 95833-2937
jcarrier@ch2m.com

COUNSEL FOR APPLICANT

Jeffery D. Harris
Ellison, Schneider
& Harris L.L.P.
2600 Capitol Avenue, Ste. 400
Sacramento, CA 95816-5905
jdh@eslawfirm.com

INTERESTED AGENCIES

California ISO
e-recipient@caiso.com

Tom Hurshman,
Project Manager
Bureau of Land Management
2465 South Townsend Ave.
Montrose, CO 81401

tom_hurshman@blm.gov

*Raymond C. Lee, Field Manager
Bureau of Land Management
1303 South U.S. Highway 95
Needles, CA 92363
Raymond_Lee@ca.blm.gov

Becky Jones
California Department of
Fish & Game
36431 41st Street East
Palmdale, CA 93552
dfgpalm@adelphia.net

INTERVENORS

California Unions for Reliable Energy ("CURE")
Tanya A. Gulesserian
Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Ste 1000
South San Francisco, CA 94080
tgulesserian@adamsbroadwell.com

Western Watersheds Project
Michael J. Connor, Ph.D.
P.O. Box 2364
Reseda, CA 91337-2364
miconnor@westernwatersheds.org

Gloria Smith, Joanne Spalding
Sidney Silliman, Sierra Club
85 Second Street, 2nd Fl.
San Francisco, CA 94105
E-mail Service Preferred
gloria.smith@sierraclub.org
joanne.spalding@sierraclub.org
gssilliman@csupomona.edu

*indicates change

INTERVENORS CONT.

Joshua Basofin, CA Rep.
Defenders of Wildlife
1303 J Street, Ste. 270
Sacramento, CA 95814
E-mail Service Preferred
jbasofin@defenders.org

Basin and Range Watch
Laura Cunningham
Kevin Emmerich
P.O. Box 70
Beatty, NV 89003
atomicoadranch@netzero.net

Center for Biological Diversity
Lisa T. Belenky, Sr. Attorney
Ileene Anderson, Public Lands Desert Director
351 California Street, Ste. 600
San Francisco, CA 94104
E-mail Service Preferred
lbelenky@biologicaldiversity.org
ianderson@biologicaldiversity.org

California Native Plant Society
Greg Suba, Tara Hansen & Jim Andre
2707 K Street, Suite 1
Sacramento, California, 95816-5113
E-mail Service Preferred
gsuba@cnps.org
thansen@cnps.org
granite@telis.org

ENERGY COMMISSION

JEFFREY D. BYRON
Commissioner and Presiding Member
jbyron@energy.state.ca.us

JAMES D. BOYD
Vice Chairman and
Associate Member
jboyd@energy.state.ca.us

Paul Kramer
Hearing Officer
pkramer@energy.state.ca.us

John Kessler
Project Manager
jkessler@energy.state.ca.us

Dick Ratliff
Staff Counsel
dratliff@energy.state.ca.us

Elena Miller
Public Adviser
publicadviser@energy.state.ca.us