

DOCKET

07-AFC-5

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California Native Plant Society
2707 K Street, Suite 1
Sacramento CA, 95816

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:)
The Application for Certification)
for the Ivanpah Solar Electric)
Generating System)

DOCKET NO. 07-AFC-5

INTERVENOR CALIFORNIA NATIVE PLANT SOCIETY

Reply Briefs of the California Native Plant Society

Docket 07-AFC-5

April 16, 2010

Greg Suba, Tara Hansen, Jim André
California Native Plant Society
2707 K Street, Suite 1
Sacramento, CA 95816
Phone: 916-447-2677 x 206
gsuba@cnps.org
thansen@cnps.org
granites@telis.org

1. CNPS List 1 and 2 plant taxa meet the definition of rare under CEQA

CNPS List 1 and 2 plant taxa identified on the project site meet the definition of rare as defined by the California Environmental Quality Act (CEQA) Guidelines (Title 14, California Code of Regulations [14 CCR]) Section 15380, and represent genetically important peripheral populations.

For the purpose of determining whether a species meets the criteria of rare in CEQA Guideline section 15380, the Commission must make the determination based on the species range within California. Since the intent of CEQA is to prevent the elimination of plant and animal species and preserve representations of all plant and animal communities within the State [(Public Resources Code Sections 21001(a) and (c)], and since the State has no authority to manage rare plants outside of California, the Commission must implement its responsibility, consistent with the Public Resources Code, where it does have authority. The intent of CEQA cannot be met by assuming that species meeting the criteria under CEQA Guidelines Section 15380 will be protected elsewhere.

Although a plants' range might extend beyond California, this project's boundaries do not, and neither does the State's ability to regulate impacts to plants occurring beyond California extend to projects occurring beyond California. There is both biological value and legal precedent for protecting natural resources that are restricted in range within California. The record shows that biologically, CNPS List 2 plants represent peripheral populations of their species, and are important for the long-term conservation of genetic diversity and evolutionary potential of their species, particularly within the context of uncertain climatic changes to their habitat (see Exhibits #1004, #1010, #1011).

The applicant refers to an opinion issued by the California Attorney General in 1975 to claim that, in this case, CEQA requires consideration of impacts to plants by considering portions of the plant species' range that occurs outside of California. The relationship of circumstances and intentions related to the 1975 Opinion to environmental impacts related to this project site is misapplied.

The 1975 Opinion addresses the need for projects occurring in California to analyze their impacts beyond state boundaries to surrounding states. The 1975 Opinion is thus consistent with the Legislature's direction that CEQA is "to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." See *Laurel Heights Improvement Assn. v. Regents of University of California ("Laurel Heights I")* (1988) 47 Cal. 3d 376, 391.

Here, in contrast, the applicant's approach would limit that protection by denying CEQA review for plants with extremely restricted ranges in California. The record demonstrates that the range and geographic diversity of a species is critical to maintain for long term species survival. In no way can the 1975 Opinion be interpreted as a basis for *weakening* environmental protection for sensitive and rare native plant species.

2. Mischaracterization of Threat Ranks

The applicant misidentifies the rarity and threat rankings associated with several rare plants on the proposed project site.

Rusby's desert mallow (*Sphaeralcea rusbyi* var. *eremicola*) is given a "G4T2" ranking by the CNDDDB. Where the "G4" ranking indicates "apparently secure", this refers only to the more broadly-defined *Sphaeralcea rusbyi* as a global species. The subspecies "*eremicola*" is given the additional ranking of "T2" which means this subspecies has a global status of "imperiled." The same convention of assigning subspecies "T" rankings applies to both plant and animal taxa alike.

The CNPS Threat Rank is an extension added onto the CNPS List and designates the level of endangerment by a 1 to 3 ranking, with 1 being the most endangered and 3 being the least endangered. A Threat Rank is present for all List 1B's, List 2's as follows:

- 0.1-Seriously threatened in California (high degree/immediacy of threat)
- 0.2-Fairly threatened in California (moderate degree/immediacy of threat)
- 0.3-Not very threatened in California (low degree/immediacy of threats or no current threats known.

Mojave milkweed is a CNPS List 2.1 plant, not a List 2.3 plant as the applicant asserts in their Opening Briefs. Desert Pincushion is a CNPS List 2.1 plant, not a List 2.2 plant; Parish's club-cholla is a CNPS List 2.2 plant, not a List 2.3 plant, and Nine-awned pappus grass is a CNPS List 2.2 plant, not a List 2.3 as the applicant asserts in their Opening Briefs (Applicant's Opening Briefs, p. 121).

The corrections demonstrate that Mojave milkweed and Desert Pincushion are "seriously threatened" in California, and that Parish's club-cholla and Nine-awned pappus grass are "fairly threatened." Yet, as discussed in our prior submissions, the project as currently proposed considers impacts on these threatened species to be less than significant based on untried mitigation techniques that have no track record of success.

3. Project impacts to rare plants have not been fully assessed

As we have noted in prior comments, the environmental review process for the project is informationally inadequate because it does not provide accurate information on the presence of rare plants that sprout and bloom following desert rains in the late summer and early fall. Without this information, neither the Commission nor the public has any understanding of the impacts of this project on late summer species and certainly the project contains no mitigation that specifically addresses these impacts. This procedure violates the basic informational requirements of CEQA, which apply to certified regulatory programs such as in this case. *See See e.g., Sierra Club v. State Board of Forestry* (1994) 7th Cal.4th 1215, 1229-1236.

CEQA requires a full disclosure of relevant environmental information. An EIR is "an informational document" whose purpose "is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (§ 21061; Guidelines, § 15003, subs. (b)-(e).) *See Laurel Heights I, supra*, 47 Cal. 3d at 391. *See also* *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal. App.3d 357, 365 ("The value of an EIR is as an informational

document...It is 'the 'heart' of CEQA, the principal method by which environmental data are brought to the attention of the agency and the public")

Without survey information, the project's CEQA review process lack lacks an adequate description of the environmental setting of the project. *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722 ("[I]nadequate consideration and documentation in the EIR of existing environmental conditions rendered it impossible for the [EIR] to accurately assess the impacts the project would have on wildlife and wildlife habitat or to determine appropriate mitigation measures for those impacts.")

This includes information on threatened or rare species with the potential to occur in the area. *See e.g., Sierra Club v. State Board of Forestry, supra*, 7th Cal.4th at 1235-1236 (Supreme Court finds that agency's failure to conduct surveys necessary to determine the presence of important species violates informational requirements of CEQA); *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal. App.3d 357, 363 (supplemental environmental review required by presence of previously unaddressed vernal pool habitat containing a number of rare or endangered plant species.) *See also* Pub. Res. Code § 21160 (public agency has authority to require applicant to "submit data and information which may be necessary to enable the public agency to determine whether the proposed project may have a significant effect on the environment or to prepare an environmental impact report.")

Here, the record contains evidence showing that summer/fall blooming rare plants are likely to occur in the project area. In particular, specimens from herbarium collections demonstrate that summer/fall plants occur in locations near the project area that are not recorded in the CNDDDB, the sole source relied on by the applicant in its determination that summer/fall species. The record also shows that the CNDDDB data base was not an accurate substitute for the spring surveys. Instead those surveys discovered a number of rare and threatened species in project area locations that were not recorded in the CNDDDB.

During cross-examination questioning on the 01-12-10 Evidentiary Hearing date, CEC staff acknowledged the need for summer botanical surveys but claimed this issue was brought up too late in the project's data acquisition process:

" [the need to perform summer/fall blooming surveys is]definitely an
16 issue that needs to be raised we think on all these
17 projects. I think we need to get in there and tell these
18 applicants early on that they need to do well time
19 surveys, even though it's not -- it's not something that
20 we're accustomed to doing. It is provided for in the
21 survey guidelines, the agency botanical survey guidelines
22 say that you need to do surveys at a time of year that
23 anything that has the potential to occur in the project
24 area is blooming or is identifiable. So in that sense, we
25 probably all should have been doing fall surveys for a
1 long time. But it is new to staff. It's an issue we were
2 not familiar with and it came to us late in the process."
Transcript of ISEGS Evidentiary Hearing, January 12, 2010. pp. 192-
196]

This position ignores that CNPS has brought the need to include botanical surveys for summer/fall blooming rare plants botanical surveys to the Commission's attention since as early as February 2009. Thus, the CEC staff's approach violates CEQA's requirement an agency "use its best efforts to find out and disclose all it reasonably can" on relevant environmental issues." *See San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151

Cal.App.3d 61, 74; CEQA Guideline § 15144. Indeed, here, the applicant was required to and did perform expedited tortoise habitat quality surveys during the July/August of 2009 (Exhibit #46) when no such "late in the process" restriction applied to additional data acquisition, review, and assessment. Similar fall surveys for summer/fall plants could have occurred in this case.

The result of this process is that the CEC lacks adequate information to determine whether or not the impacts of this project are significant on these plant summer/fall plant species. Earlier, CEC staff opined that the issue was not relevant because the staff had already determined that impacts from the project would be significant. This approach would have violated CEQA's requirement that the impacts of projects be fully evaluated in order to adopt all feasible mitigation to avoid or *substantially lessen* impacts. The fact that impacts are significant and cannot be avoided does not mean those impacts must not be analyzed and mitigated to the extent possible.

Recently the Commission staff has proposed that mitigation measures will in fact avoid significant impacts to rare plant species. As discussed in the section below, the record does not support this conclusion. Further, as to summer/fall plants, this is just a post-hoc rationalization not based on any analysis in the environmental review documents. *See e.g., Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1601-1602 ([W]e note the City cannot rely upon postapproval mitigation measures adopted during the subsequent design review process"); *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 884 ("There cannot be meaningful scrutiny of a mitigated negative declaration when the mitigation measures are not set forth at the time of project approval.")

Here the proposed mitigation measures were not formulated based on any information regarding the project's potential to harm these species. For example, in the most recently updated version of Condition of Certification BIO-18, the Commission included the requirement for pre-construction floristic surveys to be performed and to include surveys for summer/fall blooming rare plants. However, the added requirement is flawed because it limits the extent of surveys for summer/fall blooming plants, as per Bio 18 condition #3,

"to encompass at a minimum the three areas totaling 476 acres and labeled 'Rare Plant Mitigation Area' in Project Description Figure 13 and shall extend 150 feet on both sides of the proposed gas pipeline alignment and 250 feet out from the project fence line."

Based on this requirement, summer/fall blooming rare plants that might occur across the vast majority of the project area within active construction and operation areas throughout the remaining proposed project acreage, as well as project impacts to these species, will be ignored.

In sum, Staff's current conclusion that plant impacts have been reduced to less than significant fails to include a full assessment of potential impacts to summer/fall plants because it is not possible to develop mitigation measures that reduce impacts to these species where no information is provided as to how the project actually impacts them in the first place.

As a result, the Commission must require supplemental late summer/early fall botanical surveys be performed and results assessed for the entire project site so that additional rare plant findings, should they occur, can be incorporated into the existing Bio-18 Conditions of Certification and so the Commission can fulfill their obligations to fully assess project impacts pursuant to CEQA.

4. Project will fragment rare plant habitat, rare plant mitigation measures are untested and speculative, and there is a high probability the project will lead to increased listing status and possible extirpation of plants from California.

As we have previously commented, the CEC presently lacks adequate information to support its proposed finding that the rare plant mitigation measures for spring blooming plant species are adequate to avoid significant impacts.

The Committee should not consider the "impact minimization" or "halo" approach to rare plant impacts as "avoidance" as the applicant claims it represents, or as an on-site mitigation measure that will result in long-term, self-sustaining populations of rare plants. Mitigation practices certified on this project could be precedent-setting for subsequent project applications and therefore should be based on sound scientific information. The extent of protection afforded to plants within the proposed "halos" remains untested, and speculative at best.

The revised project presented in the Applicant's Mitigated Ivanpah 3 design (Exhibit #88) still relies on the fenced "halo" method of addressing impacts to rare plant occurrences within the heliostat fields, as described in Applicant's Exhibit #81, and as required in the CEC's Condition of Certification BIO-18. Mojave Milkweed and Desert Pincushion are especially reliant upon Exhibit #81's "halo" design since both species are distributed widely across the project site and benefit little from the Block 3 avoidance area.

In order for impacted plant populations to remain viable in the long-term, we must assume that proposed mitigation measures for plant populations for which we know little to nothing about their physiological and ecological needs, will successfully achieve the following:

- a. the plants will survive in the shade of hundreds of thousands of heliostats, where they will experience more water more often (from mirror washing), where above and below ground nutrient conditions have changed (from regular mowing, mulching above and reduced nutrient uptake of stunted plants from below), where surrounding soil compaction has occurred (from construction and maintenance vehicles and activity), and where invasive plant competition has increased,
- b. the plants will survive transplantation in the desert,
- c. additional plants will be found *and* provided protection on off-site lands.

No biologically defensible data has been presented during these proceedings to support the assumptions being made regarding both the "halo" plant mitigation measures, and the probability of locating *and* protecting in-lieu off-site plant habitat. Should the highly-improbable "halo" approach fail to preserve self-sustaining populations of the rare plants occurring on site, and no requirement to locate and protect off-site occurrences be required, then the proposed project will have a significant impact on the continued existence of these plants in the state.

Under CEQA, substantial evidence cannot be "argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous.. or ...not credible." Pub. Res. Code § 21082.2(c). In cases lacking substantial evidence that an untried mitigation technique will be successful, courts have found that an agency may not rely on such mitigation to purport to avoid significant project impacts. *See Sundstrom v. County of Mendocino, supra*, 202 Cal. App. 3d at 308-312; at 307 ("[E]nvironmental problems should be considered at a point in the planning process where genuine flexibility remains... A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking.")

Here the project review process lacks adequate information to support a finding that mitigation

measures will avoid fragmentation of rare plant habitat in this region. Currently the CEC has no programmatic review document that has addressed this issue. However, as represented by this project, CEC staff are now recommending that projects be approved without any understanding on this issue. *See* Transcript of January 12, 2010, p. 165: 20-25 (“And probably my biggest concern in terms of why I’m concerned about how the plan is set up is that there will be what appears to be fragmentation if the population. And this will disrupt -- it could disrupt pollination and dispersal and therefore gene flow.”)

5. The ISEGS project is precedent-setting, will irreversibly and negatively impact intact wildlands, and a statement of overriding considerations should not be issued.

The applicant has chosen an ecologically high-impact location for this project. The Commissioners must consider and make sustainable management decisions that are firmly grounded on science-based ecological principles. A decision to build the project as proposed by relying on mitigation concepts with no scientific foundation, and on statements of overriding consideration, will set a very low bar for this and all subsequent desert solar project applications whose cumulative impacts will hasten the type of ecological destruction for which the ISEGS project is meant to mitigate.

The Commission should deny the ISEGS application for certification of the Mitigated Ivanpah 3 project design because of the significant ecological impacts the project will have to intact wildlands. Rather than expedite project certification applications outside of a comprehensive conservation planning process, the Commission should expedite the relocation of poorly-sited projects to low-impact areas while encouraging the development of distributed photo-voltaic solar generation to the extent that Commissioners and staff are able to do so.

**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

DECLARATION OF SERVICE

I, Greg Suba, declare that on April 16, 2010, I served and filed copies of the attached Reply Briefs of Intervenor California Native Plant Society, dated April 16, 2010. 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 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:

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

by personal delivery or by depositing in the United States mail at 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

FOR FILING WITH THE ENERGY COMMISSION:

sending an 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.

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.



Greg Suba

Sent via email to: sdeyoung@brightsourceenergy.com; tstewart@brightsourceenergy.com; jcarrier@ch2m.com; jdh@eslawfirm.com; e-recipient@caiso.com; tom_hurshman@blm.gov; Raymond_Lee@ca.blm.gov; dfgpalm@adelphia.net; tgulesserian@adamsbroadwell.com; mjconnor@westernwatersheds.org; gloria.smith@sierraclub.org; devorah.ancel@sierraclub.org; joanne.spalding@sierraclub.org; gssilliman@csupomona.edu; jbasofin@defenders.org; atomicoadranch@netzero.net; gsuba@cnps.org; thansen@cnps.org; granites@telis.org; bbrizzee@cc.sbcounty.gov; jbyron@energy.state.ca.us; jboyd@energy.state.ca.us; pkramer@energy.state.ca.us; jkessler@energy.state.ca.us; dratliff@energy.state.ca.us; publicadviser@energy.state.ca.us; docket@energy.state.ca.us; lbelenky@biologicaldiversity.org; ianderson@biologicaldiversity.org

Sent via US mail to:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 07-AFC-5
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

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

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

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

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

Bart W. Brizzee, Deputy Co. Counsel
County of San Bernardino 385 N. Arrowhead
Avenue, 4th Fl. San Bernardino, California,
92415

Raymond C. Lee, Field Manager
Bureau of Land Management
1303 South U.S. Highway 95
Needles, CA 92363

Becky Jones
California Department of
Fish & Game
36431 41st Street East
Palmdale, CA 93552

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

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

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

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